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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2009-01:  
WHISTLING RIDGE ENERGY, LLC;  
WHISTLING RIDGE ENERGY PROJECT

APPLICANT’S RESPONSE TO  
INTERVENOR YAKAMA NATION  
CULTURAL RESOURCES PROGRAM’S  
OBJECTIONS TO PREHEARING  
ORDER NO. 4

COMES NOW the Applicant, Whistling Ridge Energy, LLC, by and through its attorneys of record Stoel Rives, LLP and Darrel L. Peebles and submits this response to Intervenor Confederated Tribes and Bands of the Yakama Nation Cultural Resources Program’s (“Intervenor” and “Yakama Nation CRP”) objections to Energy Facility Site Evaluation Council (“Council”) Prehearing Order No. 4 (Council Order No. 848). The Applicant responds to correct the factual misrepresentations and legal errors upon which Intervenor’s objections rely.

**I. Response to Intervenor’s First Objection: The Yakama Nation Cultural Committee clearly suspended Intervenor’s authority to act on its behalf in this proceeding.**

On February 3, 2010, Lavina Washines, Yakama Nation Tribal Council Member and Chairwoman of the Cultural Committee, wrote the following to the Council in response to the cultural resources survey that Intervenor had issued:

*“[O]ur Yakama Nation Tribal Council [has] directed the Cultural Committee to further review and investigate this report and its contents along with [the] intervention of the Yakama Nation on this project. The survey report concludes that part of the Whistling Ridge project area is a Traditional Cultural Property of the Yakama Nation but it provides no evidence to support this claim. The conclusion that this site is*

1 a vision quest site and TCP of the Yakama Nation is not  
2 recognized and [is] disputed by the Chiefs of the Klickitat and  
3 Cascades Tribes of the Yakama Nation and other Yakama  
4 Nation members. The Cultural Committee of the Yakama  
5 Nation will conduct an investigation and review of this matter  
6 and make a final determination. *Until that time, the report of  
7 the Cultural Resources Program should be returned to the  
8 Yakama Nation, removed from the public record and its  
9 contents not considered to be considered official comments of  
10 the Yakama Nation at this time and not considered in any  
11 manner related to your review of the Whistling Ridge Energy  
12 Project. All future correspondence and consultation with the  
13 Yakama Nation CRP regarding this project should either be  
14 directed to me, or copied to me, as Chair of the Tribal  
15 Council’s Cultural Committee.”<sup>1</sup>*

9 (Emphases added.) The Applicant understands that Yakama Nation Tribal Resolution T-66-  
10 84 established the Cultural Committee and gave it authority to comment on cultural resource  
11 concerns on behalf of the Yakama Nation. The Applicant understands that Intervenor (the  
12 Yakama Nation Cultural Resources Program) is staff to the Cultural Committee. By means  
13 of the quoted communication, the Cultural Committee (presumably overseeing *its staff*)  
14 clearly suspended Intervenor’s authority to act on behalf of the Cultural Committee in this  
15 proceeding. For this reason, it was entirely appropriate for Prehearing Order No. 4 to state  
16 that Intervenor “has not shown by official action of the Yakama Nation that its positions or  
17 representations are those of the legal entity comprising the Nation.”

18 **II. Response to Intervenor’s Second Objection: The Council cannot initiate formal**  
19 **consultation with Intervenor, and it properly disregarded Intervenor’s cultural**  
20 **resources survey as instructed by the Cultural Committee.**

20 Intervenor fundamentally and erroneously relies on arguments applicable to the  
21 federal National Historic Preservation Act (“NHPA”) process, not the Washington EFSEC  
22 process.<sup>2</sup> Washington’s Administrative Procedures Act prohibits Council members from

23  
24 <sup>1</sup> A copy of this communication is attached for the Council’s convenience.

25 <sup>2</sup> Section 106 of the NHPA applies to federal agencies. *See* 16 U.S.C. § 470f. The  
26 Council is not a federal agency, but is instead an agency of the State of Washington. *See*  
RCW 80.50.030. Thus, Section 106 does not apply to the Council, and the NHPA’s  
direction for tribal consultation is similarly inapplicable.

1 working, directly or indirectly, with Intervenor regarding any issue outside of the hearing  
2 process. RCW 34.05.455. For this reason, the Council simply cannot formally consult with  
3 Intervenor. That said, it would be appropriate and routine for the Intervenor to consult with  
4 and discuss issues with EFSEC staff and the Applicant’s representatives---and from the  
5 Applicant’s perspective, such discussions would be welcome, and have always been  
6 welcomed.

7 The Cultural Committee has officially withdrawn the cultural resource report  
8 referenced by Intervenor (and referred to at the Council’s proceedings in Skamania County),  
9 and the Intervenor’s authority to participate in these proceedings is very much in doubt.  
10 Specifically, Lavina Washines’s February 3, 2010 communication to the Council stated that  
11 until the Cultural Committee had investigated, reviewed, and made a final determination,

12 “the report of the Cultural Resources Program should be  
13 returned to the Yakama Nation, removed from the public  
14 record and its contents not considered to be considered official  
15 comments of the Yakama Nation at this time and *not*  
*considered in any manner related to your review of the*  
*Whistling Ridge Energy Project.*”

16 (Emphasis added.) For this reason, it was entirely appropriate for the Council’s draft  
17 environmental impact statement (“DEIS”) to not utilize Intervenor’s withdrawn report. To  
18 do otherwise would directly violate the Cultural Committee’s express instruction.

19 Principally at issue is the unsubstantiated opinion of one or more staff members of the  
20 Intervenor that a historically densely wooded and forested (old growth) timber site is a  
21 vision question site—an opinion vigorously disputed by Tribal members whose ancestors  
22 have inhabited this area for countless generations.<sup>3</sup> If this unsubstantiated opinion is  
23

24 <sup>3</sup> A January 12, 2010 letter from Chief Johnny Jackson of the Cascades Tribe of the  
25 Yakama Nation and Chief Wilbur Slockish of the Klickitat Tribe of the Yakama Nation to  
26 Lavina Washines, Chairwoman of the Cultural Committee, stating that “our people have  
never used this area as a vision quest site” is attached.

1 seriously advocated in these proceedings, it will be tested and explored as part of the  
2 Council’s adjudicatory process, through testimony and cross-examination, if needed.

3 The Applicant is particularly troubled by Intervenor’s apparent aversion to working  
4 with the Applicant to address any concerns that Intervenor may have. This is especially  
5 concerning in light of the Yakama Nation’s direct communications with prior applicants.  
6 *See, e.g.*, Final Supplemental EIS for Desert Claim Wind Power Project § 1.2 (“Following  
7 publication of the Draft SEIS, the Applicant consulted with the Yakama Nation[.]); *id.*  
8 at § 3.3.2.4 (“In August 2009, the Applicant and Yakama Nation entered into an MOU  
9 concerning surveys that will be performed[.]”). This Applicant has welcomed and will  
10 continue to welcome the opportunity to work with the Yakama Nation and any or all of its  
11 members and authorized representatives.

12 **III. Response to Intervenor’s Third Objection: The Council’s Adjudicatory**  
13 **Proceeding Can Begin Prior to the Completion of the Final Environmental**  
14 **Impact Statement (“FEIS”).**

15 **A. The Council’s Administrative Rules Expressly Allow the Adjudicatory**  
16 **Proceeding to Start Prior to the Issuance of the FEIS.**

17 WAC 463-47-060(2) provides that “[t]he council may initiate an adjudicative  
18 proceeding required by RCW 80.50.090 prior to completion of the draft EIS.” Clearly, if  
19 the adjudicative proceeding can begin prior the completion of the DEIS, it can certainly start  
20 before the FEIS is issued. Further analysis of this issue is provided on pages 2 to 3 of the  
21 Applicant’s response to Intervenor Save Our Scenic Area’s and Intervenor Friends of the  
22 Columbia Gorge’s objections to Prehearing Order No. 4.

23 **B. The Analysis of Tribal Cultural Resources in the DEIS is Proper.**

24 As explained above, the Cultural Committee instructed the Council to “not consider[]  
25 in any manner” the cultural resources report prepared by Intervenor. However, this does not  
26 mean that the DEIS ignored tribal cultural resources. Two local ancestral chiefs with long-  
standing ancestral connection to the vicinity toured the site and stated that the project area

1 was not specifically used by their ancestors or contemporary Indians, and neither identified  
2 any traditional cultural properties or other sensitive or sacred sites. DEIS § 3.10.2.2. These  
3 opinions are highly relevant regardless of whether these chiefs speak officially for the  
4 Yakama Nation—the local chiefs have specific and important local knowledge related to  
5 historic use of the land at issue. Also, two separate, professional field inventories did not  
6 identify any pre-contact Native American site types, such as lithic scatters, petroglyphs, or  
7 peeled cedars. DEIS § 3.10.2.3. Such findings would be expected if the locations had  
8 historic use and importance as a traditional cultural property or site. Assertions that the  
9 DEIS’s cultural resource analysis is flawed is without merit, and contentions that the project  
10 site is culturally significance lack credibility.

11 **C. The DEIS properly analyzed reasonable alternatives.**

12 Contrary to Intervenor’s claim, the DEIS does contain an analysis of reasonable  
13 alternatives as required by SEPA. As described in more detail on pages 3 to 6 of the  
14 Applicant’s response to Intervenor Save Our Scenic Area’s and Intervenor Friends of the  
15 Columbia Gorge’s objections to Prehearing Order No. 4, SEPA does not require analysis of  
16 offsite alternatives to private projects and limits analysis to reasonable onsite alternatives  
17 that achieve the Applicant’s objectives. The Council’s DEIS considered “different project  
18 sizes, alternative wind generation technologies, and different project configurations.” DEIS  
19 § 1.4.3. The DEIS describes these onsite alternatives and why they were ultimately  
20 “eliminated from detailed study in this EIS because of technical or economic feasibility  
21 issues, not meeting the indentified purpose and need for proposed action, or clearly greater  
22 environmental impacts” (*i.e.*, why they were not “reasonable alternatives”). *Id.* See also  
23 DEIS § 2.3. Assertions that the DEIS’s alternatives analysis is flawed lack merit.

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**IV. Conclusion**

For the reasons set forth above, the Applicant respectfully requests that the Council deny Intervenor's requested relief.

DATED this 19<sup>th</sup> day of July, 2010.

STOEL RIVES LLP  
  
TIMOTHY L. MCMAHAN  
WSBA No. 16377  
Attorney for Applicant

And

  
DARRELL L. PEEPLIES  
WSBA No. 885  
Attorney for Applicant



Confederated Tribes and Bands  
the Yakama Nation

Established by the  
Treaty of June 9, 1855

February 3, 2010

FROM: Lavina Washines, Yakama Nation Tribal Council  
Chairwoman, Cultural Committee

TO: Gretchen Kaehler, Washington State Department of Archaeology  
and Historic Preservation, [Gretchen.Kaehler@dahp.wa.gov](mailto:Gretchen.Kaehler@dahp.wa.gov)

Jim Laspina, Washington Energy Facility Site Evaluation Council  
[Jim.laspina@commerce.wa.gov](mailto:Jim.laspina@commerce.wa.gov)

Andrew Montano, Bonneville Power Administration [ammontano@bpa.gov](mailto:ammontano@bpa.gov)

CC: Johnson Meninick, Yakama Nation Cultural Resources Program

RE: Whistling Ridge Wind Energy

It has come to my attention that Yakama Nation staff person Jessica Lally in the Yakama Nation Cultural Resources Program (CRP) has forwarded to some or all of you a report on cultural resource survey performed by the Yakama Nation CRP for SDS Lumber Company on their Whistling Ridge Energy project. This report is under review and investigation and should not have been distributed by Cultural Resources Program staff. Just yesterday, February 2, 2010, our Yakama Nation Tribal Council directed the Cultural Committee to further review and investigate this report and its contents along with intervention of the Yakama Nation on this project. The survey report concludes that part of the Whistling Ridge project area is a Traditional Cultural Property of the Yakama Nation but it provides no evidence to support this claim. The conclusion that this site is a vision quest site and TCP of the Yakama Nation is not recognized and disputed by the Chiefs of the Klickitat and Cascades Tribes of the Yakama Nation and other Yakama Nation members. The Cultural Committee of the Yakama Nation will conduct an investigation and review of this matter and make a final determination. Until that time, the report of the Cultural Resources Program should be returned to the Yakama Nation, removed from public record and its contents not considered to be considered official comments of the Yakama Nation at this time and not considered in any manner related to your review of the Whistling Ridge Energy Project. All future correspondence and consultation with the Yakama Nation CRP regarding this project should either be directed to me, or copied to me, as Chair of the Tribal Council's Cultural Committee. The Yakama Nation Tribal Council Cultural Committee request that you reply to me with the exact date that you received a copy of this report from the cultural resource program staff. Thank you.

Post Office Box 151, 401 Fort Road, Toppenish, WA 98948 (509)865-5121

January 13, 2010

Lavina Washines, Chair  
Yakama Nation Cultural Resources Committee  
Post Office Box 151  
Toppenish, Washington 98948

Dear Lavina;

We have reviewed a report from the Yakama Nation Cultural Resources Program titled "Yakama Nation Cultural Resource Review and Consultation for the Whistling Ridge Energy Project".

As Chiefs of the Klickitat and Cascades Bands of the Yakama Nation, we have worked closely with Jason Spadaro, President of SDS Lumber Company, on the Whistling Ridge Energy Project for several years. SDS Lumber Company approached us cooperatively and very early in their process, asking us to review their property and identify any concerns we may have with a wind energy project in the area. Our understanding is they also approached the Yakama Nation Cultural Resources Program early on as well.

Several times, we have reviewed the property where SDS proposes to develop wind energy and have never found any issues related to cultural resources or traditional cultural property of concern to us as Chiefs of the Klickitat and Cascades Bands of the Yakama Nation. This area where SDS Lumber proposes wind energy is within our homeland and we feel that we are uniquely qualified to determine what areas have been traditionally used by our people and what are traditional cultural properties for this area.

We have the following specific issues related to the Yakama Nation Cultural Resource Program report:

1. In the report, "Chemawa Hill" was identified as a vision quest site and Traditional Cultural Property of the Yakama Nation, but the source of this designation and its historical significance is solely "personal communication" from Johnson Meninick. The report does not offer any evidence or recognize that if the site was used for such purposes there would be some physical evidence. Prior to SDS harvesting the timber on the site it was heavily forested and our people have never used this area as a vision quest site. We have also discussed this with Bill Yallup Jr. and Ray Colfax and they agree that with us that this area was not a vision quest site in the Columbia River Gorge.
2. The report claims the word "Chemawa" is a Yakama word indicating the site has special meaning as a vision quest site. The word Chemawa is not in our vocabulary and our only knowledge or use of that word relates to the Chemawa Boarding School that was near Salem, Oregon.
3. In one paragraph the report states the Yakama CRP opposes wind turbine construction in the area. Later, in the report conclusions, the CRP does not recommend full avoidance. The report contains a "recommendation" to design the project to avoid turbine placement in this vicinity, but states: [should full avoidance of the site be impossible, buffered zones should be established to protect those features which lead to

the integrity of the monumental site." There are no features on site which lead to its integrity as a monumental site, therefore, we do not see any justification for recommending avoidance or mitigation.

4. The conclusions also recommend "full avoidance" of the Haran Farmstead, based on the erroneous conclusion that the Farmstead is potentially eligible for listing. According to the SDS archeological report done by URS Consultants, the Haran Farmstead is not historically eligible after it was evaluated. Therefore, there is no justification for the Yakama Nation to recommend avoidance of this site.

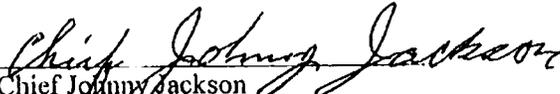
Given the lack of proof of proof provided by the Yakama Cultural Resources Program and our knowledge of the area, we request that the Yakama Nation Cultural Resource Committee send a letter to SDS clarifying the report and indicating that there are no culturally significance sites within the project area.

SDS Lumber has been a cooperator and friend to the Yakama Nation and the Klickitat and Cascade Tribes of the Yakama Nation. They have sponsored important cultural education events for the Yakama Nation such as our River Peoples Cultural Exchange in Lyle and Wishram cultural exchanges. Their efforts have helped our people. We feel strongly that they should be treated fairly and cooperatively by the Yakama Nation. The Cultural Resources Program report is indicating significant concerns of the Yakama Nation that we believe are not true.

Furthermore, we strongly believe wind energy development should be encouraged in appropriate areas because it is clean energy. We believe the SDS land being proposed is a very appropriate area because the SDS wildlife surveys have shown no threatened or endangered plants or animals exist in the area and we do not find any cultural resource concerns to our Tribes or the Yakama Nation. We believe the Yakama Nation Wind should be supportive of wind energy in places such as this because it is clean energy and should be encouraged by the Yakama Nation over traditional energy resources like natural gas and coal fired plants that consume large amounts of water and pollute our air, hydro-electric dams that destroy our fish and nuclear power plants that poison our people.

We ask and would appreciate the Cultural Committee's quick action to correct this report and address the situation.

Sincerely,

  
Chief Johnny Jackson  
Cascades Tribe of Yakama Nation

  
Chief Wilbur Slockish  
Klickitat Tribe of Yakama Nation