BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: APPLICATION NO. 2006-02 DESERT CLAIM WIND POWER LLC DESERT CLAIM WIND POWER PROJECT	**COUNCIL ORDER No. 843** **Order Recommending Approval of Site Certification Agreement**

Executive Summary

In this Order, the Energy Facility Site Evaluation Council (EFSEC or Council) recommends that the Governor, on behalf of the State of Washington, approve a proposed site in Kittitas County near Ellensburg, Washington, for the construction and operation of the Desert Claim Wind Power Project.

EFSEC is the state agency charged with making a recommendation to the Governor as to whether a new major energy facility should be sited in the state of Washington.[1]

This matter involves an Application for certification of a proposed site in rural Kittitas County, approximately eight miles northwest of Ellensburg, Washington, for the construction and operation of the Desert Claim Wind Power Project (the Project), a wind-powered energy production facility consisting of a series of turbines as well as associated electric collector and transmission lines and other supporting infrastructure.

Approximately 5,200 acres of undeveloped land are proposed for use with the Project. About 86 acres would be permanently developed for placement of the turbine towers, access roads, substations, underground and overhead transmission lines, and an operations and maintenance facility, and about 317 acres would be disturbed temporarily during construction.[2] Desert Claim Wind Power LLC, (Desert Claim or Applicant) seeks a Site Certification Agreement (SCA) with the State of Washington to construct and operate no more than 95 wind turbines that would generate up to 190 MW of wind power. The Project would also construct and use an interconnection transmission line 100 to 200 feet in length, to allow interconnection with the Bonneville Power Administration (BPA) or Puget Sound Energy transmission systems.

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[1] RCW (Revised Code of Washington) 80.50

[2] Application, Table 3, P. 15

The Council has reviewed Desert Claim's Revised Application for Site Certification (Application), No. 2006-02; it has conducted public meetings and adjudicative hearings; and by this Order it recommends approval of the Application to the Governor of the state of Washington.

The Applicant has entered into a stipulation and settlement agreement with Counsel for the Environment, a party to the proceeding. It has also entered an agreement with the Washington Department of Fish and Wildlife, or WDFW[3] defining and limiting the Project's construction and operation with regard to matters of interest to that department. Applicant accepts the offset and mitigation commitments it makes in those agreements in addition to the commitments it makes in the Application, and those offset and mitigation measures provided for in the hearing evidence and in the environmental impact statement. Applicant asks that the provisions be incorporated into the SCA. The Council has reviewed, and it approves, each of these agreements and measures.

Operation of the planned Project consistent with the protections provided in the Application and the Final Supplemental Environmental Impact Statement (FSEIS), the commitments made in the Agreements and within the terms of the proposed SCA is therefore expected to produce minimal adverse impacts on the environment, the ecology of the land and its wildlife, and the ecology of the state waters and their aquatic life.

The Council has carefully considered the state's need for energy at reasonable cost[4] and the need to minimize environmental impacts. The Council determines that this facility will provide the region with significant energy benefits while not resulting in unmitigated, significant adverse environmental impacts. Thus, the proposed Project meets the requirements of applicable law and is consistent with the policy and intent of RCW 80.50.

The Council therefore recommends that the Governor APPROVE the siting of this Project, as set out in this Order and the accompanying draft Site Certification Agreement.

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[3] The WDFW is not a party to the proceeding, although it provides one member to the Council and thus is entitled to party status upon request. Washington Administrative Code (WAC) 463-30-050.

[4] *See,* RCW 80.50.010.

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1. INTRODUCTION

A. Procedural Setting

1. Application: This is an application for a Site Certification Agreement allowing the Applicant, Desert Claim Wind Power LLC, to construct and operate a commercial wind power generation facility in Kittitas County, Washington.

2. Hearings: This matter was heard before the Washington State Energy Facility Site Evaluation Council in formal adjudicative sessions on July 13, 21 and 22, 2009, in Ellensburg, Seattle and Olympia, Washington, before Council Members James O. Luce, Council Chair; Richard Fryhling, Department of Commerce[5]; Hedia Adelsman, Department of Ecology; Mary McDonald, Department of Natural Resources; Jeff Tayer, Washington Department of Fish and Wildlife; Richard Byers, Washington Utilities and Transportation Commission; and Ian Elliot, Kittitas County. The Council retained C. Robert Wallis, Administrative Law Judge, for purposes of this proceeding.

The parties were represented as follows:

Applicant, Desert Claim Power Project LLC: Karen McGaffey and Kelley Moser, Attorneys at Law, Perkins Coie LLP, Seattle

Counsel for the Environment: Bruce Marvin, Assistant Attorney General, Office of the Attorney General, Olympia, Washington.

Kittitas County: Neil Caulkins, Deputy Prosecuting Attorney, Kittitas County Prosecuting Attorney's Office, Ellensburg, Washington.

Washington State Department of Commerce: Alice Blado, Asst. Attorney General, and Tony Usibelli, Assistant Director, Energy Policy Division, Olympia, Washington.

Economic Development Group of Kittitas County: Ron Cridlebaugh, Executive Director, Ellensburg, Washington.

3. Decision: In this Order, the Council recommends to the Governor of the State of Washington that the Application be approved; consistent with the terms of the Order, and that the Governor and the Applicant enter into a Site Certification Agreement as proposed in Attachment I to this Order.

B. The Applicant and the Project

The Applicant is Desert Claim Wind Power, LLC (Desert Claim or Applicant). It is a

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[5] The Department of Community, Trade and Economic Development was renamed as the Department of Commerce in the 2009 legislative session.

wholly owned subsidiary of enXco, an affiliate of the French company EdF Energies Nouvelles. The Applicant is a Washington State limited liability company, created for the sole purpose of developing, permitting, financing, constructing, owning and operating the Desert Claim Wind Power Project.

The Project was initially proposed in 2001 as a 180 MW, 120-turbine project, and application was made to Kittitas County. The Kittitas County Board of County Commissioners denied the proposal. Applicant appealed the decision to Kittitas County Superior Court, which upheld the County's decision. Desert Claim filed its EFSEC application in 2006 and submitted its revised application in February, 2009. Among the modifications made to the Project proposal since it was denied by Kittitas County are the following:

- The Project area is consolidated into one parcel, rather than the four separate parcels previously proposed.

- The number of turbines is reduced from 120 to 95, and a more powerful, 2 MW generator model is proposed to generate 190 MW instead of the initially-proposed 180 MW.

- The turbine placement configuration is modified to reduce to seven the number of non-participating residences within 2,500 feet of a turbine and all are placed more than 1,640 feet[6] from residences owned by persons who are not participating in the Project by selling or leasing land to the Applicant.

- Shadow flicker has been reduced or avoided for adjacent, non-participating residences, and if it occurs, Applicant agrees to stop the offending turbines under flicker conditions at the request of the affected landowner.

- Daytime strobe lighting has been eliminated and nighttime red lighting reduced to fewer than half the turbines.

The Project would be constructed in central Washington's Kittitas Valley on valley land eight miles northwest of Ellensburg that is used principally for cattle grazing and feed crop production. Elements of the Project include access roads, foundations, underground and overhead electrical system collection lines, a grid interconnection substation, a step-up substation for interconnection with the power grid, meteorological stations, an operations and maintenance (O&M) facility, and associated supporting infrastructure such as safety and control systems and an internal electrical system. The entire Project area encompasses approximately 5,200 acres.

Desert Claim proposes turbines that are located on the valley floor rather than located

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[6] The distance 1,640 feet is four times the "tip height," *i.e.*, the height of the turbine tower plus a blade at a vertical position.

along high ridgelines[7], noting that it is thus less noticeable. The Project area is currently zoned as either Agriculture-20 or Forest and Range, and is designated as rural in the Kittitas County comprehensive plan. The majority (3,671 acres) of the Project site, and the proposed interconnection points, lie on privately owned land. The remainder of the Project site occupies 1,529 acres of land for which the Applicant has secured a long term-lease from the Washington Department of Natural Resources (DNR).

The Project will use 3-bladed wind turbines on tubular steel towers to generate electricity. Turbines will be 2 MW (generator nameplate capacity). Only one type and size of turbine will be used for the entire Project.

All construction activities will occur within the areas identified in the Application. The precise location of the facilities may change during final engineering and micro-siting to maintain adequate spacing between turbines for optimized energy efficiency and to compensate for local topographical and wind conditions and to minimize impacts on nearby nonparticipating residences. Final locations will comply with conditions set forth in this order and the Site Certification Agreement, including safety and visual setbacks, noise level limitations, and requirements related to sensitive environments and cultural resources. Final turbine construction placement will maximize turbine setback from non-participating residences.

Water required for construction of the Project will be purchased off-site from authorized sources, and transported to the Project area by truck. Sanitary waste water produced during construction will be disposed of off-site at facilities authorized to accept such wastes. Sanitary waste water produced during Project operation will be discharged to and treated in an on-site sanitary septic system constructed in accordance with Kittitas County requirements. Water needs during operation will be supplied by an on-site permit-exempt well producing less than 5,000 gallons per day, with sanitary wastes disposed of in an on-site approved septic system. The Project will not generate process wastewater during operation. Stormwater discharges generated during construction and operation of the Project will be managed in accordance with Washington State stormwater management practices and guidelines.

The Applicant agrees to mitigate all permanent and temporary negative impacts on vegetation caused by the proposed Project, in accordance with the guidelines outlined in the Washington Department of Fish and Wildlife (WDFW) Wind Power Guidelines for siting and mitigating wind power projects east of the Cascades.

Electricity generated by the Project will be transmitted to either the Puget Sound Energy (PSE) or Bonneville Power Administration (BPA) electrical transmission systems. Both transmission lines run through the Project area. A 230 kV transmission feeder line will be constructed to allow interconnection with the transmission system chosen to transport the power to its purchaser. The maximum length of the line will be 200 feet.

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[7] The Wild Horse and Kittitas Valley wind projects approved by the Governor are located predominately on ridge lines.

Power from the Project turbines will be fed to a step-up substation to match the voltage of the transmission lines. The step-up substation will connect to the feeder line, which will connect to the utility's interconnect substation.

C. The Council and the EFSEC Review Process

EFSEC was created to advise the Governor in deciding which proposed locations are appropriate for the siting of large energy facilities.[8] It is the policy of the state of Washington to recognize the pressing need for 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.[9]

The Council has a comprehensive mandate to balance the State's need for abundant energy at a reasonable cost with the broad interests of the public. The Council is also charged with protecting the health of citizens and recommending site approval for power facilities where minimal adverse effects on the environment can be achieved.[10]

The Council conducted its review of this Application in an adjudicative proceeding pursuant to RCW 34.05, as required by RCW 80.50.090(3) and WAC 463-30.

Desert Claim moved for a determination that it had satisfied WAC 463-28-030(1) by making reasonable efforts to cure the inconsistency with local land use requirements and, therefore, Desert Claim could proceed to submit a request for preemption. The Council heard argument on the motion on April 10, 2007, and requested supplemental briefing, which Desert Claim submitted.

On May 8, 2007, the Council granted Desert Claim's motion and ruled that Desert Claim was not required to file another application with Kittitas County under Kittitas County Code chapter 17.61A. See Council Order No. 830 at page 7 (May 8, 2007). The Council urged the County and Desert Claim to work together to resolve their issues.[11]

Desert Claim acquired rights to additional property, which allowed reconfiguration of the Project and additional mitigation measures. It filed a Revised Application on February 6, 2009, which is now the basis for this proceeding.

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[8] RCW 80.50.

[9] RCW 80.50.010.

[10] RCW 80.50.010; WAC 463-47-110.

[11] At the conclusion of the adjudicative hearings, the County acknowledged that it had no remaining issues with the Applicant.

D. Compliance with the State Environmental Policy Act

The Council is charged with the responsibility to review proposed projects under the State Environmental Policy Act (SEPA), RCW 43.21C. That law provides for the consideration of probable adverse environmental impacts and possible mitigation measures. WAC 463-47-140 Pursuant to SEPA, EFSEC is the lead agency for environmental review of projects under the jurisdiction of RCW 80.50; the Council Manager is the SEPA responsible official. WAC 463-47-051

In this proceeding, the Council complied with SEPA requirements by taking several steps. It adopted the Final Environmental Impact Statements (EIS) that Kittitas County previously adopted for the Project. The Council issued a Determination of Significance and request for comment on the scope of a Supplemental EIS and it conducted a scoping hearing. The Council issued a Draft Supplemental EIS for public comment, and conducted a public hearing on the DSEIS. The Council also accepted written comments on the DSEIS documents, and adopted and issued a Final SEIS.

E. Adjudicative Proceeding

Applicant filed its Revised Application on February 6, 2009. On March 27, 2009, the Council issued its Notice of Intent to Hold Adjudicative Proceeding, Notice of Opportunity and Deadline to File Petitions for Intervention, and Notice of Prehearing Conference.

Statutory parties to the EFSEC adjudicative hearings include the Applicant and Counsel for the Environment. The Washington State Department of Community, Trade and Economic Development (CTED, now the Department of Commerce ["Commerce" in this order]) filed a Notice of Intervention. Kittitas County also timely sought party status. Commerce and Kittitas County, as Council members for this proceeding are entitled to intervene under Council rule[12]. The Council also granted party status to the Economic Development Group of Kittitas County (EDG).

The Council conducted a prehearing conference pursuant to proper notice on April 23, 2009. The Council entered Prehearing Orders Numbers 1 and 2 (Council Orders Nos. 838 and 840), allowing and rejecting requests to intervene and establishing a schedule for the hearings.

On June 23, 2009, the Applicant entered into a Stipulation and Settlement Agreement with Counsel for the Environment. On July 21, 2009, the Applicant entered into an Agreement with the Washington State Department of Fish and Wildlife (WDFW),[13] and it stipulated on the record on July 22, 2009 that it would comply with the terms of that agreement. The Council reviewed the stipulation with CFE and the agreement with WDFW at a post-hearing session on

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[12] WAC 463-30-050.

[13] The WDFW did not submit a formal notice of participation in this matter and thus is not a party, although it had the right to participate under WAC 463-30-050.

July 22, 2009, at Olympia, Washington.

The Council held an adjudicative evidentiary hearing session regarding Desert Claim's Application on July 13, 2009, in Ellensburg, Washington. On the evening of the same day, the Council held a hearing session in Ellensburg to receive comments from members of the public at which 19 members of the public testified. On July 21, the Council convened a hearing session in Seattle, Washington, to receive public testimony at which 13 members of the public testified. The Council also received 30 written comments regarding the Project from members of the public, collectively received in the record as Exhibit No. 9. On July 22, 2009, by notice to the parties, a further session was convened in Olympia, Washington for the purpose of inquiring into the Applicant's stipulation and settlement with Counsel for the Environment and its Agreement with the Department of Fish and Wildlife.[14] The Applicant and Counsel for the Environment appeared, and the Applicant offered the testimony of its witness, Mr. Steeb, in support of the terms of the Agreements.

After the hearings, the Applicant filed a post-hearing brief and Kittitas County filed a document expressly stating that it considered its issues with the Applicant to be resolved. Counsel for the Environment submitted comments relating to inclusion of Stipulation and Agreement provisions into Applicant's draft Site Certification Agreement. No other parties made submissions.

F. Land Use Consistency

The Council is required to hold a formal public adjudicative hearing to determine whether a proposed Project's use of a site is consistent with local or regional land use plans as well as zoning ordinances in effect at the time the Application was submitted to the Council.[15] A land use consistency hearing was conducted on January 30, 2007, in Ellensburg, Washington. Both Desert Claim and the County agreed that Desert Claim had not obtained the approvals required by the Kittitas County Code. On May 8, 2007, following briefing and argument, the Council granted Desert Claim's motion and determined that Applicant was not required to file another application with the County.

Desert Claim filed an application with Kittitas County in January 2003 seeking the approvals necessary under the County Code to construct and operate a 120-turbine, 180 MW wind project. Desert Claim made numerous changes to the project and incorporated mitigation measures to address concerns raised during that process. The Board of County Commissioners denied Desert Claim's application.[16]

The Kittitas County Superior Court rejected Desert Claim's appeal and upheld the county's decision. Desert Claim then considered additional changes to address concerns raised

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[14] *See,* WAC 463-30-253, relating to presentations of settlement agreements.

[15] RCW 80.50.030(2), WAC 463-14-030(2).

[16] Ex. 11.16.

during the County process and obtained a lease on neighboring WDNR land so that it could consolidate the turbines in a more compact area. Desert Claim submitted its Application for Site Certification to EFSEC on November 6, 2006, proposing a 95-turbine, 190 MW project to be located in the same area as the original proposal. The EFSEC proposal had fewer turbines, fewer neighboring residences, and greater setbacks than the original proposal. It also avoided impacts to wetlands, complied with state noise regulations, and included commitments to avoid shadow flicker at neighboring residences.

The Applicant reports that it made efforts to communicate with Kittitas County about the changes to the Project with a view toward achieving agreement.[17] The County Commissioners, however, indicated that they had "no interest" in "making a decision about the project" outside of the siting process outlined by the Kittitas County Code.[18]

EFSEC held a Land Use Consistency Hearing in Ellensburg on January 30, 2007. During the hearing, both 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.[19] Desert Claim then moved for a determination that it had satisfied the requirement of WAC 463-28-030(1) that it make reasonable efforts to cure the inconsistency and, therefore, that Desert Claim could proceed to submit a request for preemption. The Council heard argument on the motion on April 10, 2007 and received additional briefing.

The Council granted Desert Claim's motion on May 8, 2007, ruling that Desert Claim is not required to file another application with Kittitas County under Kittitas County Code chapter 17.61A.[20] Desert Claim's evidence indicates that it continued to make efforts to resolve differences with the County, but that the Board of County Commissioners declined to meet with Desert Claim.[21]

Applicant now urges us to preempt County regulations under the authority of RCW 80.50.110(2) and RCW 80.50.040(1). Desert Claim then filed a written Request for Preemption and a supporting declaration. Under rules applying to this application,[22] the Council must consider, in an adjudicative hearing, whether to preempt inconsistent local regulation. WAC 463-28. The Council has considered that issue in this adjudicative proceeding.

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[17] Ex. 11.19

[18] Ex. 11.17

[19] Council Order No. 825

[20] Council Order No. 830, at p. 7

[21] Exhibit 11, p.38. ll. 37-38.

[22] After this application was filed, the Council repealed and amended some of the rules relating to preemption. This application is governed by the rules in effect at the time it was filed.

At the conclusion of the proceeding, the County indicated that it no longer opposed the application.

Desert Claim has satisfied the legal requirements for preemption; therefore, we grant Desert Claim's request.

G. Public Testimony and Comment

In addition to evidentiary hearings, the Council is required to hold adjudicative hearing sessions in which any person may present information and comment about a proposed project and may be heard in support of, or in opposition to, an Application.[23] The Council provided an opportunity for public witnesses to testify during the hearing on the Draft EIS, the hearings on land use consistency, and the public adjudicative hearings on the proposed Project.

EFSEC provided public notices of the following events: receipt of the Application; public meetings; land use hearing; the Council's intent to hold adjudicative proceedings; the opportunity to file petitions for intervention and filing deadlines for such petitions; adjudicative hearings; Determination of Significance and request for comments on scope of the Environmental Impact Statement (EIS); Draft EIS comment period and public comment hearings; notice of availability of a Final EIS. The Council duly published all required notices of these proceedings. The Council did receive comment from members of the public at each of these procedural stages during the hearings or portions of hearings set specifically to receive public comment.

The Council received oral comments on the original application on December 13, 2006, in Ellensburg, Washington; and at a Land Use hearing on January 30, 2007. Oral comments were also received on the Draft SEIS on April 23, 2009, in Ellensburg, Washington; and at public hearings held July 13, 2009 and July 21, 2009 in Ellensburg and Seattle, Washington respectively.

The Council received 41 comment letters from members of the public regarding the Application, 40 written submissions regarding land use consistency, and 63 letters regarding the Draft SEIS.

The Council considered the oral and written comments submitted by the public as indications of topics and views significant to the public. The Council appreciates the witnesses' efforts in presenting testimony and written comments.

H. Council Action on Recommendation to Governor

In accordance with the requirements of RCW 34.05 and RCW 80.50, on November 16, 2009, at a duly noticed Special Meeting convened in Ellensburg, Washington, the Council voted

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[23] RCW 80.50.090; WAC 463-14-030.

unanimously to recommend approval of the Project to the Governor of Washington state. The Council memorializes its action in this Order, Council Order No. 843.

4. SETTLEMENTS AND STIPULATIONS

The Council encourages parties to application proceedings to make reasonable efforts to settle contested issues. The Applicant worked with Counsel for the Environment and the Council acknowledges the professionalism, attention to detail, and advocacy underlying the resulting stipulation and settlement, Exhibit 30 in this record. In addition, the applicant and the Department of Fish and Wildlife entered an agreement specifying actions the applicant will take to preserve habitat and reduce adverse effects on fish and wildlife. Although the WDFW is not a party to this proceeding, the Council has reviewed the document (Exhibit 20). The Council considered the agreements and explored them with the parties at a post-hearing session on July 22, 2009. The Council finds that the Applicant has appropriately accepted their terms as commitments benefiting the environment and that it accepts the agreements and the obligations set out therein.

Therefore, the Council accepts and approves the Desert Claim settlement agreement with Counsel for the Environment and Desert Claim's agreement with WDFW. The Council incorporates the two Agreements and their terms into the Site Certification Agreement. In doing so, we note that the Agreements in part independently address common matters, and the two may not be squarely comparable. Recognizing the possibility of ambiguity or conflict in this area, the Council accepts the unopposed suggestion of Counsel for the Environment that the provision most protective of the environment be adopted. In addition, the Council has added general provisions in the Site Certification Agreement to guide interpretation of the documents.

5. ELEMENTS FOR CONSIDERATION

Notwithstanding the agreements we received and accept, and the resolution of previously-contested issues through modification of the application and entry into the Agreements, the Council still must consider whether the evidence presented meets the Applicant's obligation to demonstrate that applicable environmental standards are met. The applicant has the burden of demonstrating through its evidence that the Project meets the requirements of law, consistent with the legislative policy and intent of RCW 80.50 and the Council has the obligation to review the evidence, even when uncontested, to ensure that it meets the requirements of law and rule. We have done so, and enter this Order as our acknowledgment and review of all the evidence of record.

EFSEC is also responsible for complying with the State Environmental Policy Act (SEPA), set out in RCW 43.21C. That Act requires consideration and mitigation of a project's probable significant adverse environmental impacts. WAC 463-47-140. The Council must also consider all public comment received on proposed power facilities. RCW 80.50.090; WAC 463-14-030.

6. ENVIRONMENTAL DETERMINATIONS

A. Habitat and Wildlife

1. Habitat

The Project is located primarily in grassland and shrub steppe habitat types. Although there are some federal jurisdictional waters and wetlands within the Project Area, there will be no temporary or permanent impacts to these waters and wetlands. Desert Claim's agreements with CFE (Ex. 30) and WDFW (Ex. 20) include conditions intended to minimize temporary and permanent habitat impacts, and to provide compensatory mitigation for impacts that cannot be avoided. Desert Claim will develop a Habitat Restoration Plan in consultation with WDFW to ensure that areas disturbed during construction will be reseeded with native vegetation and noxious weeds will be controlled. Desert Claim will also develop a Habitat Mitigation Plan in consultation with WDFW that will provide compensatory mitigation for temporary and permanent habitat impacts consistent with the 2009 WDFW Wind Power Guidelines.

At the conclusion of the Project's life, the wind turbines, foundations and other facilities will be removed to a depth of 4 feet below grade, and areas will be revegetated and restored to their pre-project condition. Desert Claim will prepare an Initial Site Restoration Plan for Council approval, consistent with the Council's rules, and has agreed to consult with WDFW in the preparation of that Plan.[24]

In light of these commitments, WDFW has agreed that the Project is consistent with the WDFW Wind Power Guidelines and that "the Project will not result in significant adverse impacts to . . . habitat."[25] The Council finds that with the mitigation measures Applicant agreed to with WDFW and required in the Site Certification Agreement, mitigation is consistent with the WDFW Wind Power Guidelines, and as a result no significant adverse impacts to habitat are expected to occur.

2. Birds

The Project's effect on birds is expected to be similar to those experienced at other wind projects in the region. Although individual birds will be killed, the Project is not expected to have a significant impact on the regional population of any species of birds.

Consistent with its agreement with WDFW, Desert Claim has incorporated features in the Project design to reduce avian impacts, including minimizing the use of overhead collector lines, using tubular towers without guy wires, and minimizing tower lighting. Desert Claim has also proposed a monitoring and adaptive management plan involving a Technical Advisory Committee ("TAC") that EFSEC has required for other wind projects.

Desert Claim, CFE and WDFW have also agreed to several specific measures to address potential risk to bald eagles during calving season. Private ranchers currently conduct calving within fenced areas in the Project Area, and they will continue to do so. Because calving can attract eagles, turbines will not be located within or inappropriately near fenced calving areas, and

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[24] WDFW Agreement, Ex. 20

[25] Ex. 20 at 12 (WDFW Agreement).

all carcasses and afterbirths will be removed promptly. Desert Claim will also conduct a bald eagle study during the calving season in the first two years of the Project's operation and present the study's results to the TAC, which can then consider whether to recommend additional mitigation measures.

WDFW has concluded that, with the agreed protections, "the Project will not result in significant adverse impacts to . . . wildlife."[26] CFE represents that if the stipulated measures are accepted, his issues with the Project are withdrawn.[27]

3. Bats

Although wind power projects often result in some bat fatalities, the evidence here does not indicate that the Project will significantly impact bat populations. At the request of the CFE and WDFW, Desert Claim has agreed to conduct a pre-operation bat monitoring survey and two years of fatality monitoring once the Project is in operation. It will present the results to the TAC.

B. Air Quality

One of the principal environmental advantages of wind power is that it produces electricity without the significant emission of air pollutants and greenhouse gases that are associated with traditional fossil fuel-fired electrical generation. There will be no air emissions associated with the Project, except for the relatively minor emissions associated with construction; operation and maintenance vehicles and equipment; and emissions of fugitive dust.

The Council finds that the expected construction emissions associated with the Project will have no adverse affect on the ambient air quality in the Kittitas County air shed. The Project will not emit regulated air pollutants when operating, and is therefore not subject to federal or state emissions control requirements during operations. Fugitive emissions will continue to be mitigated using the same measures implemented during construction.

C. Water Use and Water Quality

Wind power will produce electricity without water use typically associated with thermal or hydro electrical generation. The Project will only use small amounts of water for dust suppression, concrete mixing, and domestic and sanitary uses. Construction of the Project is not expected to affect surface or ground water in the area adversely. The Project must develop and implement a Council-approved Construction Stormwater Pollution Prevention Plan ("SWPPP"), Temporary Erosion and Sedimentation Control ("TESC") Plan, and Spill Prevention Control and Countermeasures ("SPCC") Plan. Although public comments questioned the potential impact of construction on wells, there is no information of record that construction activities would adversely affect groundwater or wells in the vicinity.

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[26] Ex. 20 at 12.

[27] Ex. 20, p 14, line 6-7.

Once in operation, the Project will not discharge industrial waste water. It will implement a Council-approved Operational SWPPP and SPCC Plan to avoid adverse impacts to water quality, and it will construct and operate a septic system to deal with domestic-type wastes produced on-site.

D. Noise

The Council's regulations require compliance with the maximum noise limits set forth in regulations promulgated by the Department of Ecology.[28] The results of predictive modeling introduced into evidence indicate that the Project will comply with these noise limits. The Site Certification Agreement should require compliance with those regulatory noise limits.

E. Shadow Flicker

Shadow flicker is a term used to refer to the shadow a revolving blade casts on a stationary object. Analysis in Tab 8 of the Revised Application described and supported by Applicant's witness Julia Meier (Ex.17) indicates that the Project has a theoretical potential to result in no more than 26 hours of shadow flicker a year at nearby residences. The report also concludes that shadow flicker is not expected to be noticeable at distances of more than 1,500 feet from a turbine. With all nonparticipating residences more than 1,640 feet from turbines, therefore, no noticeable shadow flicker is anticipated. To ensure that shadow flicker is not a problem to nonparticipating residences, however, Desert Claim has proposed a condition in the Site Certification Agreement that would require turbines to be turned off during the time during the day if and when a nonparticipating residence experiences shadow flicker. The Council adopts that proposal.

F. Cultural and Archeological Resources

The Applicant will address cultural resources in the final design and micro-siting process. It will work with the Washington State Department of Archaeological and Historic Preservation and affected Native American tribal authorities to identify, preserve, and as necessary mitigate, culturally significant sites.

The Council finds that with implementation of these mitigation measures no impacts on known culturally sensitive areas will occur under any of the proposed scenarios. Operation of the Project will not impact any of the archaeological or historical sites identified during this current cultural resource survey.

G. Turbine Views and Aesthetics

The Desert Claim Project is spread out over a relatively flat valley floor. The valley is already a working agricultural landscape with barns, silos, hay storage and farm equipment, and

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[28] WAC 463-62-030 (referencing WAC 173-60).

views already include high voltage transmission lines. By locating the Project in the valley, turbines do not stand out on top of area ridgelines, and turbines do not break the horizon line when viewers in the Ellensburg area look north toward the Stewart Range.

Although any commercial scale wind project will have an effect on area views, Desert Claim will minimize and mitigate aesthetic impacts by painting turbines a neutral color with low-reflectivity finish, minimizing Project lighting, and promptly repairing or removing any broken or inoperable turbines.

The greatest aesthetic impacts will likely be experienced by those living closest to the Project[29]. The Project has been revised since its original proposal to reduce the number of turbines by 25 (about 20%) and the number of non-participating residences within 2,500 feet[30] of a turbine by two (about 22%), with seven remaining. At the same time, total generating capacity from the project has been increased to 190 MW through use of higher capacity turbines.

The Council recognizes, as Desert Claim asserts,[31] that a configuration on the valley floor minimizes visual intrusion compared with a distant view of ridgelines. However, a corollary to this is that nearby views appear more intrusive, as is apparent in the visual simulations in this record.[32] Not only may one or two nearby turbine towers be seen, but the relatively level ground and the number of Project turbines mean that for some nearby residences the Project visual presence may be greater and more intrusive.

Desert Claim proposes a minimum setback of four times the turbine tip height,[33] here 1,640 feet. Witness David Blau testified for Desert Claim on ".... visual impacts... with particular emphasis in the impacts of those residing near proposed turbines."[34] His testimony

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[29] Applicant's brief, p. 19, citing the draft SEIS, ex. 4, at 3-58; *see also* Ex. 5 (FSEIS) at 3-63

[30] The Applicant acknowledged the significance of a 2,500-foot setback in the EFSEC application by identifying the nine residences within that radius of one or more turbines (Section 2.3.2) and by noting the reduction to seven residences in Section I, p. 2 and in its January 20, 2009 submission of its revised application (third unnumbered page). The FSEIS also considers distances, noting that Desert Claim proposed a minimum 4X setback based upon EFSEC's recommendation to the Governor in the Kittitas Valley application (page 3-47) and that Desert Claim reduced to seven the number of nonparticipating residences between 1,640 and 2,500 feet from turbines. The aesthetic impact of turbines with 2,500 feet is acknowledged in Application Section 1.7.6 at p. 1-11; turbines within 2,500 feet are identified in Sec. 2.2.1.3, p. 2-11. Sec. 2.2.2.2, p. 2-19, also acknowledges the seven nonparticipating residences within 2,500 feet of a turbine.

[31] Desert Claim Post-hearing brief, p. 18.

[32] Section 3.4.6 of the FSEIS (exhibit 5) observes the increased impacts on nearby views, and applicant cites and acknowledges this effect is its brief at page 19.

[33] Exhibit 18, Prefiled Testimony of David Blau

[34] Exhibit 18, p. 2

includes an evaluation of the "looming effect" of the turbines located nearest to residences. He concludes that this "4X" setback would be more than sufficient to mitigate visual impacts and "eliminate any adverse looming effect" at nearby residences.[35] Affected nonparticipating homeowners did not express specific concerns about the effect of nearby turbines on view or aesthetics. Setback requirements appear to be somewhat subjective and to vary markedly in other jurisdictions. Mr. Steeb submitted evidence of other jurisdictions' setback requirements, indicating minimal setbacks (Ex. 11, pp. 41-2); the Kittitas County ordinance requires one-half mile. One of the public witnesses cited to an asserted French requirement of a one-mile setback (Ms. McCosh, TR36).

Mr. Blau's testimony was uncontroverted by other expert testimony. It does not specifically address the effects of multiple turbines in proximity to residences. Few commenters at the public hearings mentioned visual aspects of nearby turbines and the comments were not expert. The Applicant asserts in its brief that "The evidence does demonstrate . . . , that requiring greater setbacks would significantly reduce the environmental, energy and economic benefits of the Project."[36]

The Council has not adopted a setback "standard," but has relied on the record in each proceeding.[37] Reviewing the evidence of record, including the simulations,[38] however, the Council believes that it is appropriate to maximize the distance of nearby turbines from nonparticipating residences.

This is consistent with decisions in the Kittitas Valley proceeding, EFSEC Application 2003-1. There, Governor Gregoire directed the Council reconsider setback distances from adjacent landowners' residences,[39] and the KV SCA imposed the following requirement:

> For each turbine located within 2,500 feet of a non-participating landowner's existing residence, micro-siting determinations shall give highest priority to increasing the distance of the turbine from that non-participating landowner's residence, even beyond the minimum four times height setback ..., so as to further mitigate and minimize any

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[35] Exhibit 18, p. 13

[36] Applicant's brief, p. 20.

[37] The "4X" measure was proposed and adopted in the Kittitas Valley application and was proposed in this proceeding. The Council does not establish a different requirement in this order.

[38] *See,* for example, FSEIS figures 3.4-10, 3.4-14, 3.4-16 and 3.4-18.

[39] "I am directing EFSEC to reconsider Article I (C) (7) of the proposed Site Certification Agreement ("Agreement") pertaining to turbine setbacks from adjacent land owners' residences without signed agreements with Sagebrush Power Partners, LLC., my directive ... is solely focused on the need to determine on this particular project whether additional setbacks beyond the four times height (4xh) requirement for non-participating landowners are achievable..."

visual impacts on that non-participating landowner.[40]

WAC 463-28-070 requires the Council to consider local government or community interests in deciding matters subject to preemption. Kittitas County has adopted an ordinance[41] that requires one-half mile setbacks from residences, or 2,640 feet.[42] It is not by its terms applicable to the land on which the Project will be built, and it would be inappropriate for the Council to consider mandating compliance with the ordinance. But the ordinance reflects the interests of the County and the community, and the regulatory mandate of our rule requires a close review of setback requirements for the Project.

The Council therefore believes that steps must be taken in this proceeding similar to those in the Kittitas Valley matter cited above. Given the need in any event to perform engineering and micro-siting analyses, there is little additional burden on the Applicant in that process to include concerted efforts to increase the setbacks of turbines located within 2,500 feet of a nonparticipating residence. In addition, based on our review of simulations that illustrate visual effects of turbines when viewed from nearby locations and our view of the site, Applicant must take similar efforts to limit to one the number of turbines located within 2,500 feet of any nonparticipating residence. The Council recognizes the desirability of increased distance based on record references, on the simulations of record, the Council's expertise and its view of the site. It recognizes also that the 2,500-foot distance is not a generally applicable standard, but selects it because of its use a benchmark for analysis in the evidence of record.

Prior to commencement of construction, the Applicant shall provide EFSEC with documentation demonstrating its efforts to site the applicable turbine locations in the manner set out in this section, identifying specific reasons if Applicant considers this not to be feasible.

H. Glare and Aesthetics

The Application discusses glare and aesthetics, making commitments to ensure that the project minimizes light and glare impacts. The Council, based on the Applicant's commitments, requires the applicant to comply with the following provisions: Project buildings will be constructed of local materials and in local building styles to maximize their fit into the local landscape, and be landscaped with native shrub-steppe vegetation around buildings and equipment boxes to integrate the structures into the surrounding landscape. Project structures shall be painted with neutral/low reflectivity finishes. The Certificate Holder shall neither place nor allow advertising, logos, cellular antennas, or other clutter on the turbines, nacelles, or buildings of the Project. The O&M facility buildings shall be painted with a low reflectivity

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[40] Site Certification Agreement between State of Washington and Sagebrush Power Partners LLC, p. 11.

[41] Kittitas County Code, Chapter 17.61A, the Wind Farm Resource Overlay Zone.

[42] Section 17.61A.035, adopted in 2007, applies to certain eastern and southern portions of the county, and does not apply to the Project area. The section states that if the half-mile setback "is not attainable, additional analysis shall be included to support the application."

earth tone colored finish. The only lighting on the turbines will be the aviation lighting required by Federal Aviation Administration. Outdoor lighting at the O&M facility and substation(s) will be minimized to safety and security requirements, motion sensors will be used to keep lighting turned off when not required, and lighting will be equipped with hoods and directed downward.

We include these requirements in the Site Certification Agreement. We do not believe it likely that compliance with these requirements will be difficult, but require the Certificate Holder to seek a waiver from the Council if it believes that compliance is not feasible.

I. Health and Safety

1. Safety setback

Desert Claim has designed the Project to include a minimum 625-foot safety setback between turbines and all occupied structures, public roads and public rights of way. This distance is based upon engineering calculations of the maximum potential distance of safety hazards such as tower collapse, blade throw and ice throw, plus an additional 25% margin of safety. The Council finds this adequate for public safety protection.

However, we note that it is the 625-foot setback, and not the 1,640-foot setback, that applies to occupied residences owned by project participants, that is, persons who have a financial interest through lease of land or otherwise, in the Project. We anticipate that in a future application or rulemaking proceeding we will receive information about health or safety effects related to setback that will provide us with greater information. This issue is related to, but different from, the setback for aesthetic reasons.

2. Fire Hazards

Members of the public raised concerns and Council members asked questions about fire hazards and the resources for adequate fire protection. Although evidence in the record appears to indicate that wind turbines rarely cause fires and would be unlikely to affect a fire started by some other cause, it is not denied that fires could be started by turbine or other activities on the site, nor that fires originating off-site could spread onto the site. In either event, emergency response would be required on-site.

Desert Claim must therefore prepare a Fire Control Plan in coordination with pertinent local and state agencies and response organizations. Desert Claim has reached agreement with the Department of Natural Resources, which has fire protection jurisdiction over its lands under lease to Desert Claim. Desert Claim must also enter into one or more additional fire services agreements to cover the entire Project Area before beginning construction. Desert Claim must also maintain agreement(s) covering the entire Project, for the life of the Project. In addition, it must design the internal project roads to accommodate fire fighting and other emergency response equipment.

3. Health and Safety Plans

The Applicant must prepare Health and safety and emergency plans for both the construction and operation phases to protect public health, safety and the environment on and off

the site, to anticipate a comprehensive list of major natural disasters or industrial accidents that could relate to or affect the proposed Project. The Applicant will be responsible for implementing the plans in coordination with the local emergency response organizations. The Project operating and maintenance group and all contractors must receive emergency response training as part of the regular safety-training program to ensure that effective and safe response actions would be taken to reduce and limit the impact of emergencies at the Project site.

J. Roads and Transportation

1. Public Roads

At the County's request, Desert Claim has agreed to use video to document before and after conditions of roads being used for construction access. After construction, Desert Claim will make any repairs necessary to ensure that these roads are returned to Kittitas County standards.[43] Desert Claim also agreed to prepare a Road Signage Plan prior to construction, consistent with the Manual on Uniform Traffic Control Devices.

2. Internal Access Roads

The Project expects to have approximately 27 miles of internal access roads, allowing construction and maintenance vehicles to travel to each Project turbine. Desert Claim has agreed with the CFE and WDFW to minimize new road construction to avoid unnecessary impacts to habitat and soil disturbance.[44] The Revised Application describes the Project's internal roads as single-lane gravel roads, generally having 15-20 foot surface widths. Desert Claim proposes to make these roads no wider than necessary for their intended purpose. However, Desert Claim commits to ensure that the points of ingress and egress from these internal Project roads to public roads be constructed according to County standards. Ex. 1 Tab 1 at 11 (Revised Application).

Desert Claim agreed on brief to construct the internal access roads according to whatever requirements the Council imposes, but Desert Claim does not propose to construct all internal roads according to County private road standards. The County's private road standards appear to be intended to apply to privately owned roads that will allow two-way traffic within low- and high-density residential developments that serve from three to forty or more lots.[45] For low density developments, the County requires a minimum gravel surface of 20 feet. Desert Claim argues that the Project's access roads are not intended to serve two-way traffic to members of the public, and might be considered more akin to private driveways, which the County Code only requires to be 8 feet wide for single use, or 12 feet wide for joint use. Desert Claim argues that its proposal to construct narrow one-lane internal access roads appropriately balances the need for safe and effective access for construction and maintenance with the interest in minimizing

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[43] Testimony of Mr. Steeb, TR 11.

[44] Ex. 20 at 3 (WDFW Agreement); Ex. 30 at § II.G.2. (CFE Stipulation).

[45] *See* Kittitas County Code § 12.12.020, Table 12-1.

impacts to habitat in the Project Area.

The Council agrees with WDFW and the CFE that habitat must not be disturbed unnecessarily. However, the Council has concerns here, as noted in the section addressing fire protection, that emergency service vehicles must have adequate access to the site in the event of fire, accident or other emergency. The Council directs that the Applicant consult with emergency service suppliers, including fire departments or districts, police or sheriff departments, and any other emergency service responders that may be called to the site, regarding required weight capacity, turning radius, accommodation as necessary for the passage of two or more vehicles, and other requirements for safe and prompt emergency access at any time of the year, and submit a proposal to the Council for approval before finalizing plans for roadway construction.

3. Socioeconomics

The Project will result in increased employment in Kittitas County, both during construction and during operation. The Project's economic impacts are not expected to be limited to jobs and the salaries of employees. The Project will purchase goods and services, and it will make lease payments to landowners for use of the property for the Project. The Project will increase the total valuation of real property in Kittitas County. It and its lessors will pay increased taxes as a result. The resulting revenues will be available for schools and local public services in the area, including county roads and county government. Tax revenues resulting from the Project could result in reduced property tax levy rates for local taxpayers.

4. Site Restoration

WAC 463-42-655 requires an Applicant to provide a plan for site restoration in sufficient detail to identify, evaluate, and resolve all anticipated major environmental, public health, and safety issues. The rule requires that this plan address provisions for funding or bonding arrangements to meet the site restoration and management costs.

In its Application, Desert Claim outlines the scope of activities that would be undertaken at the end of the Project's useful life. These activities included removal of Project structures, removal of foundations to four feet below grade, and restoration of soil surfaces as close as reasonably possible to their original condition. Through its Stipulation and Settlement Agreement with WDFW, the Applicant has further defined the site restoration activities.

The Applicant has committed to posting funds or guarantees sufficient for decommissioning, to ensure the availability of decommissioning funds when needed.

The Council has considered the Applicant's commitments and finds them to be appropriate. Desert Claim will provide an initial site restoration plan to the Council prior to construction of the Project, and a detailed site restoration plan must be approved by the Council prior to decommissioning at the end of the useful life of the Project.

5. Cumulative Impacts

Potential impacts of the proposed Project were considered cumulatively with other potential development in the surrounding areas. On balance, the impacts are adequately mitigated.

K. Exceptions to specific requirements

The Council recognizes that during the construction and operation of a complex project such as the one proposed, circumstances may rarely arise where literal adherence to SCA requirements would operate to raise costs unnecessarily or could actually produce a result counter to the interests of the public or the environment. An example might be taking advantage of weather conditions to do minor preparation work that, if delayed, could be more difficult *and* that, if performed early, would not run counter to the intent of regulation or of the SCA.

The Council authorizes the Council Manager to allow such exceptions, provided that a record is kept; that Council members are immediately notified and any Council member may within seven days of the notice put the item on the next Council open meeting agenda for review.

L. Project Construction

The Council finds that there is a benefit to the public to have permitted facilities ready to be constructed whenever it becomes known that more generation capacity is needed. As noted above, it is in the state's declared interest to secure abundant energy at reasonable cost. Nonetheless, the Council recognizes that an unlimited "build window" for a proposed project is not appropriate as, over time, technology or mitigation measures presented in an application may no longer be protective of environmental standards and conditions at the time the facility is constructed.

The Applicant proposes to construct the Project in the manner set out in the Application and the Agreements. It has proposed a five-year build window for the Project after obtaining needed permits. The Applicant expects to complete construction in approximately nine months, but commits to making its best efforts to complete construction within 18 months. The Applicant is not restricted from operating and generating power from individual strings of turbines that are completed prior to others, so long as all needed infrastructure, safety and mitigation measures are in place.

These measures provide flexibility for construction but also address needs to complete the project in a timely manner.

M. Conformity with Law

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, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. It is the intent of the law 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. RCW 80.50.010.

Consistent with legislative intent, the Council must consider whether an energy facility at a particular site will produce a net benefit after balancing the legislative directive to provide for abundant energy at a reasonable cost with the impact to the environment and the broad interests of the public. Here, the Council finds that the Project conforms to the legislative intent expressed in RCW 80.50.010.

The Applicant proposes to construct the Project in accordance with applicable national and international building codes. Electrical and mechanical project components would comply with international design and construction standards. The Applicant proposes to implement a comprehensive employee safety plan during construction and operation of the Project. The Council therefore finds that operational safeguards will be technically sufficient to protect the public and the public welfare. RCW 80.50.010 (1).

The Applicant has agreed to appropriate environmental mitigation requirements as indicated in the sections discussed above. As a whole, the mitigation package preserves and protects the quality of the environment. This Project will produce electrical energy without generating greenhouse gas emissions. As a renewable energy resource and one that does not produce carbon dioxide with the production of energy, the Project will 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. RCW 80.50.010(2).

Finally, the evidence in the record supports the conclusion that the region needs to continue to add electrical generation capacity. As a renewable energy source using wind power for generation, the Project will contribute to the diversification and reliability of the state's electrical generation capacity, and will therefore support the legislative intent to provide abundant energy at a reasonable cost.

N. Project Benefits

The Council noted above that the Project will benefit Washington State stemming both from the nature of a wind power generation project, and from certain economic benefits.

The environmental benefits include the energy generated, from a generation source that does not require the creation of carbon dioxide, and economics, as the Project will provide construction jobs, employment during operation, tax revenues to local governments, and payments to landowners and service providers. And of course, the available generation will have considerable economic value.

5. CONCLUSION

The Council has carefully considered its statutory duties, applicable administrative rules, and all of the evidence in the record in exercising its duty to balance the state's need for energy at a reasonable cost with the need to protect the environment and the health and safety of the residents of the local area.

One of the Council's principal duties is to ensure that the location of energy facilities will produce minimal adverse effects on the environment. We have considered the testimony of expert witnesses and members of the public, the settlement agreements, as well as the Draft and Final EIS and Draft and Final Supplemental EIS in determining whether this Project, with its proposed mitigation measures and the requirements of the settlement agreements, is appropriate for this location.

We understand the concerns of members of the public. The technology is still relatively

new to this region, new facilities may seem out of place in today's landscapes, and fear of possible consequences of industrial development is natural and understandable. However, based on the record before us, we conclude that the mitigations and protective measures that the Applicant commits to are adequate to protect the public, including members of the public who reside in and use the areas near the Project.

As currently proposed, and with mitigation for a number of impacts and the conditions of the Site Certification Agreement, the Project will have a minimal impact on the environment.

One of the Council's additional duties is to ensure that the supply of energy, at a reasonable cost, is sufficient to ensure people's health and economic welfare. The record shows that this Project would serve those goals. The Council considered whether the total package of mitigation measures offset the environmental impacts of the Project. Viewed on balance, with respect to this Project, and in the context of mitigation proposed, the package for the Desert Claim Project satisfies the legislative policy of RCW 80.50.

For all of the reasons discussed in the body of this Order, and the Council recommends to the Governor that this Project be APPROVED, subject to agreement to the attached Site Certification Agreement.

6. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having found above the detailed facts relating to all material matters, the Council now makes the following summary Findings of Facts and Conclusions of Law. For readers' convenience, relevant preliminary conclusions of law are stated with the supporting findings of fact.

A. Nature of the Proceeding

This matter involves Application No. 2006-02 to the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) for certification to construct and operate the Desert Claim Wind Power Project (Project), a wind powered energy generation facility with a maximum of 95 wind turbines and a maximum installed nameplate capacity of 190 MW. The Project is to be located in the central portion of Kittitas County, Washington.

B. The Applicant and the Application

1. The Applicant, Desert Claim Power Project LLC, is a Washington Limited Liability Company (LLC) formed to develop, permit, finance, construct, own and operate the Project. Desert Claim Power Project LLC is owned by enXco, which is considered to be a Site Certificate Holder, as defined in the Site Certification Agreement, and thus bound by obligations defined therein.

2. Kittitas County rejected Desert Claim's application for Project approval by a decision affirmed in Kittitas County Superior Court. Despite later negotiations, the Applicant and the County failed to reach agreement. The County indicated in its final briefing presentation in this matter that it now does not dispute any aspect of the application.

3. The Council concludes that the Project is inconsistent with local land use plans and zoning ordinances. On November 3, 2006 the Applicant submitted an Application for Site Certification to the Council seeking certification, pursuant to the RCW 80.50.060, of a site on which to construct and operate the Desert Claim Power Project in Kittitas County, Washington. As initially proposed, the Project was to be a wind powered electrical generation facility, with a generation capacity not to exceed 180 MW produced by no more than 120 turbines.

4. On February 6, 2009, the Applicant submitted a Revised Application for Site Certification. As revised, the Project is to be a wind powered electrical generation facility, with a generation capacity of up to 95 turbines, not to exceed a total of 190 MW.

C. Compliance with the State Environmental Policy Act (SEPA)

5. EFSEC is the lead agency for environmental review of project proposals within its jurisdiction under terms of the State Environmental Policy Act, RCW 43.21C. The Council Manager is the SEPA responsible official. WAC 463-47-051.

6. On December 15, 2003 Kittitas County issued a DEIS and August 16, 2004 the County issued an FEIS regarding Desert Claim's application to the County.

7. On March 19, 2007 the Council adopted the FEIS issued by the County and issued a notice of determination that an SEIS would be required. On April 6, 2009 the Council issued a notice that a draft SEIS was issued on April 2, 2009. The notice stated that public comments on the DSEIS would be received through May 5, 2009 and that a public meeting to receive comments would be held in Ellensburg on April 23, 2009. On April 23, 2009 the Council held a public meeting in Ellensburg to receive public comments on the DSEIS.

8. On November 6, 2009, the Council issued the Final SEIS for the Project.

D. The Adjudicative Proceeding

9. The Council duly published and, when required, served, notices of receipt of the Application, public meetings, commencement of the Adjudicative Proceeding and opportunity to file petitions for intervention, prehearing conferences, land use hearings, and the adjudicative hearings regarding Application No. 2006-02.

10. The Council duly noticed and conducted prehearing conferences on April 23, 2009 and July 8, 2009. The Council issued Prehearing Orders Numbers 1 through 3 (Council Orders Nos. 838, 840 and 841).

11. Counsel for the Environment (CFE) Bruce Marvin and the Applicant are parties to the proceeding pursuant to RCW 80.50.080. The Council received a notice of intervention and granted party status to the Washington State Department of Community, Trade and Economic Development (CTED, now the Department of Commerce), and Kittitas County, which are both entitled to participate pursuant to WAC 463-30-050. The Council also granted party status to the Economic Development Group of Kittitas County (EDG). The Council denied intervenor status to Roger Overbeck, who appeared on his own behalf, for failure to comply with basic procedural requirements.

12. On July 23, 2009, Desert Claim and Counsel for the Environment filed a Stipulation and Settlement Agreement with the Council addressing environmental issues.

13. On July 21, 2009, Desert Claim and WDFW filed an Agreement with the Council addressing issues of wildlife and habitat protection and preservation.

14. The Council held a formal adjudicative hearing regarding Application 2006-02 on July 13, 2009, in Ellensburg, Washington.

15. The Council held adjudicative hearings to receive testimony and opinion from members of the public about Application 2006-02 in Ellensburg and in Seattle Washington. Nineteen persons testified at the Ellensburg hearing on July 13, 2009, and 13 members of the public offered comments at the Seattle hearing session on July 21, 2009.

16. At a post-hearing conference on July 22, 2009, the Council considered the Stipulation and Settlement Agreement between Desert Claim and Counsel for the Environment, as well as the Agreement between Desert Claim and WDFW. Counsel for the Environment, counsel for the Applicant and a witness, Mr. Steeb, described the agreements and responded to Council questions about them

17. The Applicant and other parties to the proceeding were given an opportunity to submit simultaneous briefs and a Proposed Site Certification Agreement. The Applicant made the submission, but other parties waived presentation of simultaneous opening briefs and were allowed the opportunity to submit responding briefs, instead. The Applicant made its filing on July 21, 2009. In filings on August 17, 2009, Counsel for the Environment submitted responding comments that clarified but did not dispute the applicant's submission, and Kittitas County stated formally that it had no remaining issues involving the Project.

18. On November 16, 2009, the Council voted unanimously to recommend approval of the Project to the Governor of the state of Washington.

E. Project Description and Configuration

19. The Desert Claim Power Project is a wind powered electrical generation facility in Kittitas County, Washington. The Project will consist of 95 wind turbine generators with a total nameplate capacity of 190 MW.

20. The Project will include access roads, turbine foundations, underground and overhead collection system electrical lines, a grid interconnection substation, step-up substation(s), a feeder line running from the on-site step-up substation(s) to the interconnection substation, meteorological stations, an operations and maintenance (O&M) center and associated supporting infrastructure and facilities

21. The Project is to be constructed in accordance with the Application and the analysis performed in the Environmental Impact Statement and Supplements, within five years from obtaining all necessary state and federal permits. Applicant will make its best efforts to complete construction within 18 months of beginning construction. The Applicant may operate and generate power from individual strings of turbines as they are completed, while the remaining strings of turbines remain under construction, so long as necessary infrastructure, safety and

mitigation measures are in place.

F. Site Characteristics

22. The Project will be located approximately eight miles northwest of Ellensburg, in Kittitas County.

23. The Project will be constructed across a land area of approximately 5,200 acres.

24. The majority of the Desert Claim Power Project site and the proposed electric transmission interconnect points lie on privately owned lands. The Applicant has secured a long term lease on the remaining portion of the Project site from the Washington Department of Natural Resources.

25. The proposed site is located within Forest and Range and Agriculture 20 land use zoning designations in Kittitas County. The site has historically been used for grazing.

G. Air Quality

26. During construction, the types of direct impacts to air quality would be typical of those associated with any large construction project. The primary types of air pollution generated during Project construction will be emissions from vehicle and equipment exhaust, along with fugitive dust particles from travel on paved and unpaved surfaces.

27. Exhaust emissions and fugitive air emissions from construction sites are exempt from air emission permitting requirements. Exhaust emissions and fugitive air emissions resulting from travel on Project roads during operation of the Project are also exempt from air permitting requirements.

28. Operation of the Project will not result in any direct air emissions.

29. The Council finds that the Applicant's proposed mitigation measures, as set out in the Site Certification Agreement, are adequate to minimize fugitive dust impacts during construction and operation of the Project.

H. Water Resources

30. Water for construction will be purchased off-site from an authorized source, and then delivered by truck to the Project site.

31. During construction, sanitary waste water will be collected in portable tanks, and disposed of off-site at locations permitted to accept such waste. During Project operation, a septic system will be installed at the operations and maintenance facility site in compliance with Kittitas County septic system requirements to treat the domestic-type sanitary waste water from the facility.

32. Wind energy facilities do not use water in the electrical generation process. There will be no operational use or discharge of water from the Project.

33. Precipitation could result in surface runoff from Project facilities during Project construction and operation. However, the Project site grading plan and roadway design will incorporate measures in compliance with the Storm Water Pollution Prevention Plan (SWPPP) and Best Management Practices (BMPs) to ensure that surface runoff will infiltrate directly into the surface soils surrounding Project facilities.

34. The Council finds there will not be significant adverse impacts to water quality from construction or operation of the Project.

I. Habitat, Vegetation and Wetlands

35. The Project primarily contains grassland habitat.

36. The Applicant has proposed to mitigate all permanent and temporary impacts on vegetation and habitat in accordance with the WDFW Wind Project Habitat Mitigation Guidance Document (WDFW Wind Power Guidelines).

37. The Applicant will also implement Best Management Practices to minimize introduction of weeds, will implement a noxious weed control program, and will develop and implement a comprehensive post-construction restoration plan, including habitat reseeding programs, for temporarily disturbed areas, in consultation with WDFW.

38. The Applicant will implement mitigation measures to prevent the spread of noxious weeds in the Project area during construction.

39. The Council finds that with the implementation of all mitigation measures proposed by the Applicant, the Project is not expected to result in significant adverse impacts on wetlands, vegetation, and habitat.

J. Fisheries and Wildlife

40. Given the lack of potential fish habitat for fish species with federal or state protected status within the Project area, no significant impacts on fisheries are anticipated to occur with the implementation of Best Management Practices (BMPs) and applicable stormwater permits that would control runoff, erosion and sedimentation into water bodies.

41. The Council finds that with the mitigation measures proposed, no significant adverse impacts on fish resources are expected to occur.

42. The Council finds that mitigation measures implemented by the Applicant to protect habitat, wetlands and vegetation, as described previously, will compensate for disturbance impacts to wildlife, including avian species, during construction and operation of the Project.

43. Total avian mortality is expected to be 171-608 birds per year if 95 turbines are constructed; this equals 0.9 to 3.2 birds/MW/year. Raptor mortality is expected to be 23 per year, which equals 0.12 raptors/MW/year. Passerine (songbird) mortality is expected to be 280 birds per year, which equal 1.47 birds per/MW/year. Bat mortality is expected to be 76-475 bats per year, which equals 0.4-2.5 bats/MW/year.

44. The proposed design of the Project incorporates features to avoid or minimize impacts to plants and wildlife, including avoidance of construction in sensitive areas; choice of underground electrical collection lines wherever feasible to minimize perching locations and electrocution hazards to birds; choice of turbines with low rotation speed, and use of tubular towers to minimize risk of bird collision with turbine blades and towers.

45. The Applicant will conduct baseline monitoring and avian mortality analyses in conformance with WDFW's wind power guidelines. The Applicant has addressed all of WDFW concerns, according to the Settlement with WDFW.

46. The Applicant will develop a post-construction monitoring plan for the Project to quantify impacts to avian species and to assess the adequacy of mitigation measures implemented.

47. The Applicant has proposed, and will be required to convene, a Technical Advisory Committee (TAC) to review pertinent monitoring and scientific data and to develop appropriate responses to impacts that exceed avian mortality projections made in the Application and EIS. The TAC will monitor all mitigation measures and efforts and examine information relevant to assessing Project impacts to habitat, avian and bat species, and other wildlife. The TAC will determine whether further mitigation measures would be appropriate, considering factors such as the species involved, the nature of the impact, monitoring trends, and new scientific findings regionally or at a nearby wind power facility. The TAC shall recommend mitigation measures to the Council; the ultimate authority to implement additional mitigation measures, including any recommended by the TAC, will reside with EFSEC.

48. The bald eagle has the potential to occur within the Project site, based on the use of site property for cattle calving, which creates potential food for the eagles.

49. During calving, the Applicant will cease operations of any turbines within blade distance plus 100 feet of fences within which calving occurs. Doing so is adequate to protect eagles attracted to the activity. Studies to be conducted during operations will provide further information about the effect of operations on the eagles and will provide support for any necessary additional protections.

50. The Council finds that, with appropriate mitigations, the Project will result in no significant unavoidable adverse impacts to wildlife.

K. Noise

51. The Project shall be designed to comply with applicable Washington State Environmental Noise Levels of WAC 173-60.

52. The Council finds no significant noise impacts from construction or operation of the Project.

L. Geological Hazards

53. There are no significant impacts on soil, topography, or geology resulting from construction of the Project. Risks associated with ground movements due to landslides,

subsidence, expansive soils or similar geological phenomena are minimal; no special design or construction considerations are recommended or required.

54. Historically, the region has a low level of seismicity. Project buildings, structures, and associated systems will be designed and constructed consistent with pertinent requirements, including seismic standards, of the Uniform Building Code (UBC) or the International Building Code (IBC), but no less stringent than those found in the Uniform Building Code of 1997.

M. Traffic and Transportation

55. Construction of the Project will result in a short-term increase of traffic in the local area through truck deliveries of equipment and materials and worker commutes. Operation of the Project will have no significant impact on local traffic patterns.

56. The Applicant's Traffic Mitigation Plan will adequately mitigate all adverse impacts identified in the FEIS. The Plan will include documentation of pavement conditions before construction begins, allowing Kittitas County to monitor any road deterioration associated with the Project. The Applicant will repair any such road damage

N. Cultural and Archeological Resources

57. The Applicant, in consultation with the Office of Archeology and Historic Preservation (OAHP) and affected tribes, will develop a cultural resources monitoring plan for monitoring construction activities and responding to the discovery of archeological artifacts or buried human remains.

58. The Council finds that with implementation of these mitigation measures no impacts on known culturally sensitive areas will occur. Operation of the Project will not impact any of the archaeological or historical sites identified during this current cultural resource survey.

O. Visual Resources/Light and Glare

59. The Applicant's visual simulations of the Project demonstrated existing conditions together with the expected post-construction images from a variety of viewpoints, allowing the Council to view a computer model of the completed wind farm.

60. The Council recognizes, as demonstrated in public testimony, that evaluation of visual impacts of wind farms is potentially controversial. Because simulated images are reduced in size from eyewitness views, they must be evaluated accordingly. Objective visual impact assessments based on recognition of the changes to the existing visual resources that would result from construction, operation, and decommissioning of the Project can be conducted scientifically.

The Applicant will use landscaping and paint so as to minimize the visual impact of project structures and will forbid the use of advertising or decorations on its structures. The Project is sited on the valley floor, rather than on ridges, which will lessen its visibility.

61. After all mitigation measures are implemented, despite the nature of contrasts between mechanical structures and elements of a natural environment, this Project will have no

significant adverse impacts on the existing visual environment.

P. Health and Safety

62. The Project site is generally arid rangeland. The risk of fire during the summer dry season is a significant health and safety concern associated with the proposed Project.

63. To mitigate the fire risk the Applicant will comply with electrical design that complies with the National Electric Code (NEC). The Applicant will enter into a fire protection contract with one or more existing fire protection agencies. The Applicant will also prepare a fire control plan and an emergency plan, coordinated with local and state agencies to ensure efficient response to emergency situations and will construct roads adequate to allow access to emergency vehicles.

64. Construction and operation of the Project will require the use of hazardous materials such as diesel and gasoline fuels for operating construction equipment and vehicles; lubricating oils; transformer mineral oils; and cooling, lubricating and hydraulic fluids used in the turbines. The Applicant has proposed various supply and storage mechanisms depending on the type of fluid being handled.

65. The Applicant will be required to develop Spill Prevention Control and Countermeasures Plans for both construction and operation phases of the Project.

66. Construction and operation of the Project will not result in the generation of any hazardous wastes in quantities regulated by state or federal law.

67. Tower collapse is extremely rare and highly unlikely. Minimum setbacks incorporated into the proposed Project layout will reduce the safety risks associated with ice throw, tower collapse and other safety or nuisance issues.

68. The Project is not likely to produce shadow-flicker effects on any existing, nonparticipating residences in the area because the residences are farther from the turbines than flicker effects can customarily be noticed. However, the Applicant will stop turbines producing a flicker effect on nonparticipating residences existing when the application was filed, during times when flicker may be observed, upon request from the landowner of the residence.

69. With the mitigation measures provided, the Council finds that the Project will not cause a significant adverse health and safety impact.

Q. Socioeconomics

70. Project construction and operation will result in increased employment in Kittitas County.

71. Project-related spending will generate direct and indirect income during construction.

72. Adequate local housing supplies exist to accommodate the Project's demand for temporary rental housing.

73. Construction of the Project will increase the total valuation of real property in Kittitas County. Based on the assessed value of its real property, the Project will become a significant taxpayer in Kittitas County. The new tax revenues will benefit local and state schools, county government, county roads, and other local services.

74. The rural location of the Project site greatly diminishes the potential for negative impacts to residential property values. Several public witnesses voiced concerns that the values of some nearby homes could be adversely affected, which the Council believes to be likely. Based upon a review of all evidence contained in the record, however, the Council finds that construction and operation of the Desert Claim Wind Power Project will not have any significant negative impact on overall property values in Kittitas County.

R. Public Services

75. The Project is not anticipated to have a significant adverse effect on any public services, including law enforcement, fire, water, medical, recreational, or schools.

76. The Project will not have any significant adverse impact on communication facilities or services in the area.

S. Site Restoration

77. In accordance with WAC 463-42-655 the Applicant entered into an Agreement with WDFW that addresses site restoration. At the end of the useful life of the facility, the equipment will be removed and the entire area returned to as near its original condition as reasonably possible.

78. Prior to starting construction activities, the Applicant must post sufficient security to ensure complete decommissioning of the Project and restoration of the site.

T. Cumulative Impacts

79. Potential cumulative impacts of the development of the Desert Claim and other wind power projects, as well as other economic and residential growth in Kittitas County, were considered. The construction of the Project, in conjunction with other development actions, is not expected to result in significant adverse cumulative impacts, because such impacts are either not expected to occur, or mitigation measures shall be employed to reduce the impacts of individual development.

80. A single cumulative impact involving development of all existing and proposed wind power projects was identified with respect to visual resources: the impact of repetitive views of turbines in the County for residents and visitors to the Valley could result in the impression of change in the overall visual character of the Kittitas Valley landscape.

U. Term of the Site Certification Agreement

81. The Site Certification Agreement will authorize the Certificate Holder to construct the Project such that substantial completion is achieved no later than five (5) years from the date

that all state and federal permits necessary to construct the Project are obtained. Applicant may seek an extension of time through an SCA amendment if it believes it is unable to complete the Project on that schedule.

82. Construction of the entire Project shall be completed within approximately eighteen (18) months of beginning construction.

83. The Site Certification Agreement will continue in effect for the life of the Project and until the completion of site restoration unless terminated earlier by agreement between the Certificate Holder and the State.

V. Conformance with Law

84. The Applicant proposes to construct the Project in accordance with applicable national and international building codes, in compliance with international design and construction standards, and to implement a comprehensive employee safety plan. The Council finds that operational safeguards will be at least as stringent as the criteria established by the federal government and will be technically sufficient for welfare and protection of the public. RCW 80.50.010 (1).

85. The Applicant has agreed to appropriate environmental mitigation requirements. The mitigation package preserves and protects the quality of the environment. As a renewable energy resource, the Project will enhance the public's opportunity to enjoy the aesthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment. RCW 80.50.010(2).

86. As a renewable energy source wind power generation facility, the Project will contribute to the diversification and reliability of the state's electrical generation capacity, and will therefore support legislative intent to provide abundant energy at a reasonable cost. RCW 80.50.010(3)

87. The Council finds that approving the Application as provided herein and entering the Site Certification Agreement will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.

7. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the testimony received, and evidence admitted during the adjudicative and land use hearings, the environmental documents and environmental determinations made by the Council, the settlement agreements presented to and approved by the Council, and the entire record in this matter, the Council makes the following ultimate Conclusions of Law:

1. The Washington State Energy Facility Site Evaluation Council has jurisdiction over the Applicant and entities with ownership interests in the Applicant, and the Council has jurisdiction over the subject matter of Application No. 2006-02, pursuant to RCW 80.50 and RCW 34.05.

2. The Council conducted its review of the Desert Claim's Application 2006-02 as an

adjudicative proceeding pursuant to RCW 34.05, as required by RCW 80.50.090(3) and WAC 463-30.

3. EFSEC is the lead agency for environmental review of Desert Claim's Application pursuant to the requirements of RCW 43.21C. Because the SEPA responsible official determined that the proposed action could have one or more significant adverse environmental impacts, an Environmental Impact Statement (EIS) was required. The Council complied with RCW 43.21C, WAC 197-11, and WAC 463-47, by adopting the Final EIS adopted by Kittitas County and by issuing a Determination of Significance and Scoping Notice, conducting a scoping hearing, issuing a Draft Supplemental EIS (SEIS) for public comment, conducting a public hearing and accepting written comments on the Draft SEIS, and adopting a Final SEIS.

4. The Council is required to determine whether a proposed Project site is consistent with county or regional land use plans or zoning ordinances. RCW 80.50.090; WAC 463-14-030. The Council concludes that the proposed use of the site is not consistent and not in compliance with all applicable Kittitas County land use plans and zoning laws, based on the prior application to the County, the rejection of Applicant's judicial appeal, the failure to reach a settlement with the County, and Kittitas County's acquiescence in Desert Claim's legal positions set out in its post-hearing brief. The Council has considered County interests affected by the application, particularly the setback issue, and the County has withdrawn its opposition to the application. Preemption of County regulation is therefore appropriate. WAC 463-28-030, -070.

5. The legislature has recognized that the selection of sites for new large energy facilities 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. RCW 80.50.010.

6. The certification of the Desert Claim Wind Power Project, as described in Application 2006-02, as amended, and with the inclusion of the requirements of the settlement agreements and the terms of this Order, will further the legislative intent to provide abundant energy at reasonable cost. At the same time, the mitigation measures and the conditions of the proposed Site Certification Agreement ensure that through available and reasonable methods, the construction and operation of the Project will produce minimal adverse effects to the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

7. The Application should be granted, as provided in this Order, and the Council should recommend approval of the attached Site Certification Agreement.

8. RECOMMENDATION AND ORDER

Based on the Findings of Fact, Conclusions of Law, the Draft and Final EIS and the draft and final supplemental EIS, and the full adjudicative record in this matter, the Council makes and enters the following Order:

1. The Council recommends that the Governor of the state of Washington APPROVE certification for the construction and operation of the Desert Claim Power Project located in Kittitas County, Washington.

2. The Council orders that its recommendations as set out in this Order, together with the proposed Site Certification Agreement appended hereto, be reported and forwarded to the Governor of the State of Washington for consideration and action.

9. SIGNATURES

DATED and effective at Olympia, Washington, this 16th day of November, 2009.

James Oliver Luce, Chair
James O. Luce,
Council Chair

Richard Fryhling,
Department of Commerce

Hedia Adelsman,
Department of Ecology

Richard Byers,
Utilities and Transportation Commission

Mary McDonald,
Department of Natural Resources

Jeff Tayer,
Department of Fish and Wildlife

Ian Elliot, Concurring in the result – As a newcomer to the EFSEC process I have had to spend significant time understanding the law and convention as it pertains to EFSEC. I believe the process is flawed because the rights of the local citizens and the obligations of EFSEC do not align. As a result, once a project has been accepted by EFSEC and local permitting has been preempted, the issues of law take precedence over the issues of the project and how those issues affect the local citizen or land owner. An issue might be significant but if it is not of record in the hearing it is not to be considered. I believe the project has too high a turbine density (units per acre) and that we have not adequately dealt with the visual effect of multiple turbines on relatively flat terrain as it pertains to local residents.

Another issue is the cumulative effect of multiple proceedings on local citizens. Kittitas County has gone through three applications and two preemptions. The vast

majority of the local populace has taken the attitude, "what difference does it make? They are going to approve the project anyway, why bother to get involved?" This is evidenced by the great volume of public involvement and testimony in the first project and dearth of similar input in Desert Claim. Local news stories and letters to editor also point to this conclusion. Adequate safeguards and flexibility are required to protect the local interests after preemption. In addition, I believe that the State of Washington has done a poor job of informing the citizens of their rights under preemption and how their input can affect the outcome.

I concur with the outcome of the process, given the parameters we were required to work within and applaud the hard work of the council in trying to deal with some issues they felt were needed to be addressed but were limited by the evidence of record.

Ian Elliot,
Kittitas County

10. NOTICE TO PARTIES:

Administrative relief may be available through a petition for reconsideration, filed no later than 2:00 p.m. on November 30, 2009 with the Council Manager pursuant to WAC 463-30-335(1). Answers, if any, must be filed no later than the close of business on December 11, 2009, pursuant to WAC 463-30-335(3).