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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 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

1 approvals necessary to construct and operate the Project. Steeb Decl. ¶ 5. For more than
2 two years, Desert Claim met with Kittitas County Community Development Services staff,
3 and attended hearings and meetings of the Board of County Commissioners ("BOCC")
4 regarding the Project. Steeb Decl. ¶ 6. In an effort to address concerns expressed during the
5 County process, Desert Claim made numerous revisions to the Project and to the conditions
6 and mitigation requirements outlined in a draft Development Agreement. *Id.* Nonetheless,
7 in April 2005, the BOCC issued a final decision denying Desert Claim's application. Steeb
8 Decl. ¶ 7. Desert Claim then made some additional changes to the Project to address the
9 expressed concerns further, and filed an Application for Site Certification with this Council
10 in November 2006. Following this Council's issuance of Order No. 826 recommending
11 certification of the Kittitas Valley Wind Project, Desert Claim announced its intention to
12 incorporate the setbacks and shadow flicker mitigation recommended by the Council in the
13 Kittitas Valley proceedings. Desert Claim has since met with Kittitas County's Community
14 Development Services, but has been unable to resolve one of the County's concerns about
15 the Project.

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31 **A. Desert Claim's Application to Kittitas County**

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

37 In late 2002, the County enacted Ordinance 2002-19, which established the wind
38 power siting provisions now found in Kittitas County Code chapter 17.61A. According to
39 the chapter 17.61A, a wind project may be permitted in any area zoned as Ag-20, Forest and
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1 Range, Commercial Agriculture or Commercial Forest. KCC 17.61A.020(4). However, it
2 requires a Wind Farm Resource Development Permit and Development Agreement with the
3 County, a site-specific amendment to the Comprehensive Plan land use designation map,
4 and a site-specific rezone of the project area. It is impossible to know whether a project at
5 any particular location would be able to obtain these required approvals without filing an
6 application and going through the County process to obtain a final decision.
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12 After considering the wind resource, land availability, transmission access, potential
13 environmental impacts and neighboring land uses, Desert Claim selected a location for its
14 project approximately 8 miles northwest of Ellensburg. Steeb Decl. ¶ 2. At that point,
15 Desert Claim considered whether to file an application with Kittitas County or with EFSEC.
16 Looking at EFSEC's regulations, Desert Claim understood that, if it filed with EFSEC, the
17 Council's proceedings would be stayed while Desert Claim tried to obtain County approvals.
18 See WAC 463-28-030(1). However, if Desert Claim went through the County process and
19 obtained County approvals, it would not need to obtain EFSEC's approval as well. Desert
20 Claim concluded that the most efficient way to proceed was to file an application with
21 Kittitas County first. If it did not obtain County approvals, it could then proceed with an
22 application to EFSEC. Steeb Decl. ¶ 3.
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34 On January 28, 2003, Desert Claim filed an application with Kittitas County to
35 obtain the approvals necessary to construct and operate a 180 MW wind power project. The
36 Project described in the original application to the County included 120 turbines spread out
37 over a 5,237-acre project area. Steeb Decl. ¶ 5.
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42 For more than two years, Desert Claim's application worked its way through the
43 Kittitas County process. Steeb Decl. ¶ 6. The following is a summary of that process. A
44 detailed chronology is also provided as **Exhibit 2** to the Steeb Declaration.
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1 In April 2003, the County issued a SEPA Determination of Significance. Steeb
2 Decl. Ex. 2. In December 2003, the County published a Draft EIS and in August 2004, the
3 County published its Final EIS. *Id.*

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5
6 In September 2004, Desert Claim worked with Community Development Services
7 and the County attorney to prepare a draft Development Agreement, which the County then
8 circulated to the public. Steeb Decl. Ex. 2. On October 25 and 26, 2004, the Kittitas County
9 Planning Commission and the Kittitas County Board of County Commissioners ("BOCC")
10 held joint hearings. *Id.* At the conclusion of those hearings, the Planning Commission
11 recommended denial of Desert Claim's application. *Id.*

12
13 For the next five and a half months, the BOCC held at least ten hearings and
14 meetings to consider Desert Claim's application. Steeb Decl. ¶ 6, Ex. 2. In between them,
15 Desert Claim worked with staff to revise the Development Agreement and try to address
16 concerns that had been raised. Steeb Decl. ¶ 6. On March 9, 2005, the BOCC deliberated
17 and voted to deny Desert Claim's application. Steeb Decl. ¶ 7. On April 5, 2005, more than
18 twenty-six months after Desert Claim had filed its application with the County, the BOCC
19 issued Findings of Facts and Resolution 2005-46 formally denying Desert Claim's
20 application. *Id.*

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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.

1 **B. Revised Project Description and EFSEC Application**

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3 Following the BOCC's decision, Desert Claim considered whether additional
4 changes could be made to the Project to address concerns that were raised during the County
5 process. Steeb Decl. ¶ 9. After obtaining a lease on neighboring DNR land, Desert Claim
6 was able to consolidate the Project and eliminate the eastern portion of the Project. *Id.*
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9
10 On November 6, 2006, Desert Claim submitted an Application for Site Certification
11 ("the Application") to EFSEC. The Application described the Project, which consisted of 90
12 turbines (2.0 MW capacity each), located on 4,783 acres of public and private land
13 northwest of Ellensburg. **Exhibit 3** to the Steeb Declaration compares the Project Area to
14 the area identified in the original application to Kittitas County.
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17 The revised Project described in the November 2006 Application has several
18 advantages over the original proposal:
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- 21 • The Project Area has been consolidated from four separate parcels to one
22 contiguous area.
- 23 • The Project Area has been reduced from 5,237 acres to 4,783 acres.
- 24 • The total number of turbines has been reduced.
- 25 • There are only 32 non-participating residences located within 3,000 feet of a
26 proposed turbine.
- 27 • Sound from the Project will be no more than 50 dBA at adjacent properties.
- 28 • Shadow flicker at adjacent residences has been substantially reduced. For
29 those residences (if any) that are affected by perceptible shadow flicker,
30 Desert Claim will stop the blades of the wind turbine that causes the flicker
31 during those hours and conditions when shadow flicker occurs, or offer a
32 voluntary waiver agreement to the landowners in lieu of stopping the turbine.
- 33 • The Project will not result in any temporary or permanent impacts to
34 wetlands, stream or their buffers.
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- 1 • Daytime white strobe lighting has been eliminated and nighttime red lighting
2 has been reduced.
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4 *See* Desert Claim Wind Power, Application for Site Certification (Nov. 2006).
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6 Both before and after filing the Application, Desert Claim made efforts to
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8 communicate with Kittitas County about the changes it had made to the Project. In summer
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10 and fall 2005, Joe Fahrendorf (enXco Vice President Business Development) attempted to
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12 contact the Commissioners to discuss changes Desert Claim was considering to address the
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14 County's concerns, but his calls were not returned. Steeb Decl. Ex. 2. On October 24, 2006,
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16 Darin Huseby (enXco Development Director Northwest Region) met individually with each
17
18 of the Commissioners to explain the changes made to the Project. Steeb Decl. Ex. 4 (Letter
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20 from D. Huseby to Commissioners dated Nov. 30, 2006). On November 6, 2006, David
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22 Steeb (Desert Claim Project Director) hand-delivered copies of the Application to each of
23
24 the Commissioners and to the Director of Community Development Services. Steeb Decl.
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26 ¶ 11. Thereafter, Mr. Huseby attempted to contact each of the Commissioners again, but his
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28 calls were not returned. Steeb Decl. Ex. 4.
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30 By letter dated December 5, 2006, Kittitas County Commissioner David Bowen
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32 explained the County's position that Desert Claim was required to submit an application to
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34 the County to seek the approvals required by the County's Wind Overly Ordinance. Steeb
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36 Decl. Ex. 5. Commissioner Bowen stated unequivocally that the County had "no interest" in
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38 "making a decision about the project" outside the process outlined by chapter 17.61A. *Id.*
39
40 Nonetheless, he did offer to arrange a public meeting to discuss the Project changes with
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42 Desert Claim, but also emphasized that "[i]n that we do not have an application the Board
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44 will not, however, be able to make any decision on your project. As such, a meeting like
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46 this would be an information meeting only." *Id.* In light of the position set forth in this
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1 letter, Desert Claim did not believe a public meeting would be productive and did not take
2
3 Commissioner Bowen up on his offer at that time.

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5 **C. EFSEC Land Use Consistency Process**

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7 On January 30, 2007, the Council held a Land Use Consistency Hearing in
8
9 Ellensburg regarding the Desert Claim Project. During the hearing, Desert Claim and
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11 Kittitas County agreed that Desert Claim had not obtained the approvals required by Kittitas
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13 County Code chapter 17.61A. The Council therefore found that the Project was not
14
15 consistent with the Kittitas County land use requirements in existence at the time Desert
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17 Claim filed its application with the Council. *See* Council Order No. 825.

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19 Soon thereafter, Desert Claim filed a motion with the Council seeking a
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21 determination that it had satisfied WAC 463-28-030(1)'s requirement that it make reasonable
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23 efforts to cure the inconsistency with local land use requirements and, therefore, could
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25 proceed to submit a request for preemption. The Council heard argument on the motion
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27 during its Council meeting on April 10, 2007, and requested supplemental briefing on
28
29 certain issues. Desert Claim submitted additional briefing, and in doing so, also offered to
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31 spend another thirty days meeting with the County to try to identify and resolve any County
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33 concerns about the revised Project. *See* Desert Claim's Supplemental Briefing re WAC 463-
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35 28-030(1) (April 17, 2007).

36
37 Shortly before Desert Claim submitted its supplemental briefing, the Council issued
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39 Order No. 826 recommending certification of the Kittitas Valley Wind Project on March 27,
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41 2007. In its Supplemental Briefing, therefore, Desert Claim informed the Council that it
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43 would be amending its Application to incorporate two mitigation measures that the Council
44
45 had included in the recommended K.V. Site Certification Agreement. Specifically, Desert
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47 Claim indicated that it was re-configuring the Project to ensure that all turbines would be

1 located a distance from existing residences equal to at least four times the tip height of the
2 turbine (4 x 414 feet = 1,656 feet). *See* Desert Claim Supplemental Briefing at 7.¹ Desert
3 Claim also indicated that it would mitigate potential shadow flicker in the same manner
4 specified in Article VII, Section I of the Kittitas Valley Site Certification Agreement. *Id.*
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7
8 On May 8, 2007, the Council granted Desert Claim's motion and ruled that Desert
9 Claim is not required to file an application with Kittitas County under Kittitas County's
10 Wind Overlay Ordinance, KCC chapter 17.61A. *See* Council Order No. 830 at 7 (May 8,
11 2007). The Council also sent a letter to the Kittitas County Commissioners encouraging
12 them "to use your best efforts to work with the Applicant and to resolve as many issues as
13 possible in advance of any adjudication." Letter from J. Luce to Commissioners dated May
14 17, 2007.
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18 On May 17, 2007, Desert Claim met with Kittitas County Community Development
19 Services. Steeb Decl. ¶ 13.² During the meeting, Community Development Services
20 Director Darryl Piercy explained that he believed three issues led to the BOCC denial of
21 Desert Claim's original application to the County: (1) inadequate mitigation of potential
22 shadow flicker, (2) the Project area included several non-contiguous parcels, and
23 (3) inadequate setbacks from existing residences. *Id.* Mr. Piercy said that the changes
24 Desert Claim has made to the Project addressed the first two of these issues. However, Mr.
25 Piercy indicated that Desert Claim's proposal to locate all turbines at least 1,656 feet (four
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41 ¹ Desert Claim is now evaluating the revised configuration in light of the Governor's
42 decision last week regarding the K.V. Project.
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44 ² Desert Claim was represented at the meeting by Darin Huseby (enXco Development
45 Director Northwest Region), David Steeb (Claim Project Director) and Karen McGaffey (attorney).
46 Attending from Kittitas County Community Development Services were Darryl Piercy (Director),
47 Allison Kimball (Assistant Director), Joanna Valencia (Planner) and Neil Caulkins (attorney).

1 times the turbine height) from existing residences was inadequate; he believed the BOCC
2 would require a 2,500-foot setback from existing residences absent site-specific reasons
3 justifying a lesser distance. *Id.* Mr. Piercy stated that he did not believe the County had any
4 other concerns about the revised Project. *Id.*
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9 Desert Claim appreciated Mr. Piercy's candor and his willingness to clearly state that
10 he believes the County's only remaining concern about the Desert Claim Project is the
11 setback from existing residences. Steeb Decl. ¶ 14. However, as Mr. Piercy acknowledged,
12 the BOCC has the responsibility for making decisions under KCC chapter 17.61A. Desert
13 Claim, therefore, requested to meet directly with the BOCC to hear the Commissioners'
14 views about the Project first-hand. *Id.* In effect, Desert Claim asked to take the BOCC up
15 on the offer that Commissioner Bowen had made back in December to hold a public meeting
16 about the Project.
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24 However, the BOCC denied Desert Claim's request. In a letter dated May 22, 2007,
25 Mr. Piercy explained:
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29 In our meeting you requested we consider the possibility of conducting a
30 public meeting with the Board of County Commissioners, prior to
31 application, to provide you with an opportunity to hear directly from the
32 Commissioners any concerns or issues they may have in regards to your
33 project. The Commissioners have considered your request but must
34 respectfully decline. It is felt that to hold a public meeting where some
35 measure of approval or rejection seems to be the goal may leave the
36 community and applicant to believe the Commissioners have prejudged a
37 specific project without full and fair opportunity for public participation.
38 Such discussion is best conducted as part of the public hearing process on
39 your application where the full details of the project are known and the
40 Commissioners can take specific action consistent with the County code.
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43 Steeb Decl. Ex. 6 (Letter from D. Piercy to D. Steeb and D. Huseby dated May 22, 2007).
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1 Short of filing an application under the County's Wind Farm Overlay Ordinance,
2 which this Council has already ruled is not required, there appears to be nothing further
3
4 Desert Claim can do to reach resolution of outstanding issues with the County.
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6 Accordingly, Desert Claim now files this request for preemption.
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8 **III. RCW Chapter 80.50 Preempts Local Authority**

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10 Through RCW chapter 80.50, the Legislature established a one-stop process for
11 permitting certain energy facilities. A Site Certification Agreement, recommended by
12 EFSEC and approved by the Governor, authorizes the construction and operation of energy
13 facilities covered by RCW chapter 80.50. The decision of EFSEC and the Governor takes
14 precedent over local land use requirements.
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20 The Legislature unequivocally expressed its intention to preempt local regulation of
21 energy facilities that fall within the Council's jurisdiction:
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25 The state hereby preempts the regulation and certification of the location,
26 construction, and operational conditions of certification of the energy
27 facilities included under RCW 80.50.060 as now or hereafter amended.
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29 RCW 80.50.110(1). The Legislature further provided that a Site Certification Agreement
30 would supersede and take the place of all state and local permits that would otherwise be
31 required for these projects:
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35 The issuance of a certification shall be in lieu of any permit, certificate or
36 similar document required by any department, agency, division, bureau,
37 commission, board, or political subdivision of this state.
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39 RCW 80.50.120.
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42 In its recent decision regarding the Kittitas Valley Wind Project, the Council
43 explained the tension between the Legislature's command in RCW chapter 80.50 and the
44 wind power siting process created by ordinance in Kittitas County:
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1 In an Application for Site Certification filed with EFSEC, site-specific details
2 are not for a county or city to negotiate and impose, but are firmly within the
3 jurisdictional realm of this Council. EFSEC is charged with unitary
4 permitting authority for energy facilities seeking its site certification,
5 allowing for a streamlined siting process. EFSEC's preemptive statutory
6 power to certify and regulate the location, construction, and operation of
7 energy facilities such as the proposed KVVPP simply cannot be usurped by
8 local governments seeking to impose their own imprimatur on the siting
9 process.

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11 Council Order No. 826 at 17.

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

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26 Desert Claim will present testimony and other evidence during the Council's
27 adjudicatory proceedings demonstrating that approval of the proposed Project is in the
28 State's best interests, and that approval is justified under the Council's governing statute and
29 regulations. The Council should, therefore, recommend that the Governor issue a Site
30 Certification Agreement, preempting local land use regulation of the Project.
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36 The Council's regulations require an applicant to submit a written request for
37 preemption that addresses the following points:
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- 39
40 (1) That the applicant has demonstrated a good faith effort to resolve the
41 noncompliance issues.
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43 (2) That the applicant and the local authorities are unable to reach an
44 agreement which wills resolve the issues.
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1 (3) That alternative locations which are within the same county and city
2 have been reviewed and have been found unacceptable.

3
4 (4) Interests of the state as delineated in RCW 80.50.010.

5
6 WAC 463-28-040.³ Desert Claim addresses these criteria in the following sections, and will
7 present additional evidence regarding each of these factors during the adjudicatory
8 proceedings.
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12 **A. Desert Claim has made good faith efforts to resolve inconsistency with local**
13 **land use requirements.**
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15 As the Council is aware, Kittitas County has established a siting process for wind
16 power projects. Under Kittitas County Code chapter 17.61A, a wind project may be
17 permitted in any area zoned as Agricultural-20, Forest and Range, Commercial Agriculture
18 or Commercial Forest. However, Chapter 17.61A requires an applicant to obtain a Wind
19 Farm Development Permit and development agreement, a site-specific amendment to the
20 Comprehensive Plan land use designation map, and a site-specific rezone. The process of
21 obtaining these approvals amounts to a site-specific siting process, not a change in the
22 general zoning requirements for the property at issue.
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31 Desert Claim has made good faith efforts to obtain local land use approvals. In
32 January 2003, Desert Claim submitted an application for these approvals to Kittitas County.
33 Desert Claim then spent the next 26 months trying to obtain the required approvals. That
34 lengthy process is discussed above and outlined in greater detail in a chronology attached as
35 **Exhibit 2** to the Declaration of David Steeb. In summary, Desert Claim attended numerous
36 hearings and meetings before the BOCC, provided requested information and repeatedly
37 revised a proposed Development Agreement in an effort to address concerns about the
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³ The Council has formally proposed to repeal this regulatory requirement.

1 Project. The Kittitas County Superior Court found that Desert Claim made "extraordinary
2 efforts to satisfy two different boards of county commissioners over the process of the
3 application it submitted to the County." *Desert Claim Wind Power, LLC v. Kittitas County*,
4 No. 05-2-00243-6, slip. op. at 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005).
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8 Following the BOCC's decision in 2005, Desert Claim made several changes to the
9 Project in an effort to address concerns raised during the County process further, and those
10 changes are reflected in the Application filed with this Council in November 2006. Since
11 filing its Application, Desert Claim has made additional efforts to resolve the County's
12 concerns about the revised Project. Most recently, in a meeting with Community
13 Development Services on May 17, 2007, Director Darryl Piercy indicated that the County's
14 only remaining concern about the Project is the length of the setback from existing
15 residences. Steeb Decl. ¶ 12. Desert Claim proposes a 1,656-foot setback, based on the
16 four-times-height standard EFSEC recommended in the Kittitas Valley proceedings, and
17 Kittitas County apparently believes a 2,500 foot setback is appropriate.
18
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20
21 Over the almost four and a half years since Desert Claim filed its initial application
22 with the County, Desert Claim has attempted to resolve this setback issue. In January 2003,
23 Desert Claim originally proposed a 1,000-foot setback from existing residences. Steeb Decl.
24 ¶ 14. In 2004, Desert Claim submitted various iterations of a Draft Development Agreement
25 to the County, each of which proposed a 1,000 foot setback. Initial comments by the BOCC
26 about the proposed setback seemed to focus primarily on noise impacts, and at a BOCC
27 hearing on January 25, 2005, all three commissioners seemed to find a 1,000 foot setback
28 from the build line on adjacent properties to be acceptable. Commissioner Bowen stated it
29 "doesn't cause me any grief." Commissioner Huston said that it was "an acceptable buffer"
30 and that he had "no issue with that." Commissioner Crankovich said "I can agree with that."
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1 Ex. 7 at 48-57. However, on January 27, 2005, County Attorney Jim Hurson advised the
2 Commissioners that the turbines could be "visually dominant" from one-quarter to one-half
3 mile away. Ex 8 at 47. Ultimately, in April 2005, the BOCC issued Resolution No. 2005-
4 46, in which it concluded that "a minimum of 1/2 mile separation from wind turbines and
5 residences would be necessary to reduce significant adverse impacts to moderate adverse
6 impacts." In November 2006, Desert Claim filed its EFSEC Application, and configured
7 turbines to ensure that noise levels would not exceed 50 dBA at the boundary line of
8 adjoining properties where residences were or could be constructed. In this new
9 configuration, the closest residence was 1,106 feet from a turbine. Following the Council's
10 decision on the K.V. Project, Desert Claim reconfigured the Project to ensure that all
11 turbines were at least 1,656 (four times tip height) from existing residences. Desert Claim is
12 now evaluating the revised configuration in light of the Governor's decision last week
13 regarding the K.V. Project.
14

15
16 In attempting to resolve this disagreement, Desert Claim has acted in good faith.
17 Likewise, Desert Claim does not question the good faith of the County. The parties simply
18 disagree about the length of setback that is necessary and appropriate. Under RCW chapter
19 80.50, EFSEC should resolve this siting issue.
20

21
22 In its recent decision regarding the Kittitas Valley Wind Project, this Council
23 explained the "good faith effort" requirement as follows:
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25
26 [T]he Council believes this requirement to mean that an Applicant must work
27 through local government land use processes to resolve inconsistencies as
28 extensively as possible, but not to the point where further efforts would be futile.
29 Further reasonable compromises in position must be explored by both sides. Finally
30 a good faith effort to resolve a land use consistency dispute need not result in actual
31 resolution of all underlying matters.
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33
34 Council Order No. 826 at 17-18.
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DESERT CLAIM'S
REQUEST FOR PREEMPTION – 14

LEGAL13073313.1

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1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 Desert Claim has demonstrated good faith efforts. WAC 463-28-040 does not
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3 require an applicant to make every conceivable effort to cure local land use inconsistencies,
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5 or to simply agree to whatever conditions a local jurisdiction proposes. Given the
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7 Legislature's clear intent that EFSEC preempt local siting authority and that the EFSEC
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9 process avoid duplication and delay in the siting process, the Council should not require
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11 Desert Claim to make any further effort to obtain local land use approvals.

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

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14 Desert Claim has applied for and been denied local land use approvals by the Kittitas
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16 County Board of County Commissioners. Since the BOCC's April 2005 decision, Desert
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18 Claim has made changes in the Project to try to address the concerns raised during the
19
20 County process. According to the County's Director of Community Development Services,
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22 the changes made by Desert Claim have resolved all of the County's concerns other than the
23
24 setback from existing residences. As explained above, Desert Claim has been unable to
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26 reach agreement with the County on that issue.

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

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32 WAC 463-28-040 requires a request for preemption to address the extent to which an
33
34 applicant has evaluated other sites in the county and found them to be unacceptable. As a
35
36 threshold matter, there are no areas in Kittitas County where wind power is an outright
37
38 permitted use. Wind power projects may be permitted on any lands, such as the Project
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40 Area, zoned Ag-20, Forest and Range, Commercial Forest or Commercial Agriculture, but
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42 only if the Board of County Commissioners grants the necessary approvals following an
43
44 extensive project siting process. KCC 17.61A. This is not a situation in which an applicant
45
46 has selected a site that is not zoned for wind project development despite the availability of
47

1 numerous comparable sites that are zoned for wind power development. No such sites exist
2
3 in Kittitas County.⁴

4 enXco began looking for potential commercial wind power project sites in Kittitas
5
6 County in 2001. Like most wind power developers, enXco considers several factors in
7
8 identifying potential project sites:
9

10 (1) Wind Resource. The most important factor in selecting a site for a wind power
11
12 project is the available wind resource. enXco was looking for a site with an average wind
13
14 speed of 13 to 17 miles per hour. Potential sites are typically identified using published
15
16 wind maps, and then promising sites are evaluated more thoroughly, usually by collecting
17
18 one to two years of on-site meteorological data.
19

20 (2) Access to Electrical Transmission. Access to existing electrical transmission
21
22 lines is a significant advantage in wind power project development. Access to nearby lines
23
24 avoids or substantial reduces the cost associated with constructing new lines, which can
25
26 range from \$ 500,000 to \$ 1,000,000 per mile. In this case, the presence of transmission
27
28 lines crossing the Project area avoids the permitting complications and aesthetic concerns
29
30 associated with constructing new transmission lines to connect the Project to the regional
31
32 transmission grid.
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37 ⁴ Desert Claim acknowledges that Kittitas County is now in the process of considering a
38
39 proposal that would establish a pre-identified Wind Farm area on approximately 500 square miles in
40
41 the eastern portion of the County. Steeb Decl. ¶ 18. If adopted, a wind power developer seeking to
42
43 site a project within this area would still need to apply for a Development Permit and approval of a
44
45 Development Agreement by the County, but would not need a site-specific rezone or a change in the
46
47 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.*

1 (3) Environmental Constraints. Wind power developers try to avoid areas of
2 significant known environmental concerns. Developers try to avoid lakes, rivers, wetlands,
3 wildlife reserves, and endangered species habitat.
4
5

6 (4) Available Real Estate. A commercial wind power development typically requires
7 about 5,000 acres of open land. Developers typically look for large, 10,000 to 50,000 acre
8 open tracks of land as potential areas for development, and then gradually focus in on
9 specific areas. Ultimately, project development requires the right to use land, the company's
10 ability to negotiate leases with existing property owners is critical to site selection.
11
12

13 (5) Zoning and Land Use Regulations. Subject to the Board of County
14 Commissioners' approval, the Kittitas County Code allows wind power project development
15 in areas zoned Ag-20, Forest and Range, Commercial Agriculture and Commercial Forest.
16
17 *See Steeb Decl.* ¶ 16.
18
19

20 Desert Claim's parent corporation enXco initially identified the Kittitas Valley,
21 extending from Lookout Mountain on the west to the Columbia River on the east, and
22 between the National Forest lands in the north and I-90 in the south as an area worth further
23 investigation. *Steeb Decl.* ¶ 17. It then looked for large tracts of land and contacted
24 landowners about the possibility of obtaining wind leases. *Id.* As a result, enXco identified
25 a project area of over 5,000 acres made up of land owned by eight private land owners
26 located northwest of Ellensburg, and obtained leases for those properties. *Id.* After
27 performing further on-site meteorological evaluations, it designed the Desert Claim Project
28 at this location and submitted an application to Kittitas County concerning that project area.
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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

1 in the County, enXco was not able to identify other commercially available properties that
2 provided a comparable combination of wind conditions, transmission access and minimal
3 environmental impacts. *Id.*
4

5
6 Kittitas County also undertook an evaluation of potential alternatives in preparation
7 of the County FEIS. *See* County EIS § 2.3. In the FEIS, the County concluded that there
8 were not "reasonable alternatives" to the Desert Claim location. The EIS evaluated four
9 general areas of land in the County: the area west of Highway 97, the area immediately east
10 of Highway 97, the Whiskey Dick area and the Boylston area south of Whiskey Dick.
11 Although the FEIS identified potential sites in each of these areas, it ultimately concluded
12 that those sites did not present reasonable alternatives to the Desert Claim site. *See* County
13 FEIS at 2-45 to 2-50.
14
15

16
17 EFSEC has also undertaken an analysis of alternative sites in its SEPA documents
18 relating to the Wild Horse and Kittitas Valley wind projects. In these documents, the
19 Council considered six potential sites in addition to the sites proposed for the Desert Claim,
20 Wild Horse and Kittitas Valley projects. *See* Wild Horse Power Project, Draft EIS at 2-31
21 to 2-41; Kittitas Valley Wind Power Project Final EIS at 2-47 to 2-78. Of those six sites,
22 only two – the Springwood Ranch and Swauk Valley Ranch sites – were considered to be
23 worthy of detailed consideration in the SEPA documents. Although the Council's SEPA
24 documents evaluated those two sites, they also acknowledged that neither site is actually
25 available for wind project development. The owner of the Springwood Ranch site is not
26 willing to lease it for wind farm development,⁵ and a conservation easement precludes
27 development on much of the Swauk Valley site.⁶
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46 ⁵ *See* County FEIS at 2-47.

47 ⁶ *See* Kittitas Valley Wind Power Project Final EIS at 2-50.

1 There are no other sites in Kittitas County zoned for wind power development. Even
2
3 putting aside zoning provisions, other superior wind power sites are not available in Kittitas
4
5 County.

6
7 **D. Preemption in this case will further the state interests set forth in RCW**
8 **80.50.010.**
9

10 Preemption to authorize construction and operation of the Desert Claim Wind Project
11
12 would further the state's interests as set forth in RCW 80.50.010. EFSEC's governing statute
13
14 provides, in pertinent part:

15
16 The legislature finds that the present and predicted growth in energy demands
17
18 in the state of Washington requires the development of a procedure for the
19
20 selection and utilization of sites for energy facilities and the identification of
21
22 a state position with respect to each proposed site. The legislature recognizes
23
24 that the selection of sites will have a significant impact upon the welfare of
25
26 the population, the location and growth of industry and the use of the natural
27
28 resources of the state.

29
30 It is the policy of the state of Washington to recognize the pressing need for
31
32 increased energy facilities, and to ensure through available and reasonable
33
34 methods, that the location and operation of such facilities will produce
35
36 minimal adverse effects on the environment, ecology of the land and its
37
38 wildlife, and the ecology of state waters and their aquatic life.

39
40 It is the intent to seek courses of action that will balance the increasing
41
42 demands for energy facility location and operation in conjunction with the
43
44 broad interests of the public. Such action will be based on these premises:

45
46 (1) To assure Washington state citizens that, where applicable, operational
47
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.

1 (4) To avoid costs of complete site restoration and demolition of
2 improvements and infrastructure at unfinished nuclear energy sites, and to
3 use unfinished nuclear energy facilities for public uses, including economic
4 development, under the regulatory and management control of local
5 governments and port districts.
6

7 (5) To avoid costly duplication in the siting process and ensure that decisions
8 are made timely and without unnecessary delay.
9

10 RCW 80.50.010.
11

12 As shown in the following sections, the Desert Claim Project is consistent with the
13 four relevant policy premises identified in 80.50.010. The fifth premise mentioned in the
14 statute – to avoid costs of restoration at nuclear energy sites – is not relevant to this wind
15 project proposal.
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20 **1. Federal Operational Safeguards**
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22 The Project meets or exceeds all applicable federal and state requirements for the
23 development of a wind power project. The Application, together with the County FEIS,
24 address applicable requirements and demonstrate that the Project has been designed in a way
25 that will protect the welfare of Washington citizens. Public safety, welfare and
26 environmental impacts will be addressed further in the Supplemental EIS being prepared,
27 and in the testimony and evidence to be introduced in the adjudicatory proceedings.
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34 **2. Protect the Environment**
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36 The Desert Claim Project furthers the state's interest in preserving and protecting the
37 quality of the environment: By utilizing a renewable resource, the Project produces
38 electricity without the air pollutant emissions, greenhouse gas emissions and water pollutant
39 discharges commonly associated with fossil-fuel electrical generation. Desert Claim will
40 introduce additional evidence on these environmental advantages during the adjudicatory
41 hearing.
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1 The Desert Claim Project has also been designed to minimize its impact on the
2 environment. The Project's environmental studies and mitigation proposals comply with the
3 Washington Department of Fish and Wildlife's Wind Power Guidelines. Wetlands and
4 surface waters will be avoided. Project sound levels will comply with EFSEC's regulatory
5 requirements. Shadow flicker has been minimized and will be avoided through operational
6 limitations. The Application provides information on these issues, and Desert Claim will
7 introduce additional evidence during the adjudicatory hearing.
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14 **3. Abundant Energy at Reasonable Cost**

15 The Legislature has directed EFSEC to make decisions "to provide abundant energy
16 at reasonable cost." RCW 80.50.010(3). In enacting RCW chapter 80.50, the Legislature
17 found there to be a "pressing need for increased energy facilities," and this Council has
18 acknowledged that need in its regulations. See WAC 463-14-020. As the Council
19 recognized in its recent Kittitas Valley decision, "[n]ew sources of electrical generation are
20 needed now and will continue to be important in the future." Council Order No. 826 at 26.
21 In one of its recent SEPA documents, the Council described the need for additional power
22 generating facilities and wind resources in particular:
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33 Recent national and regional forecasts predict increasing consumption of
34 electrical energy will continue into the foreseeable future, requiring
35 development of new generation resources to satisfy the increasing demand.
36

37 * * *

38
39 [T]he [Northwest Power and Conservation Council]'s revised 20-year
40 demand forecast projects that electricity demand in the region will grow from
41 20,080 average MW in 2000 to 25,423 average MW by 2025 (medium
42 forecast), an average annual growth rate of just less than 1% per year.
43
44

45 EFSEC, *Kittitas Valley Wind Power Project: Final Environmental Impact Statement 1-8*
46 (Feb. 2007).
47

1 In satisfying increasing electricity demand, Washington's statutory Energy Policy
2 requires that "[t]he development and use of a diverse array of energy resources with
3 emphasis on renewable energy shall be encouraged." RCW 43.21F.015(1). The Council
4 recently described efforts by utilities to acquire additional renewable resources:
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8
9 Many regional utilities are seeking to acquire new generating resources to
10 meet their loads. . . . PSE, PacifiCorp, and Avista have issued request for
11 proposals specifically for wind power or other renewable resources. Avista is
12 seeking to acquire 50 MW; PSE is seeking to acquire a minimum of 150
13 MW, and PacifiCorp is seeking to acquire 1,100 MW Thus, the regional
14 demand for wind-generated energy exceeds the existing regional supply.
15

16 *Kittitas Valley FEIS* at 1-9. The passage of Initiative I-937 last year will increase the
17 demand for renewable resources. The Washington Department of Community Trade and
18 Economic Development has estimated that utilities serving Washington residents will need
19 to acquire 1,185 average megawatts of wind renewable power by 2020.⁷
20
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24 Wind power is cost competitive now. The Northwest Power Planning Council has
25 identified wind power as a cost effective resource in the region. Investor-owned utilities
26 Puget Sound Energy, Avista and PacifiCorp, have included wind in their Least Cost Plans
27 and Integrated Resource Plans. Wind power is not subject to the price volatility that has
28 occurred in the fossil fuel market and is expect to occur more frequently in the future.
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Desert Claim will introduce further evidence on these issues during the Adjudicatory
Hearing.

⁷ See CTED, Draft Rough Analysis of the Energy Independence Act at
[http://www.cted.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0
&ItemID=4109&Mid=863&wversion=Staging](http://www.cted.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=4109&Mid=863&wversion=Staging)

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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.

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