BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2009-01
of
WHISTLING RIDGE ENERGY
PROJECT LLC
for
WHISTLING RIDGE ENERGY
PROJECT

SAVE OUR SCENIC AREA'S
AND FRIENDS OF THE
COLUMBIA GORGE'S
OBJECTIONS TO PREHEARING
ORDER NO. 4

I. MOTION.

Intervenors Save Our Scenic Area (SOSA) and Friends of the Columbia
Gorge (Friends) object to and move for further consideration of the Prehearing
Order (PHO) entered on June 29, 2010 (Council Order No. 848; Prehearing Order
No. 4).

II. RELIEF REQUESTED.

2.1 The Council should reconsider that portion of the PHO entitled
"TIMING OF FINAL EIS" (page 3) and determine that the Final EIS (FEIS) will be
issued before the commencement of the adjudicative proceeding in this matter.
Accordingly, the Council should cancel the schedule set forth in the PHO and set
a new schedule once the FEIS is completed.
2.2 The Council should also reconsider that portion of the PHO at page 2 that "[t]he Council expects that the Applicant will incorporate into its direct presentation any information needed to address asserted significant flaws in the DEIS" and that "[t]he Applicant may consult with Council Staff if it has questions regarding matters that may warrant attention in this matter."

2.3 The Council should not arbitrarily limit the duration of the hearing to ten days.

2.4 The Council should reschedule the hearing because of conflicts with the trial schedule for counsel for Friends of the Columbia Gorge.

III. STATEMENT OF ISSUES.

3.1 Should the Council revise the PHO to ensure that the adjudicative proceedings are commenced after the FEIS is complete and available?

3.2 Should the Council rescind the directive to the Applicant to address the significant flaws in the DEIS as part of the Applicant’s direct presentation?

3.3. Should the PHO be revised to remove the limit on the number of hearing days?

3.4. Should the Council reschedule the hearing dates because of trial conflicts for counsel?

IV. LEGAL ARGUMENT.

4.1 The Final Environmental Impact Statement Should be Completed Before the Adjudicative Proceedings Begin.

The Council’s Administrative Law Judge (ALJ) issued a PHO on June 29, 2010. At page 3, the PHO includes rulings regarding the "TIMING OF FINAL EIS."

Though acknowledging objections, the PHO includes the following conclusions:

The environmental review and application review proceed on parallel tracks until the conclusion of the process. Doing so allows the Council, in making final decisions on each track, to preserve the integrity of both processes while ensuring consistency in the results. Issuing the final EIS prior to hearing could compromise the result of the adjudicative hearing.
This ruling is clearly a misinterpretation of both NEPA and SEPA, and should be rescinded. Under both SEPA and NEPA, the final EIS must precede the initiation of adjudication proceedings as a part of the agency review process.

Both NEPA and SEPA require that the EIS, and comments of agencies and the public, be a part of agency decision making. Under SEPA:

43.21C.030. Guidelines for state agencies, local governments—Statements—Reports—Advice—Information

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(Emphasis supplied). NEPA is substantially identical:

Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

42 U.S.C. 4332(2)(C) (emphasis supplied).

Thus, SEPA and NEPA are clear that the final EIS, with its comments, does not proceed on a "parallel track" as the PHO says, nor does the law contemplate "simultaneously making final decisions on each track . . ." Both federal and state law are clear that the environmental review process is not parallel or simultaneous, but sequential. Further, the PHO errs by suggesting that there is a "final decision" on the SEPA/NEPA track to be made by the Council itself.

Both case law and regulations mandate preparation of the FEIS in advance of decision making consistent with the statutes. Thus the SEPA Rules, found at WAC ch. 197-11 provide that:

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197-11-655. Implementation.
(1) See RCW 43.21C.020, 43.21C.030(1), 43.21C.060, 43.21C.075, and 43.21C.080.
(2) Relevant environmental documents, comments, and responses shall accompany proposals through existing agency review processes, as determined by agency practice and procedure, so that agency officials use them in making decisions.

Similarly, the NEPA Guidelines say the same thing:

40 C.F.R. Sec. 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (Sec. 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (Secs. 1500.2(c), 1501.2, and 1502.2). For instance:
(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.
(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.
(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

The whole point of the environmental review process is to have the relevant environmental documents available during the review process so that they can be used by the parties as a part of agency review.

Case law under both SEPA and NEPA are equally clear in assuring that the FEIS be a part of agency decision making:

A "major purpose" of SEPA is to "combine environmental considerations with public decisions." RCW 43.21C.075(1). Consistent with this purpose, "SEPA mandates governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters." (Original emphasis.) Eastlake Comm'ty Council v. Roanoke Assoc., Inc., 82 Wash.2d 475, 490, 513 P.2d 36

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These considerations must be integrated into governmental decision-making processes so that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical consideration." RCW 43.21C.030(2)(b); Eastlake Commt'y Council, at 492, 513 P.2d 36. The environmental impact statement (EIS) must "accompany the proposal through the existing agency review processes" so that officials will use it in making decisions. RCW 43.21C.030(2)(d), WAC 197-11-655, and "[a]ny governmental action may be conditioned or denied" on the basis of adverse impacts disclosed by SEPA's environmental review process. RCW 43.21C.060; WAC 197-11-660; BCC 22.02.605B; The Polygon Corp. v. Seattle, 90 Wn. 2d 59, 65, 578 P.2d 1309 (1978).


On the NEPA side, an early Court of Appeals case emphasized that the FEIS must be a decision making tool, not some item "for the file:"

We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102(2) (C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity-mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2)(c) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement," be considered through agency review processes. FN19

FN19. The guidelines issued by the Council on Environmental Quality emphasize the importance of consideration of alternatives to staff recommendations during the agency review process: "A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects." 36 Fed. Reg. at 7725. The Council also states that an objective of its guidelines is "to assist agencies in implementing not only the letter, but the spirit, of the Act." Id. at 7724.

As the statutes, regulations and case law make clear, the integrity of the SEPA/NEPA and decisionmaking processes is accomplished by the integration of agency reviews, not by segregation of them.

Further, the PHO misinterprets the responsibilities of the Council and the SEPA "responsible official." The "responsible official" under WAC 197-11-788 is the officer of the lead agency "designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency." This differs from the SEPA "decision maker" that actually "make[s] the agency’s decision on a proposal." WAC 197-11-730.

Under EFSEC’s SEPA Rules, the Council is the decision maker. WAC 463-47-050. In contrast, under the EFSEC regulations, the SEPA "responsible official" is the EFSEC Manager, who is given the duty to manage the SEPA process:

WAC 463-47-140 Agency filings affecting this section
Responsibilities of the council’s responsible official.

The EFSEC manager shall be responsible for the following:
(1) Coordinating activities to comply with SEPA and encouraging consistency in SEPA compliance.
(2) Providing information and guidance on SEPA and the SEPA rules to council, council staff, groups, and citizens.
(3) Reviewing SEPA documents falling under council interests and providing the department of ecology with comments.
(4) Maintaining the files for EISs, DNSs, and scoping notices, and related SEPA matters.
(5) Writing and/or coordinating EIS preparation, including scoping and the scoping notice, making sure to work with interested agencies.

(Emphasis supplied). The PHO eliminates the role of the responsible official and makes the Council the party that makes a "final decision" on the SEPA track. This is completely inconsistent with the regulations.

The PHO goes on to say that "[i]ssuing the final EIS prior to hearing could compromise the result of the adjudicative hearing." This statement stands the whole
review process on its head. Quite the contrary, without the FEIS as a part of the
adjudication, the entire process, as well as the rights of Intervenors, are significantly
compromised. As discussed below and in separate written and oral comments,
there are serious flaws apparent in the DEIS. Among other problems, the DEIS
completely fails to address countless comments submitted during scoping, including
comments from agencies with special expertise in the resources that would be
impacted. Unfortunately, the DEIS is completely inadequate for commencing an
adjudicatory process. The EFSEC responsible official will need to promptly correct
the flaws in the DEIS through the issuance of a new draft EIS for comment, and
ultimately an FEIS. Intervenors are entitled to use the FEIS during the course of the
adjudicative proceedings to point to viable and suitable alternatives to the WRE
proposal, as well as a source of evidence and information regarding other
environmental impacts and comments from consulting agencies that may support
Intervenors’ positions. In some cases, the FEIS may reduce the need for
Intervenors to file evidence and arguments in the adjudicative proceedings.
Moreover, without an adequate FEIS to inform the adjudicative proceedings, the
Council will not have a clear and accurate picture of the project’s impacts and
alternatives at the outset of its adjudicative process, in violation of SEPA. Allowing
the environmental impact statement and adjudicative processes to proceed on
separate and parallel tracks creates serious and reversible error.

Intervenors expect that the Applicant or others will object to commencing the
adjudicative proceedings after the FEIS is issued, because of the length of time it
may take to issue the FEIS. Intervenors bear no responsibility for such delays. For
reasons that are unclear, EFSEC and BPA took more than a year to issue the DEIS
after the May 2009 scoping hearings, which has delayed matters significantly.
However, the law anticipates that addressing environmental issues will take time.
As Judge Wright said in Calvert Cliffs,
Of course, independent review of the "detailed statement" and independent balancing of factors in an uncontested hearing will take some time. If it is done properly, it will take a significant amount of time. But all of the NEPA procedures take time. Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered "to the fullest extent possible," see text at page 1114, supra.

_Calvert Cliffs',_ 449 F.2d at 1118. Moreover, the Applicant has already waived the one-year deadline for decisions on proposed energy facilities; thus, this time limit no longer applies.

In summary, the PHO commits serious error in expediting the adjudication so that it will start before the final EIS is issued. All applicable SEPA and NEPA authority make clear that the FEIS is to accompany the proposal through the agency review process.¹ Commencing the adjudication without the FEIS may mean that a court will later reverse EFSEC on this issue and remand for rehearing. The only possible reason for proceeding without the FEIS is to expedite the proceeding by what would likely be only a few months. But far from a time-saving measure, this approach will undoubtedly result in unfortunate delay and added expense for all parties when reversed by a court on appeal. It is far better to follow the law in the first instance rather than having to repeat the whole process.

4.2 The Adjudicative Proceedings Should Not Be Used to Address Flaws in the DEIS.

As described above, because the FEIS must accompany the WRE proposal through the existing agency review process, the issuance of the FEIS must precede the adjudication. However, the PHO commits additional error by directing that the deficiencies in the DEIS be taken up in the adjudication itself. The PHO seems to

¹ Though the EFSEC rules permit an adjudicative proceeding to be "initiated" before the draft EIS is "completed," that would not permit an actual hearing to begin before the FEIS is issued. See WAC 463-47-060(2). To the extent that EFSEC believes this provision allows hearings to proceed before the FEIS is issued, that provision is in violation of the terms of the SEPA Rules and of SEPA itself and accordingly is void.
want to shift the responsibility for preparing the DEIS from where the EFSEC's own rules place it, with the responsible official, to the parties. This unheard of procedural misdirection should be reversed.

After acknowledging that serious errors in the draft EIS have been identified, the PHO provides at page 2 that

[t]he Council expects that the Applicant will incorporate into its direct presentation any information needed to address asserted significant flaws in the DEIS. The Applicant may consult with Council Staff if it has questions regarding matters that may warrant attention in this manner.

Once again, the SEPA process is stood on its head. For at least 30 years the SEPA and NEPA process has involved the preparation of a draft EIS, its circulation for comments, and the preparation of a final EIS. Thereafter, the FEIS accompanies the proposal and informs the agency through the agency decisionmaking process.

In stark contrast, the PHO would interject questions of the adequacy and sufficiency of the DEIS into the adjudicative process.

In fact, such an approach is specifically prohibited by the SEPA Rules. At WAC 197-11-680(3), the Rules specifically allow "agency administrative appeals."

Such administrative appeals are not required, but are optional with agencies.

Though EFSEC is a state agency governed by SEPA Rules, it has not adopted any SEPA appeal procedures. See WAC ch. 463-47. However, the Rules are clear about what can be appealed and when:

(3) Agency administrative appeal procedures.

(a) Agencies may provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures. If so, the procedures must comply with the following:

(i) The agency must specify by rule, ordinance, or resolution that the appeals procedure is available.

(ii) Appeal of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) shall not be allowed.

(iii) Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. These appeals may occur prior to an agency's final
decision on a proposed action.

WAC 197-11-680 (emphasis supplied). EFSEC has adopted this section of the SEPA Rules by reference. See WAC 463-470-20. The PHO effectively proposes to authorize an administrative challenge to an “intermediary step under SEPA,” specifically “draft EIS adequacy.” This is expressly forbidden by the above-quoted rule.

It is up to the responsible official, here the EFSEC Manager, to write the DEIS and the FEIS. See WAC 463-47-140(5) (“The EFSEC manager shall be responsible for . . . writing and/or coordinating EIS preparation . . . .”). The approach set forth in the PHO apparently would instead have the Council decide as part of its adjudicative process whether the DEIS is adequate or not. This approach violates EFSEC’s rules.

The PHO’s approach also unnecessarily burdens the parties and their experts by requiring them to focus their evidence on, and to prepare for a hearing regarding, a draft document that, given its substantial flaws, will need to be substantially revised by the time the hearing occurs. In all likelihood, under the PHO’s approach, the FEIS will be issued only a few days or weeks before the hearing, obsoleting much of the evidence submitted in the adjudicative process up to that point, as well as the parties’ advance preparation for the hearing. Adjudicating the content of the DEIS would be a waste of time and a completely inappropriate burden on Intervenors.

Moreover, because the parties’ hearing evidence will have been directed at the DEIS, the parties will be effectively deprived of the ability to file evidence regarding the FEIS, which could, and in this case should, be a very different document from the DEIS. The DEIS is only a draft document; the FEIS is the document intended for use in agency review processes, and the parties should be given sufficient opportunity to review and respond to the FEIS at a meaningful stage.
in the process. The PHO's approach does not provide such an opportunity. The Council should avoid such unjust and inefficient results by ensuring that the FEIS is released before the scheduling of the adjudicative proceedings.

In addition, this is a joint NEPA/SEPA process between EFSEC, a state agency, and BPA, a federal agency. EFSEC has no power to make decisions for BPA or ensure that agency's compliance with NEPA. Nothing in the NEPA authorities contemplates turning over to the Council, a state agency, decisions regarding the content of a federal DEIS, let alone allowing such an agency to adjudicate the adequacy of a draft EIS via a state process.

It is also unclear what the result of the presentation by the Applicant and rebuttal by the Intervenors would be. Apparently, though it is by no means clear, the Council would make some kind of a decision on the questions of "serious errors, or omissions from, the draft EIS." Would that form the basis for a final EIS? Is work on the FEIS held in abeyance awaiting presentations by the Applicant and other parties and a decision by the Council? The procedures set forth in the PHO are not only completely at odds with the SEPA and NEPA established legal authority, they are unworkable as well.

Finally, is the invitation in the PHO for the Applicant to "consult with Council staff" in addressing flaws in the DEIS an attempt to provide for off-the-record communications between the Applicant and the responsible official? Based on the significantly biased nature of the DEIS, Appellants are deeply troubled that the Applicant has apparently already substantially influenced the content of the DEIS in a covert manner. The PHO should be revised to rescind the directive to the Applicant to address significant flaws in the DEIS as part of the Applicant's direct presentation, and to clarify that any communications between the agencies and the Applicant about meeting the agencies' responsibilities to review and disclose the environmental impacts of the proposal must be transparent and on the record.
It is true that the DEIS is deeply flawed for many reasons, the most
significant of which is the failure to consider alternatives. But it is up to the EFSEC
Manager and BPA to produce an FEIS that complies with all the applicable statutes
and regulations, including SEPA and NEPA.

As with the PHO’s apparent decision to commence the adjudication before
the final EIS is issued, the injection of the adequacy of the DEIS into the
adjudicative proceedings is reversible error. Once again, if this illegal process is
later reversed by a court, there will be a significant waste of time and effort. The
Council is urged to delete this ersatz administrative appeal requirement from the
adjudicatory proceedings.

4.3 There Should Not Be a Predetermined Cap on the Length of the
Hearing.

The PHO at page 2 schedules a hearing beginning on December 8, 2010
and "not exceeding 10 hearing days." While it is unlikely that the hearing would
exceed ten days, there should not be a limit on the presentations. There are fifteen
parties to this proceeding, plus Council staff and the Counsel for the Environment,
and it is unknown how many will make presentations or the length of those
presentations. Further, the PHO now adds the adequacy of the draft EIS as an
issue for the adjudicative proceedings, which will take an unknown amount of
additional hearing time. The PHO should be revised to remove the ten-day limit.

4.4 The Hearing Should Be Rescheduled Because of Trial Conflicts
for Counsel.

In addition to the foregoing, the hearing commencement date of December
8, 2010, conflicts with the trial schedule of Gary K. Kahn, counsel for Friends of the
Columbia Gorge. Mr. Kahn has a trial scheduled to begin on Monday, December 6,
2010, in Salem, Oregon in Franklin vs. Franklin, Marion County Circuit Court Case
No. 08C13486. It is anticipated that the trial will last three (3) days, and, based on
prior trial court rulings, cannot be postponed. In addition, Mr. Kahn is scheduled for

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trial to begin in Multnomah County on December 13, 2010, in KS vs. Lutz, Multnomah County Circuit Court Case No. 0910-14686. This trial has also been scheduled as a date certain.

The December 8, 2010 hearing commencement date also conflicts with the schedule of Mr. Aramburu, counsel for SOSA, as he has a long-scheduled out of state vacation from December 8 to December 16.

Intervenors SOSA and Friends therefore request modification of the hearing schedule, with coordination between the Council and all parties to select a mutually agreeable start date once the FEIS is completed and made available.

V. CONCLUSION.

Intervenors SOSA and Friends respectfully request that the PHO be modified as described herein.

DATED this 8th day of July, 2010.

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DECLARATION OF SERVICE

I am an employee in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein.

I hereby certify that on the date below written I caused delivery of one original and 12 copies and an electronic copy on CD by first-class mail, and a copy by email to EFSEC, and sent by email and first-class mail to each of the parties of record on the attached service list a true and correct copy of SAVE OUR SCENIC AREA'S AND FRIENDS OF THE COLUMBIA GORGE'S OBJECTIONS TO PREHEARING ORDER NO. 4.

Dated: This __ day of July, 2010.

Carol Cohoe, Secretary
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Peggy Bryan  
167 NW 2nd  
P.O. Box 436  
Stevenson, WA 98648 | | pbryan@skamania-edc.org |
| Skamania County Agri-Tourism Association | Skamania County Agri-Tourism Association  
P.O. Box 100  
Underwood, WA 98651 | Isa Anne Taylor, WSBA # 37977  
7751 Baseline Drive  
Mt. Hood, OR 97041 | info@scaassn.org |
| Association of Washington Business | Association of Washington Business  
Chris McCabe  
1414 Cherry St. SE  
P.O. Box 658  
Olympia, WA 98501 | | chrism@awb.org |
| | | | 360-943-1600 ph  
360-943-5811 fax |

Whistling Ridge Energy Service List as of 1-5-10  
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<table>
<thead>
<tr>
<th>Organization</th>
<th>Address</th>
<th>Contact Person</th>
<th>Email</th>
<th>Phone</th>
<th>Fax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seattle Audubon Society</td>
<td>8050 35th Ave NE, Seattle, WA 98115</td>
<td>Shawn Cantrell</td>
<td><a href="mailto:Shawnc@seattleaudubon.org">Shawnc@seattleaudubon.org</a></td>
<td>206-523-4483 ext 15 ph</td>
<td></td>
</tr>
<tr>
<td>Columbia River Gorge Commission</td>
<td>P.O. Box 730, White Salmon, WA 98672</td>
<td>Jill Arens, Executive Director</td>
<td><a href="mailto:aren@gorgecommission.org">aren@gorgecommission.org</a></td>
<td>509-493-3323 ph</td>
<td>509-493-2229 fax</td>
</tr>
<tr>
<td>Port of Skamania County</td>
<td>P.O. Box 1099, Stevenson, WA 98648</td>
<td>John McSherry, Manager</td>
<td><a href="mailto:john@portofskamania.org">john@portofskamania.org</a></td>
<td>509-427-5484 ph</td>
<td>509-427-7984 fax</td>
</tr>
<tr>
<td>City of White Salmon</td>
<td>P.O. Box 2139, White Salmon, WA 98672</td>
<td>David Poucher, Mayor</td>
<td><a href="mailto:mayor@ci.white-salmon.wa.us">mayor@ci.white-salmon.wa.us</a></td>
<td>509-493-1133 ph</td>
<td>509-493-1231 fax</td>
</tr>
<tr>
<td>Klickitat County Public Economic Development Authority</td>
<td>MS – CH – 26, 127 West Court, Goldendale, WA 98620</td>
<td>Michael Canon, Executive Director</td>
<td><a href="mailto:MikeC@co.klickitat.wa.us">MikeC@co.klickitat.wa.us</a></td>
<td>509-773-7060 ph</td>
<td>509-773-4521 fax</td>
</tr>
</tbody>
</table>
| Klickitat and Cascades Tribes of the Yakama Nation | Johnson Meninick  
|---|---|
| Klickitat and Cascades Tribes of the Yakama Nation  
c/o Wilbur Slockish, Jr.  
Whistling Ridge Energy LLC  
P.O. Box 266  
Bingen, WA  98605 | Cultural Resources Program Manager  
Confederated Tribes and Bands of the Yakama Nation  
P.O. Box 151  
Toppenish, WA  98948 |
| 541-993-4779 (cell) | 509-865-5121 ext. 4737 ph |

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1 Mr. Slockish requested that his mail be sent c/o Whistling Ridge Energy.