

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of: ) Land Use Hearing  
Application No. 2004-01 ) Pages 1 thru 104  
 ) Volume I  
WIND RIDGE POWER PARTNERS, L.L.C., )  
 )  
WILD HORSE WIND POWER PROJECT )  
\_\_\_\_\_ )

A land use hearing was convened in the above matter and was held in the presence of a certified court reporter on March 7, 2005 at 9:15 a.m., at 512 North Poplar Street, Kittitas County Fairgrounds, Fine Arts Building, Ellensburg, Washington before Energy Facility Site Evaluation Councilmembers.

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JUDGE TOREM: Now we will reconvene the land use hearing here on March 7, 2005. Again Judge Adam Torem on behalf of the Energy Site Facility Evaluation Council. All of the members of the Council are present as previously indicated this morning and for the record Tony Ifie of the Department of Natural Resources is appearing by telephone.

This is the Wild Horse Wind Power Project Application No. 2004-01, the application was filed on March 9, 2004 and let me give the Councilmembers and the parties a brief summary of what has occurred in the land use proceedings so far.

1           On April 22, 2004, we convened an informational  
2 and land use hearing here in Ellensburg and that matter was  
3 public testimony and we also heard that the county and the  
4 applicant at the time was stipulating that the project was  
5 not consistent with the local land use ordinances and  
6 regulations.

7           The meeting was reconvened on June 7, 2004 in  
8 Olympia. Most of the parties participated by telephone, and  
9 shortly after that Council Order No. 791 was issued. That  
10 was issued on June 8, 2004 indicating again that the project  
11 was not consistent and requiring the applicant and the  
12 county to give continuous updates to the Council as to when  
13 they might be able to achieve consistency or if not file a  
14 request for a pre-emption of local land use statutes so that  
15 the Council could entertain and determine whether they are  
16 able to make a recommendation to the governor on the siting  
17 on the proposed Wild Horse Wind Farm project.

18           There was a special meeting of EFSEC on August 25,  
19 2004 here in Ellensburg. There were some updates that were  
20 given and at that time we learned that the applicant filed  
21 the necessary paperwork and began the process with the  
22 county to have public hearings in Kittitas County, in  
23 Ellensburg per se, and determined through that process  
24 whether or not consistency could be achieved.

25           In November of 2004, the Council received yet

1 another update and there were indications that the planning  
2 commission would be having hearings here in Ellensburg in  
3 January 2005 and that the Board of County Commissioners  
4 could be meeting on this as soon as February of 2005.

5           Most of you are aware that on March 3rd and March  
6 4, 2005, the Board of County Commissioners had their vote  
7 and they adopted Ordinance No. 2005-10. That was a part of  
8 the -- will be part of the presentation this morning which  
9 will be a submission of the certification of land use  
10 consistency in accordance with Washington Administrative  
11 Code 463-26-090.

12           I understand that the County will have Darryl  
13 Piercy present from the Kittitas County Planning Department  
14 to answer questions and explain the basis of that  
15 certification.

16           By that Washington Administrative Code provision,  
17 the Council takes notice that there is prima fascia proof of  
18 consistency and the Council will be looking today at the  
19 development agreement that it refers to.

20           So this morning when we have that presentation of  
21 the stipulation agreement from the ordinance itself I  
22 understand that incorporates two other ordinances that  
23 precede in number 2005-08 and 2005-09 and that Council was  
24 provided that at the development meeting with Council on  
25 Friday afternoon and most of the Council had the opportunity

1 to read the meat of the development agreement yesterday but  
2 received the supporting exhibits this morning, Exhibits A  
3 thru H.

4 So, if the applicant and the county can make clear  
5 to the Council what the purpose of each of those exhibits  
6 are and whether or not we may have seen those same documents  
7 in some other form in the application whether they are truly  
8 new or they are slightly revised from what the has Council  
9 seen before that would be helpful.

10 And Councilmember Tony Ifie, who is coughing on  
11 the phone who isn't here today, is a little bit ill, so we  
12 know he is still there.

13 The Council then will entertain any presentations  
14 from other parties, Counsel for the Environment and from the  
15 Economic Development Group, and make sure that they have  
16 other questions that need answers.

17 We will anticipate recessing the land use hearing  
18 to allow the Council to move into some executive session to  
19 discuss and make sure that EFSEC jurisdiction is not at  
20 issue and that all of other questions that are asked and  
21 satisfy the Council that they should accept settlement and  
22 come back quickly no later than after lunch today and  
23 finalize at the close of today's hearing with a finding that  
24 prima fascia proof of consistency meets what the statute and  
25 the regulation require and with the council's acceptance of

1 the settlement that will be in accordance with WAC  
2 463-30-250.

3 With that completed or before we recess the land  
4 use hearing, I have again a prehearing conference that  
5 follows regarding the proposed settlement that the applicant  
6 wants to present to the Department Fish and Wildlife.

7 So that's the agenda for this morning.

8 Councilmembers, anything else on the land use  
9 hearing before we entertain the presentations from the  
10 applicants and county?

11 All right. I hope that summary puts you on the  
12 same page. It's been a few months since we got together and  
13 a lot will happen today and tomorrow.

14 Mr. Peeples, anything on the summary from the  
15 applicant at this point?

16 MR. PEEPLES: Nope. That sounds about right.

17 JUDGE TOREM: All right. Who is going to make the  
18 first presentation, you or Mr. Hurson?

19 MR. PEEPLES: Why don't we go ahead and let the  
20 county do it. I just want to make a preliminary comment  
21 that with regard to the county process and development  
22 agreement that development agreement was -- I think Darryl  
23 Piercy can explain that it was not in a vacuum. It was done  
24 with input from the PUD, from the applicant, from the  
25 county, from county commissioners, from planning

1 commissioners, and from the public.

2 So, you know, there is a lot of work that went  
3 into that and a lot of thought and so with that I will turn  
4 it over to Jim.

5 MR. HURSON: Jim Hurson, Deputy Prosecuting  
6 Attorney, Kittitas County. Take the certification part  
7 first and then the stipulation part. I understand that  
8 there may be some questions about the terms and means of the  
9 development agreement. It's my understanding basically that  
10 you want to get into more towards the stipulation settlement  
11 part rather than the certification part. If that is  
12 incorrect, we can address those now.

13 JUDGE TOREM: Go ahead.

14 MR. HURSON: I can give to the Council the  
15 Kittitas County certification land use consistency, signed  
16 by Darryl Piercy, Director of Community Development  
17 Services, that of course applies to WAC 463-26-090 there  
18 with regards to prima fascia evidence. Mr. Piercy is  
19 available for questions.

20 Mr. Piercy is available for questions as am I and  
21 you may also have some questions from staff and attorney  
22 regarding the development agreement itself.

23 As Mr. Peeples pointed out, the development  
24 agreement was developed. It wasn't just something Zilkha  
25 came up or county staff came up. It was with cooperation

1 and public process, a lot of good public input, commissioner  
2 direction, planning commission, so there was a lot of  
3 details we were attempting to work out, it's probably not  
4 perfect, but through the process I think it accomplishes the  
5 goal, and I think with the certification --

6 JUDGE TOREM: I think we have that marked as  
7 Exhibit 1.

8 MR. HURSON: So, you know, when we forwarded  
9 electronic copies, I believe that were forwarded to the  
10 Council on Friday afternoon, there is one slight difference.  
11 Line 23 after the word "subarea" is a semicolon is now a  
12 comma. Other than that, I believe your final, is the same.

13 With that, we are ready for any questions that you  
14 might have.

15 JUDGE TOREM: Any objection to introducing the  
16 Kittitas County certification and land use consistency which  
17 is a two-page document into the record as Exhibit 1?

18 All right, seeing none, that is admitted as  
19 Exhibit 1.

20 Any questions about the certification itself,  
21 Councilmembers, or simply do you want to hold those  
22 questions until we get to the details of settlement  
23 agreement?

24 All right, seeing none, we will proceed to the  
25 stipulation of the settlement agreement and note that under

1 WAC 463-26-090 the county has now presented a certificate of  
2 land use consistency and that with the supporting  
3 documentation will be regarded prima fascia proof of  
4 consistency and the applicant's compliance with all zoning  
5 ordinances and land use plans unless there be  
6 counterdemonstration by anyone else present at today's  
7 hearing.

8 Mr. Hurson, please proceed as to what we will mark  
9 as Exhibit 2, stipulation settlement agreement between the  
10 applicant and Kittitas County. It appears to be two-page  
11 document.

12 MR. HURSON: Yes. James Hurson, deputy  
13 prosecutor, it's a three page document entitled "Stipulation  
14 and Settlement Agreement." It's the stipulation settlement  
15 agreement between applicant and Kittitas County signed by  
16 both Darrel Peeples, attorney for Wind Ridge Power Partners,  
17 LLC, and by myself on behalf of Kittitas County.

18 It is the stipulation basically that the terms and  
19 conditions -- just backing up a little bit, I believe I  
20 mentioned to the Council, I know that I speak for the  
21 applicant, but we're hoping that the consistency issue was  
22 also going to resolve through the settlement process with  
23 respect to any part of intervening regarding terms and  
24 conditions necessary.

25 So we looked at the development agreement as a



1 combined document to achieve both of those goals and we did  
2 so and so the development agreement certifies not only the  
3 county's land use certification but also resolving the  
4 issues that would be dealing with EFSEC.

5           Because of the way SEPA works and the GMA, don't  
6 have a filing of an EIS for us to make our land use, we felt  
7 legally we had to put a contingency in basically, but it  
8 doesn't take effect unless and until the governor signs the  
9 certification from EFSEC that meets -- that also  
10 incorporates these conditions and recognizing that there  
11 could be additional terms and conditions.

12           And when we were going through these we were  
13 trying to avoid duplication of the process to make it so  
14 that there is no overlap so that the applicant would have to  
15 deal with multiple people.

16           For example, the stipulation provides that the  
17 county would be doing the building permit process. I  
18 understand that typically EFSEC, you have a process, you  
19 will also be with the county to be in charge of building  
20 inspection and a process like that.

21           Our development agreement sets out that we have a  
22 staffing agreement to pay for the cost of the processing of  
23 the building permit and the stipulation provides that the  
24 county and EFSEC could enter into an agreement so that we  
25 could do the building permit and review process.

1           And then there is also -- because of the SEPA  
2 contingency, like I said, is the -- it has to pass  
3 contingent approval as far as we could tell through the SEPA  
4 compliance under the Growth Management Act.

5           So, as long as you approve the process and the  
6 governor signs the approval the conclusion is then we have a  
7 consistent document that's complied with the Growth  
8 Management requirements and also EFSEC.

9           So we would offer into admission our stipulation  
10 as Exhibit 2.

11           JUDGE TOREM: Any objection to the admission of  
12 Exhibit 2 or any discussion on that exhibit?

13           MR. PEEPLES: No objection. I just want to  
14 point -- I want to point out that the language that Mr.  
15 Hurson referred to regarding inspection by the county that  
16 is taken out of the Wallulu agreement and we're  
17 anticipating, you know, the same relationship that the  
18 Council has always had with the local government to do the  
19 planning review and inspection and we have already  
20 coordinated with the public works in this county.

21           So, it's pretty much exactly what had happened in  
22 Wallulu and all the other cases.

23           JUDGE TOREM: Mr. Lane, Counsel for the  
24 Environment, any comments from CFE on the exhibit?

25           MR. LANE: I have none.

1           JUDGE TOREM: Any objection to Exhibit 2 being  
2 admitted? All right, Exhibit 2 is admitted as part of the  
3 record. It appears that the next exhibit would be Exhibit  
4 3, Ordinance No. 2005-10, which is referred to -- that one  
5 is a four-page ordinance and development agreement itself, a  
6 28-page variety of supporting exhibits.

7           Mr. Hurson, how do you want to proceed on walking  
8 the county through that for the record?

9           MR. HURSON: What I can do is the stipulation that  
10 I just presented is attached to the development agreement  
11 itself and so the development agreement with the attachments  
12 double check and make sure that map -- that's already been  
13 admitted.

14           So, if you wanted to have the ordinance itself as  
15 an exhibit, that would be fine.

16           JUDGE TOREM: I think what we will do is put it to  
17 the Council and question for the record each one and it  
18 would be easier I think in any decision or recommendation  
19 that comes out of this proceeding to refer to that  
20 individually rather than one mass exhibit in this case.

21           So Exhibit 2 just to be clear will be the  
22 stipulation and settlement agreement, three pages, by itself  
23 that document. I would suggest that Ordinance No. 2005-10,  
24 which is four pages, be marked as Exhibit 3.

25           And we can mark the entire development agreement,

1 the bulk of the body which is 28 pages as Exhibit 4 and just  
2 note for the record that the Exhibit A has seven pages,  
3 Exhibit B as one page, Exhibit C has four pages, Exhibit D  
4 has 43 pages, E and F are just one page.

5 And I am counting now, so I don't know how many G  
6 is, it appears to be 13 pages for the fire services  
7 agreement and some sub pages, but those aren't easily  
8 numbered, but Exhibit G we will get the numbers on in a  
9 little bit. And H, I thought, was just three pages.

10 MR. HURSON: When we assigned the numbers, it  
11 seemed a bit confused because one of the exhibits -- and  
12 then also one exhibit is the agreement and that agreement  
13 unfortunately is A, B, C, D exhibits with its attachment  
14 numbers, so that can be a little confusing if people aren't  
15 aware of it.

16 I don't have any actual copy of Ordinance 2005-10  
17 signed by the board. Maybe Zilkha's folks have it, if they  
18 could. Looks like they do.

19 JUDGE TOREM: The Councilmembers all have this in  
20 front of them and there's the one signed by the board.

21 I think this is simply the board's adoption of the  
22 two documents that you have just put into the record and by  
23 reference some indications as to two other ordinances at the  
24 top of Page 3, the amendments to the county land use  
25 designation map under Ordinance 2005-08 and the amending

1 rezone designation under 2005-09 those documents I don't  
2 think are part of the development agreement are before the  
3 Council.

4           So it might be helpful for you and for Mr. Piercy  
5 to explain exactly why the series of three ordinances was  
6 adopted so just there is no concern there in case there is  
7 any questions that they have on their mind of the process  
8 the county used to determine consistency and how plans that  
9 weren't consistent once become consistent now.

10           And I think just because of the nature of getting  
11 the development agreement over the weekend, it would be  
12 helpful this morning to spend a few minutes walking through  
13 it section by section and, if necessary, pointing out again  
14 where those attachments to the development agreement might  
15 be the same as what the applicant has submitted previously  
16 to the Council and where there were modifications.

17           I think some of us would be specifically  
18 interested in SEPA modifications to the mitigation as well  
19 as the questions of the decommissioning estimates and where  
20 those numbers there come from.

21           MR. PEEPLES: Your Honor, I think Andrew Young can  
22 run through those real quick. He has them right there  
23 before we get into it. Andrew, can you -- do you have them  
24 too, Jim, the correlation?

25           MR. HURSON: I didn't bring a spreadsheet.

1           MR. PEEPLES: Why don't we on that let Andrew  
2 Young go through that so you can reference them.

3           JUDGE TOREM: Before we get to this, I just want  
4 to ask Mr. Hurson on those other exhibits, potentially  
5 2005-08 that ordinance and 09, if we can have copies of  
6 those provided that we know what was incorporated by  
7 reference that would help make our case when we need them  
8 later so we can refer to them.

9           MR. HURSON: That's not possible -- well, I can  
10 explain what those are.

11          JUDGE TOREM: Before we get to Mr. Young, I would  
12 like you to hear from you or from Mr. Piercy as to where --  
13 what the sequence of the ordinances was.

14          MR. HURSON: Again, Jim Hurson, deputy prosecutor.  
15 The county codes for wind farms calls for a combining  
16 process for the review, the top one is outlining the  
17 development agreements, and it's written with the idea that  
18 the county is the one that gets all four and, in fact, with  
19 regards not only to that but it is required that it be done  
20 in a consolidated fashion so you don't have to go through  
21 multiple hearings before the county.

22          But under the Growth Management Act certain things  
23 are adopted in certain sequences and so we have a  
24 consolidated hearing and then adopted the permits in the  
25 Growth Management order process, so what happened here is

1 that office of development called for a comprehensive plan  
2 and wasn't properly zoned didn't have a permit to proceed.

3 And so what the sequence is that then in 2005-08  
4 is the ordinance that approves the subarea plan for the  
5 county comprehensive plan, under GMA, we can do an initial  
6 section of the subarea plan out of the normally required  
7 cycle under the Growth Management Act.

8 So the first step is to adopt Ordinance 2005-08  
9 which approved the subarea plan for this area so our  
10 comprehensive plan under the GMA is allowed. Then the next  
11 step was adoption of Ordinance 2005-09, which was approving  
12 a rezone overlay, and so you have to have the zone  
13 consistent with the comprehensive plan, without the rezone  
14 overlay, so that is what 2005-09 was.

15 2005-09 was also part of rezone overlay or part of  
16 the development agreement, so then you had 2005-10 then  
17 adopts the development agreement that becomes the terms and  
18 conditions of the rezone.

19 And then, after that, we adopted the 2005-11,  
20 which was approval of the development program and all of  
21 those documents, as I said, were all approved on the  
22 condition that EFSEC also -- that the governor signs that  
23 site certification.

24 So those are the four steps and all of them are  
25 contingent on the governor's certification of the EFSEC

1 process.

2 JUDGE TOREM: All right. We have marked as  
3 Exhibit 3 then 2005-10 and the development agreement all of  
4 the attachments, will be Exhibit 4.

5 We suggest that if you could provide at a  
6 convenient time later today perhaps even tomorrow a copy of  
7 the 2005-08, 2005-08, and Ordinance 2005-11, we will mark  
8 those as Exhibits 5, 6, and 7, in that order.

9 MR. HURSON: We have copies of 2005-08, 2005-09,  
10 handing those to you, and also a signed copy of 2005-11. If  
11 you find 2005-08, Your Honor, it's rather lengthy, that is  
12 because we have attached to it 22 pages of findings in  
13 support of our process, and so it was -- it's rather  
14 lengthy, so we did it as a consolidated set of findings for  
15 all four orders and then cross referenced each ordinance so  
16 we don't have repeat 22 pages of findings for each one.

17 JUDGE TOREM: We will circulate this to the  
18 Council later this morning probably at recess before we  
19 actually have them admitted and make sure that the council's  
20 questions are answered.

21 So any objections for moving Exhibit 2005-10,  
22 Exhibit 3, into the record, just that one ordinance which  
23 the Council hasn't had a chance to review. All right,  
24 seeing none, Exhibit 3 is part of record.

25 Let's shift back then to Mr. Young. Mr. Peeples,



1 would you prefer to swear him in to give testimony?

2 MR. PEEPLES: Whatever you want to do, if you want  
3 to swear him in, that's fine.

4 JUDGE TOREM: I think just to be safe since he's  
5 got counsel representing him, we will swear him in.

6 (Witness sworn.)

7 JUDGE TOREM: Do you, Andrew Young, solemnly swear  
8 or affirm that all the testimony that you will provide in  
9 the course of this proceeding will be the truth?

10 MR. YOUNG: Andrew Young, yes.

11 JUDGE TOREM: Thank you. You can go ahead and  
12 explain for us or walk through the development agreement and  
13 how those attachments and exhibits support what the Council  
14 may have already seen before.

15 MR. YOUNG: Yes, thank you. Andrew Young, for the  
16 record, Andrew Young, I represent the applicant. The list  
17 of exhibits in the development agreement as set before you  
18 this morning list Exhibits A through H.

19 I just wanted to point out the genesis and the  
20 origin of these exhibits and also where they already exist  
21 in documents that the Council has reviewed.

22 Exhibit A is the property description, it's an  
23 urban project description. It's an abridged version of what  
24 was in our original application for site certification,  
25 which was contained in Section 2.2 and some of the earlier

1 sections.

2           So this described the size and types of turbines,  
3 the project components, such as the substation, the on-site  
4 gravel pits, the roads, electrical infrastructure, et  
5 cetera, so if you are looking at that you can refer to the  
6 application for site certification originally filed in March  
7 8, 2004.

8           Exhibit B is the project site layout in the SCA.  
9 It's identical to the site layout that was contained in  
10 Exhibit 1-B, and I believe there were modifications to the  
11 site layout described in my testimony labeled as Exhibit 20,  
12 AY-T.

13           Project land legal description and land owners of  
14 interest that was contained on our original county  
15 application for development activities and that's since  
16 been -- there was minor errors in the original application.  
17 Those were adjusted, and those that are incorporated as  
18 Exhibit C to this development agreement that's before you  
19 this morning.

20           Exhibit D is the proposed SEPA mitigation measures  
21 those were pulled directly from the draft EIS that EFSEC  
22 generated on August 4, 2004, and I believe there may have  
23 been some small modifications which we can highlight for the  
24 Council. I don't believe any modifications were substantive  
25 other than just typo, clerical, and maybe just for

1 clarification in some of the areas.

2 Exhibit E is the project vicinity map with  
3 residence locations. That's Exhibit 15-A from our original  
4 ASC.

5 The decommissioning cost estimate is a one-page  
6 exhibit, Exhibit F, that's a new exhibit that was put in and  
7 it basically says that 5.2 million dollars for  
8 decommissioning funds for the project, that was a cost  
9 estimate, an engineering cost estimate for the cost of  
10 decommissioning the project.

11 Exhibit G is the fire protection service agreement  
12 that the applicant entered into with Fire District No. 2,  
13 Kittitas County Rural Fire District No. 2, that was  
14 contained in my prefiled testimony Exhibit 20, AY-T, as one  
15 of the exhibits attached thereto.

16 Exhibit H is a new exhibit that the Council has  
17 not seen. That is a letter from the FAA that provided  
18 clarification to the county that indeed the new approaches  
19 that were assigned to the county for Bowers Field Airport  
20 were actually taken into consideration in the issuance of  
21 determination of non hazardous certificates for the turbines  
22 for Wind Power Project. It basically was a confirmation  
23 from the FAA that said, yes, we're aware of those new  
24 approaches for Bowers Field Airport when we considered the  
25 application that we submitted to the FAA, and I believe it

1 was in August 20th of 2004 that we received such letters of  
2 determination of non hazardous certification for all of the  
3 turbines that are anticipated into the project including MET  
4 towers that exceed 200 feet.

5           And that's a new exhibit, it's a letter including  
6 a sample determination of non hazardous certificate that  
7 would actually be issued for each and every one of the  
8 turbines for the project and for the MET towers from the  
9 FAA. That a federal requirement that, you know, we need to  
10 comply with the FAA, also tells us what we need to do with  
11 hazard obstruction, markings such as lighting, et cetera.

12           I think that completes the list of exhibits and  
13 the applicant, you know, I can step through them because I  
14 was directly involved in the preparation of the development  
15 agreement itself. At the pleasure of the Council today, I  
16 am willing to step through the specific elements of the  
17 development agreement or leave that up to Mr. Piercy and Mr.  
18 Hurson from the county. They are also intimately familiar  
19 with the document.

20           MR. PEEPLES: Mr. Examiner, there is also, like  
21 you said, a lot people developed this thing, so if you have  
22 questions on this that properly may be referred to Erin,  
23 maybe referred to Tim, maybe to some PSE people, you know, I  
24 think that if you want to ask questions on that we can  
25 confer and get you the best person to answer that question.

1           JUDGE TOREM: All right, I think what we will do  
2 is -- my suggestion is that I go ahead and take -- as boring  
3 as it may be, walk through the development agreement one set  
4 of numbered paragraphs at a time and see just if the Council  
5 have questions and have opportunities if there are any  
6 highlights that you want to hit that we get through them so  
7 that there is no question in my mind that the Council does  
8 understand this and it's not just going to -- although, the  
9 administrative code provision does allow the Council to take  
10 this as prima fascia evidence and pencil the witness  
11 through, I don't want that to occur.

12           I want the Council to understand how we went from  
13 being inconsistent to being consistent this morning before I  
14 allow them to vote on accepting this settlement agreement,  
15 which is a separate matter besides the Kittitas County  
16 approved certificate.

17           So, Mr. Hurson, how to you want to participate as  
18 we go through this?

19           MR. HURSON: Jim Hurson. However you think it  
20 would work best to walk through this. The different people  
21 here maybe better equipped to go through a few more details,  
22 but the county can -- if you want to look at us as kind of a  
23 lead we can defer to people, that's fine.

24           I would point out one thing on this, just the  
25 exhibit that's being proposed, the SEPA mitigation measures,

1 there were a few minor changes made to those, some slight  
2 additions, and I don't have a like a grid sheet of those  
3 because they were small.

4 One of them that pops off the top of my head is  
5 the one -- eliminated the ability to have guyed wires on the  
6 MET towers.

7 JUDGE TOREM: I did see as part of the agreement  
8 that the guidelines were removed from being hazards.

9 MR. HURSON: Correct, and there was a separate  
10 reason for that. There may have been a few other slight  
11 changes to that attachment document itself, but that's the  
12 only one off the top of my head.

13 JUDGE TOREM: What I propose to do Councilmembers  
14 is get Exhibit 4, the development agreement, in front of you  
15 and go through -- I think the recitals speak for themselves.

16 In my copy, I have marked as Paragraph H and  
17 Paragraph I, where it reports to recognize that this is the  
18 document then that achieves land use consistency from the  
19 applicant and county's perspective and that we then go  
20 through the first -- I think there's ten numbered  
21 paragraphs, maybe twelve, and then we will get to the  
22 exhibits as they are cross referenced and those are  
23 Paragraphs 1, 2, 11, 12, 13, and 14, in fact 10 should be  
24 pretty quick, since that's typical legal boilerplate  
25 necessary for these county agreements and any local

1 government agreements.

2 Paragraph 1 of the agreement comes on Page 6 of  
3 Exhibit 4 and this talks about the effective date,  
4 termination, and modification, and it says that this  
5 probably going to be a 30-year document, and I think my  
6 reading of the testimony was that the expected life span of  
7 the project was about 20 years, and that we will hear from  
8 Mr. Taylor later this afternoon about how that may go as  
9 long as 30 years and beyond if they replace equipment, so  
10 that he would explain the subjective term here.

11 The diminutions, I think, speak for themselves.

12 Are there any Council questions on the definitions  
13 that you read through in the bulk of development agreement  
14 last night? I don't think there are any surprises.

15 MS. TOWNE: I had a question and it is Subpart E.  
16 Exhibit B is the project area, pardon me, there is a map  
17 showing location of the project area, then there is Exhibit  
18 D called project site layout, then there is this project  
19 area covers 8600 acres, I want to make sure I'm clear on  
20 what is being talked about because it comes up in the  
21 settlement agreement where the easement is on the project  
22 site just to make sure that we're consistent on what piece  
23 of land is at issue.

24 JUDGE TOREM: Mr. Young, are you able to answer  
25 that one?

1           MR. YOUNG: Yes, I am. For the record, Andrew  
2 Young, and it's 8500 acres, thank you. And that's contained  
3 in the project description as well as the land legal  
4 description exhibits. That's in Exhibit A -- exhibit A  
5 which is a narrative type description of it.

6           MS. TOWNE: Thank you.

7           JUDGE TOREM: Does that answer your question,  
8 Commissioner Towne?

9           MS. TOWNE: Yes.

10          CHAIR LUCE: I have a couple of questions. Also  
11 in the recitals of early on all final exhibits or Recital  
12 No. H, I just want to know if there is anything in  
13 particular meant by "all final permit approvals would be in  
14 the best interests of the citizens of Kittitas County,"  
15 that's just a standard boilerplate clarification? All  
16 right.

17           The last one is: Now, therefore in consideration  
18 of -- it sounds like law school language and I want to  
19 clarify, which are incorporated down at the bottom -- and  
20 for other good and valuable consideration. Is there any  
21 other considerations?

22           All right, that's all I wanted to know. I always  
23 like to know.

24           JUDGE TOREM: I think for the record that the  
25 achievement of goodwill between parties is that --



1           CHAIR LUCE: Goodwill usually is consideration,  
2 but I was -- I just curious about what consideration it  
3 might be.

4           MR. HURSON: If you're asking is there additional  
5 monetary or anything flowing to the county, no. There is  
6 simply, you know, the only fiscalship that would occur is if  
7 we have -- would have to get our own development agreement  
8 to do the building permits.

9           CHAIR LUCE: All right. There are substantial  
10 considerations that indirectly flow, I appreciate that, but  
11 I just wanted to know.

12           MR. HURSON: You're right, it's standard law  
13 school boilerplate contract language.

14           JUDGE TOREM: Thank you. Councilmember Adelsman?

15           MS. ADELSMAN: I think that he was just saying  
16 that this agreement is not final until the Governor approves  
17 the project. My question is what happens if there are  
18 changes between now and the Governor's approval, does it  
19 come back then to the Council for changes? Or I mean, this  
20 is dependent on the Governor's approval. What if there are  
21 changes in the meantime?

22           JUDGE TOREM: Let me ask Darrel Peeples to answer  
23 that as well as Jim Hurson.

24           And the question for Councilmember Ifie who  
25 couldn't hear it all the way is -- Tony, I think the

1 question was really what if there are any changes in Recital  
2 10 about this not being a final action by the Board of  
3 County Commissioners?

4 MR. PEEPLES: This is familiar language, but you  
5 set a floor. You can have conditions greater than but not  
6 less than. So when you approve the stipulation with regard  
7 to the county's point of view that is the floor. You can  
8 put, you know, more stringent requirements on it, those  
9 things that you stipulated to, but not less.

10 Jim, is that fair?

11 MR. HURSON: Yes, that is correct. Like for  
12 instance you have DF&W stipulations would occur whether the  
13 county wasn't involved in that. We were aware that there  
14 was some discussions and saw that as a parallel path and so  
15 I assume that the applicant has -- there are certain  
16 obligations on the county's agreement regarding the hunting  
17 regulations and access issues and I believe that they have  
18 some additional ones with DFW, so it's like ours and  
19 whatever else DFW had on top, we're in agreement with all of  
20 those and -- but, in fact, the only reasons we had to have  
21 this contingency is because of the SEPA issue. We finally  
22 just asked if we could just prove that it was a land use  
23 then we're done.

24 JUDGE TOREM: That's again one of those EFSEC  
25 procedural particularities.

1 MR. HURSON: Right.

2 MS. TOWNE: I have a question on 6.3.

3 JUDGE TOREM: We're going to get to six. Are  
4 there any other questions on the recitals themselves, on  
5 Section 1 or 2?

6 All right, let's look at Section 3, the project  
7 description, which refers to some SEPA DEIS mitigation  
8 measures in Exhibit D.

9 Other than what's already been identified as the  
10 guyed towers versus unguyed towers, Mr. Peeples, is there  
11 any other specific highlights that you or Mr. Young -- Mr.  
12 Young, what's in Exhibit D again from the DEIS that came in  
13 August?

14 MR. YOUNG: Yes, thank you. Andrew Young for the  
15 applicant. I can direct the Council to Page 21 of the  
16 Exhibit D. And this Exhibit D is the proposed SEPA  
17 mitigation that were pulled directly from the EFSEC draft  
18 EIS on August 4, 2004.

19 And on that page is -- the fifth bullet down and  
20 the text says, "The use of unguyed permanent MET towers to  
21 minimize potential for aiding collisions with guyed wires,  
22 originally, we had anticipated using guyed towers for the  
23 permanent MET towers on the project site, and we have since  
24 agreed to --

25 JUDGE TOREM: Just a moment again. Tony can't

1 hear. Try it again. All right, we will do as best as we  
2 can so just project your testimony.

3 MR. YOUNG: Yes. In the exhibit, we agreed to go  
4 to free standing MET towers without guyed wires. So that's  
5 actually been -- that's one of the modifications in Exhibit  
6 D, is to go with freestanding unguyed MET towers for the  
7 project.

8 JUDGE TOREM: Is that one working?

9 MR. HURSON: Yes.

10 JUDGE TOREM: All right. Yours is working and  
11 this one is not, okay. I would direct the Council to the  
12 bullets, it would be the sixth one down, and that's what  
13 we're referring to on Page 21.

14 MR. YOUNG: Yes.

15 JUDGE TOREM: Is there any other non or any other  
16 substantive changes?

17 MR. YOUNG: I would like to go down the page for  
18 any highlights, any alterations, for proposed SEPA  
19 mitigation measures if I may.

20 JUDGE TOREM: How long will that take you?

21 MR. YOUNG: It will take me just a couple of  
22 minutes.

23 JUDGE TOREM: I will come back to you. We're  
24 going to see if we can get to the next couple paragraphs and  
25 hopefully we won't come back to you for the next couple of

1 questions.

2 All right, so while we're waiting for the Exhibit  
3 D substantive changes so we will be able to know, Council,  
4 Paragraph 4, back on Page 10 of the original exhibit talks  
5 about vesting and I have a question for Mr. Hurson as to the  
6 vesting to the county land use plans and regulations  
7 affected by the effective date of the agreement.

8 Is there any possible earlier vesting dates simply  
9 because we have completion under state law or is this just  
10 as of the date of the agreement as opposed to any other  
11 applications that may have been filed for permits which is  
12 the more traditional vesting issue?

13 MR. HURSON: Yes, that's a good question. We  
14 have -- first of all, that's a good question.

15 JUDGE TOREM: I used to practice in this area.

16 MR. HURSON: Your Honor, that's something we  
17 discussed and the language got going back and forth from the  
18 director for the application for effective dates of the  
19 agreement.

20 What we did is that there weren't any substantive  
21 changes in the local land use regulations that would impact  
22 it one way or the other. We chose this date because as the  
23 effective -- as of the application date, didn't have  
24 comprehensive plan that would apply and didn't have the  
25 zoning that would apply.

1           So the reason why we didn't want to get into some  
2 strange argument that you're vested to a year ago when the  
3 comp plan was inconsistent and therefore your development  
4 agreement doesn't work. So we just chose to do it all on  
5 the date of the agreement so there wasn't any question about  
6 the fact that it vested as of the date of the consistent  
7 with the comp plan and zoning.

8           And that's the only -- you're right, the typical  
9 one is the vestment date of the application, but we never  
10 had a development agreement, we were actually making our own  
11 separate set of development rights, and so we -- it was just  
12 intended to make it clear that this is your development  
13 right and you're set with that as your date.

14           JUDGE TOREM: Well, it would sound as though the  
15 county is clear and the applicant is better off vesting  
16 to -- getting to regulations to which they have actually  
17 have the permission to do something consistent on EFSEC  
18 recommendations of approval and the Governor's signature not  
19 to old development regulations to which they might not be in  
20 compliance.

21           MR. HURSON: Right. Maybe it wasn't a huge legal  
22 risk but it just seemed like a much cleaner way to the  
23 eliminate potential.

24           JUDGE TOREM: Any other questions on the vesting  
25 issue, Councilmembers? All right, then let's move to part

1 five, the development standards.

2 Here there are 17 numbered paragraphs and I know  
3 that at the public hearing there were some questions as to  
4 access roads and as to site access and hunting plans for the  
5 area. These would be Paragraphs 5.7, 5.14, and 5.15, and I  
6 recall that the county wasn't particularly wanting to get  
7 into the road business on the project.

8 So I am going to turn this one back to the  
9 applicant for information on these particular paragraphs and  
10 how local concerns were addressed or local matters might  
11 have been helped along by these particulars paragraphs and  
12 then see if the Council has additional paragraphs they need  
13 information on.

14 Mr. Young?

15 MR. YOUNG: Yes, I am ready to address these two  
16 issues, Your Honor, under Provision 5.7 just primarily to  
17 discuss the project's main access way.

18 The intent of that is to put the access way in a  
19 safe location with adequate sighting distances so it would  
20 be right across the street from the existing driveway that  
21 goes into the county landfill site south of the Vantage  
22 Highway and to which standards of access would be  
23 constructed.

24 So that's the main elements of Section 5.7.

25 Additional provision, excuse me, the additional

1 provision in that is that we will comply with county road  
2 standards and provisions set forth in the -- I believe it is  
3 in their Title 12 section and specifically with reference to  
4 Table 12.1 the road standards.

5 JUDGE TOREM: Thank you.

6 MR. YOUNG: Provision 5.14 regards access to the  
7 projects site and through the project site.

8 This is the result of several meetings with  
9 various hunting groups and recreational groups in the county  
10 and also conferring with county staff and also with Puget  
11 Sound Energy as to what is adequate to allow for site access  
12 to and through the property that protects the project and  
13 also maintains an adequate level of safety for the public as  
14 well as people that operate the project and equipment so  
15 that the project can be insured, et cetera.

16 The intent of this is to have adaptive management  
17 of the program through which access could be altered or  
18 changed as time, you know, as time goes by and on an  
19 as-needed basis. Very similar along those lines is what are  
20 people accessing the property for and we're intent on having  
21 continued hunting or access for hunting through the project  
22 site to allow people to hunt up there and use the project  
23 site for recreational purposes.

24 Again with, you know, the main interest of the  
25 applicant on the project is that an adequate level of safety



1 is maintained and there is some level of control for that.

2 So, for both of those provisions, that is the main  
3 drive behind those two provisions for development standards  
4 5.14 and 5.15.

5 JUDGE TOREM: Mr. Young, there is indication in  
6 5.14 that there will be a keyed gate and the property owners  
7 and the Fish and Wildlife and DNR personnel will still have  
8 access through that keyed gate.

9 MR. YOUNG: Yes, that's accurate. As time goes on  
10 that may change, the type of gate, the type of access, you  
11 know, that's the idea behind the technical advisory Council,  
12 TAC, and the adaptive management concept.

13 JUDGE TOREM: It appears that the TAC will be  
14 granting people permission to have access to the property or  
15 who is going to be granting the permission for the hunters  
16 because it says on here the applicant will take measures to  
17 inform the public of any changes in hunting practices.

18 Is it just simply going to be signs and people  
19 self enforcing or are there going to be any enforcement  
20 issues that will require support from local law enforcement  
21 or from state game agencies?

22 Mr. Taylor, I am going to swear you in since  
23 you're going to add some testimony. Do you, Chris Taylor,  
24 solemnly swear or affirm that any testimony that you provide  
25 in the course of the proceeding this morning will be the

1 truth?

2 MR. TAYLOR: I do. For the record, I represent  
3 the applicant. Specifically with respect to the provisions  
4 in Section 5.15, development of this had come up later I  
5 believe in discussion with Fish and Wildlife and a  
6 stipulation with them.

7 The intent of the agreement is to back up half a  
8 step rather than to go into the details that we're in now.  
9 I think that there's two overriding concerns that are  
10 expressed about how the public process both in front of  
11 EFSEC and the county that we're attempting to address here.

12 One of which is a concern on the part of the  
13 wildlife agencies and those who need to do their job that  
14 this area not become a refuge for big game specifically elk  
15 because their concern has been that it would lead to greater  
16 crop damage on surrounding land particularly to the west  
17 where you have high value farm land.

18 So there is a couple things to accomplish here.  
19 One is to allow hunting to continue such that it doesn't  
20 become a refuge also so that reasonable seasonal opportunity  
21 can continue and the second of which is we want to maintain  
22 the safety of our employees and the integrity of our  
23 operation.

24 So, what the intent is, and I do want to clarify,  
25 the intent is that the permit -- the people that will be

1 hunting on the land will have to be -- have a permit from  
2 DFW and that will be sort of their role, especially when  
3 there is hunting, but there will be -- this is a positive  
4 action between the land owners that have large tracks of  
5 land that they require people who want to hunt on that  
6 property to seek access. It's more of an access right  
7 permit to be able to have access and the intent is to issue  
8 permits by the project rather than by a state agency.

9 JUDGE TOREM: So essentially this is a permission  
10 to enter non public lands for this process of hunting or  
11 other recreation for which they might or might not need a  
12 license from a state agency?

13 MR. TAYLOR: Correct. And specifically the intent  
14 is to grant the project operations team the ability to  
15 ensure that the hunting taking place in an area at a time  
16 that it's not going to conflict with the safe operation of  
17 the project. In other words, you might say on such and such  
18 a day people are allowed to hunt in the following section,  
19 but not in the other, that way we can schedule to have, you  
20 know, let people know not to use those sections for hunting  
21 taking place.

22 JUDGE TOREM: As to other recreational uses, there  
23 have been a lot of testimony before about birding or just  
24 wildlife observation and has that been -- this is not really  
25 addressed so much except in 5.14 that says you will allow

1 others access on a case-by-case basis; is that the sort of  
2 issues and concerns that you were looking at?

3 MR. TAYLOR: Correct. That's to clarify with  
4 respect to other recreational pursuits so we're, you know,  
5 low impact I think as part of our agreement with DFW is  
6 supposedly not allow activities taking place on the property  
7 that would lead to significant habitat damages outside the  
8 foot print of the project, so off-road vehicles use in these  
9 areas so that we can protect that habitat aren't going to be  
10 allowed, but passive uses, such as horseback riding, you  
11 know, hiking, bird watching, those kinds of activities, will  
12 be able to continue.

13 JUDGE TOREM: All right. As to enforcement of any  
14 of these issues if you would perhaps deny somebody's right  
15 on that one section is it going to be the typical law  
16 enforcement or state agency to support that a taxpayer would  
17 presume is going to be there; is that what you're counting  
18 on to enforce those decisions?

19 MR. TAYLOR: We're hoping that we won't have to  
20 end up in that situation, but you asked about outreach and I  
21 didn't address -- maybe that would helpful to address that  
22 now at this time.

23 We specifically looked into publishing notices in  
24 the various publications that cater to it. I think when we  
25 go out -- we've already got copies for the local field and

1 stream people and other user groups and we would point that  
2 out to those people of the changes that are coming and learn  
3 how to contact people.

4 So we're trying to avoid someone who would drive  
5 all the way out there and want to get there first thing in  
6 the morning and find out that they don't have a permit and  
7 we want to make people aware what the rules are, communicate  
8 that for them, and work with DFW, the prosecutor's office,  
9 the major groups there to resolve any conflicts.

10 JUDGE TOREM: Councilmembers, as to access, any  
11 other questions about these particulars recreational or  
12 hunting uses, kind of maintenance of the roads, that came  
13 out earlier. Seeing none.

14 Mr. Peeples?

15 MR. PEEPLES: Just want to point out I think it  
16 should be becoming obvious to the Council by going through  
17 the county process, I know, it was a large process and it  
18 was done very much in conjunction to going through the EFSEC  
19 process, especially what you're talking about now, developed  
20 out of the input process and the EFSEC process and WDFW and  
21 essentially the county has done lots of work that we would  
22 have otherwise done here and came up with those terms.

23 JUDGE TOREM: We do recognize the work that's gone  
24 in here. One paragraph Mr. Hurson that comes up to mind is  
25 5.12, the concrete batch plant. Those were specifically

1 identified in Council Order 791 as one of the bases for  
2 being inconsistent with local land use and this seems quite  
3 pro forma, one sentence about, "They shall be strictly for  
4 on-site use and removed when construction is complete," is  
5 that sentence alone going to satisfy consistency questions  
6 that came up earlier?

7 MR. HURSON: Yes. I believe that there is also in  
8 the SEPA mitigation there is some issues that deal with  
9 theft control and noise and some other related issues, but  
10 yes, conditional use permit issue is not an issue by our  
11 process when looking at it because the on-site batch plant  
12 was basically mitigation under the project itself.

13 The board determined that there was no need for  
14 there to be conditional use process because it was an  
15 on-site mitigation and under the consolidated wind farm  
16 process and so it is approve. It can only be used on site  
17 for the project and once that work is completed then it has  
18 to be completely decommissioned from that site.

19 JUDGE TOREM: All right. Thank you. The last  
20 question that I have identified is 5.17. This was the  
21 turbine setback from residences. And the Board of County  
22 Commissioners and the planning commission had like a week  
23 proceeding where they had discussed a variety of different  
24 setback lengths and when I read this yesterday I noticed  
25 there was this 541 feet and the number that I personally

1 thought would be logical was at a minimum 400 feet given the  
2 height of the towers and the tip and the rest and I don't  
3 think -- maybe the Council or maybe it's just me would be  
4 entertained to know why 541, and I guessing that was the  
5 closest possible distance already on the ground and you just  
6 wrote it in.

7 MR. HURSON: I think I can explain that.

8 JUDGE TOREM: Explain away.

9 MR. HURSON: What that was is there was --  
10 basically became an issue regarding different sorts of  
11 environmental issues and there was certainly a safety zone  
12 issue like happened with the desert claim wind power project  
13 and that EIS identified what we called -- what we started to  
14 call a safety zone, it was basically taking the ISO tower  
15 glass, those sorts of issues, established based upon the  
16 analysis of how far these things could go, and then there  
17 was basically an additional factor added on top of that  
18 saying we think something can go "X" number of feet, if the  
19 tower falls and bounces and rolls and then you add a little  
20 on top of that.

21 So it basically became a formula basic -- I don't  
22 remember the exact numbers like 125 percent of the tallest  
23 tip. The tip height maximum. And frankly what happened is  
24 the desert claim project was looking at 310 and they used a  
25 number of 400 and some odd foot and Zilkha looked at it and

1 said that was based on a shorter tower so let's do it based  
2 on their tallest tower.

3 So they voluntarily said, well, rather than 422  
4 feet, or whatever it was, they offered 541 because that  
5 would be using the desert claim EIS formula of the 125  
6 percent factor and the 541 would be the number that they  
7 derived and offered that up to the -- to my board as being  
8 the safety setback.

9 One other thing, we were, you know, the draft EIS,  
10 one of things with us -- this one became part of the issue  
11 of public comment I think because Wild Horse is farther  
12 removed from homes there wasn't as close an analysis done,  
13 so we tried to borrow that desert claim analysis for the  
14 application here in case homes or residences got closer, we  
15 wanted to have that safety setback.

16 JUDGE TOREM: All right. Thank you. Mr. Peeples,  
17 anything else to you want to add to that?

18 MR. PEEPLES: Well, I think that adequately  
19 explains the range in terms of what we followed and that  
20 explains the larger distance.

21 JUDGE TOREM: All right. Thank you.  
22 Councilmembers, any other paragraphs under Section 5 that  
23 merits further discussion or question?

24 MS. ADELSMAN: Just for clarification. I thought  
25 because of the property ownership that you wouldn't let



1 anybody closer than 1.5 miles; is that correct, you wouldn't  
2 let people closer than that?

3 MR. YOUNG: That's a good question. The closest,  
4 adjacent non participating property line from the outer  
5 boundary is probably one mile. That's set forth in this  
6 development agreement as well.

7 MS. ADELSMAN: And that wouldn't change because of  
8 the land ownership?

9 MR. YOUNG: We wouldn't change. We would not move  
10 the turbines outside of the area in the rezone, but the  
11 county wanted to ensure or ask that if there is new  
12 residences constructed that they not be constructed any  
13 closer to the wind turbines than an "X" distance and that  
14 "X" distance was set at 541 feet. So I don't think that no  
15 one is going to move any closer to that hazard with any new  
16 residents.

17 JUDGE TOREM: If there are no more questions on  
18 Section 5, we will now move to Section 6 which is the  
19 decommissioning and if anybody needs a break let me know,  
20 thinking that the court reporter may need a break after  
21 decommissioning, and then come back and complete the  
22 development agreement.

23 Decommissioning refers to I believe, yes, it is a  
24 one-page exhibit, Exhibit F, which talks about a 5.2 or 5.3  
25 million dollar potential cost and, in Paragraph 6.3, the

1 funding and insurance for that is discussed, and I wanted to  
2 ask for the --

3 Well, we lost the mikes again it sounds like.

4 If Allen would stop messing with the buttons.

5 There we go.

6 It sounds as though there was a request here on  
7 top of Page 16 in the form of a guarantee bond or letter of  
8 credit to ensure availability of funds referred to in  
9 Exhibit F.

10 The applicant shall request that through EFSEC  
11 that the county be a listed as additionally insured prior to  
12 the end of the first year after commencement of construction  
13 and the decommissioning plan requires a five-year review and  
14 then there is a question -- below Paragraphs A and B about  
15 the performance bond and the letter of credit.

16 I am not sure if the applicant wants to explain  
17 what's meant by the first and then go back to the county but  
18 I think that what the Council needs to hear is whether --  
19 what the purpose of this is, what they are anticipating the  
20 county to require of them if the project is actually  
21 constructed and how the county fits into that with EFSEC in  
22 existence and if for some reason this state agency goes out  
23 of existence how the county fits into the guarantee.

24 MR. HURSON: Jim Hurson, the -- basically, the one  
25 question asked about the issue, and I am sure that came up

1 with is there a necessity of posting bond or a letter of  
2 credit, we didn't want a situation where the applicant had  
3 to post a bond for both the county and EFSEC and so  
4 basically this was intended to make it so if you bond they  
5 can buy one bond and one letter of the credit and then we  
6 both would be listed there.

7           We never -- I mean, this is a project that could  
8 go on for thirty more years and we would never know who is  
9 going to be around or what agency or what the governmental  
10 structure is going to be like, so we wanted a situation  
11 where the county can be an additional insurer if there  
12 wasn't an EFSEC or a predecessor to EFSEC that we would be  
13 one to be able to step in, act upon a letter of credit or  
14 act upon the bond, so we could be assured that  
15 decommissioning would take place.

16           JUDGE TOREM: All right. It would appear that you  
17 were going to get the same information financially as to the  
18 costs of decommissioning and care for the property might be,  
19 would this again be the floor and if EFSEC decided to  
20 require a higher bond the county would be happy or if EFSEC  
21 required a lower bond for whatever reason, the county might  
22 then might ask for a supplemental bond; is that a reasonable  
23 reading of this?

24           MR. HURSON: Yes. We would be looking for a  
25 letter of credit or a performance bond. It could be the

1 managing partner, Puget Sound Energy, that kind of utility.  
2 They are not required for a bond or a letter of credit with  
3 WUTC, FERC regulating.

4           There was a feeling that those sorts of regulatory  
5 overlay in the state and federal regulatory commissions  
6 asked for that additional layer of security or assurance  
7 that there would be some money down the road as opposed to  
8 some LLC corporation or some other sort of an entity that  
9 could own it.

10           I guess you could say you don't want to have an  
11 ENRON coming into the wind farm and then the regulator --  
12 we're comfortable with WUTC FERC regulatory schemes or at  
13 least comparable levels where I don't believe there is the  
14 necessity to post a performance bond or a letter of  
15 credit -- they would have to have a performance bond and a  
16 letter of credit posted within the year and has to be  
17 reviewed on the -- as set forth in the schedule, updated,  
18 and refreshing the numbers.

19           JUDGE TOREM: All right. Again, this would be the  
20 county being in second standing essentially, EFSEC or  
21 whatever the regulatory agency from the state first, and  
22 then if that goes away, that requirement is somehow waived,  
23 then the county would still have this in place as ongoing  
24 backup requirement.

25           MR. HURSON: Right. If I assume that EFSEC would

1 require what our input would indicate about, okay, this is  
2 the requirement and we have it all arranged then we would  
3 have to get an additional one on top of that, but I don't  
4 anticipate that because it is less expensive to get single  
5 bonds instead of a first letter and second, I believe.

6 JUDGE TOREM: All right. Section 13 of the  
7 agreement goes to the indemnity, that claims are to be  
8 limited and not exceed of five million dollars and that's  
9 slightly under what the decommissioning costs are.

10 Can you explain if there is a difference, I think  
11 there would be, of what this hold harmless clause is and  
12 what the decommissioning bond difference would be?

13 MR. HURSON: Yes, there are certain differences.  
14 The bond and the letter of credit is anticipated what the  
15 cost would be to take it down. The indemnity is a matter of  
16 if someone gets injured.

17 JUDGE TOREM: So this is a second additional tort  
18 liability not within the decommissioning.

19 MR. HURSON: Correct.

20 JUDGE TOREM: And the similarities in those  
21 shouldn't be a confusing issue for anyone, correct?

22 MR. HURSON: That started out at a one million  
23 dollar number and then it was raised to five million. The  
24 applicant didn't want to have an unlimited, the county of  
25 course would have been happy to have an unlimited, but it's

1 the realities of it, and that's the number that we agreed as  
2 being an appropriate level.

3 It's just if somebody gets injured and tries to  
4 blame the county even though hard pressed to think what our  
5 liability would be under the particular circumstances.

6 JUDGE TOREM: You don't know, but they can be  
7 created.

8 MR. HURSON: Yes. People are creative and like  
9 that and so this is an additional five million dollars and  
10 then the county has its own 15 million dollar general  
11 liability policy.

12 JUDGE TOREM: All right. From the applicant's  
13 perspective, further anything on explaining the performance  
14 bond or how that works?

15 MR. PEEPLES: I don't believe so.

16 MR. YOUNG: We have nothing further to add.

17 JUDGE TOREM: All right. Thank you, Mr. Young.

18 Mr. Peeples?

19 MR. PEEPLES: I think you can expect that on our  
20 proposed SCA will have this language in it and that's what  
21 we're going to be posting.

22 JUDGE TOREM: Thanks.

23 MS. TOWNE: Same paragraph as the question before  
24 about, the lead in at 6.3, towards the end, this sentence I  
25 cannot -- the duty to provide such security shall commence

1 annually after substantial completion or when the project  
2 ceases to generate electricity.

3           How could that possibly work? How could it cease  
4 generating before it is decommissioned?

5           MR. YOUNG: I will try to address that one.  
6 Andrew Young, representing the applicant.

7           This sentence if I just make sure I am on the  
8 right sentence, it reads, "It's the duty to provide such  
9 security shall commence annually after substantial  
10 completion."

11           During construction, there will be a performance  
12 bond in place to ensure that the project gets built, if it  
13 doesn't get built, then financiers can step in and go on and  
14 complete the construction, that provides the surety during  
15 the construction periods.

16           Thereafter, it is -- the intent is that the bond  
17 shall be continuous and be renewed every year to the extent  
18 that the bond lasts, you know, the idea is that -- if  
19 financial surety is with a non utility, that that bond or  
20 letter of credit is renewed annually and needs to be renewed  
21 annually as soon as the project starts construction. The  
22 amounts of the bond would be reviewed. If the construction  
23 period lasts perhaps let's say two years then that bond  
24 would be reevaluated at 5.2 million dollars and that exhibit  
25 engineering estimate would be looked again to see what the

1 cost is and to see if bonds and the letter of credit is  
2 adequate coverage in the amounts.

3 After the project starts operation, then that  
4 amount would be looked at ever five years for an engineering  
5 estimate, Exhibit F, would be updated every five years.

6 JUDGE TOREM: See if I understand correctly, there  
7 is a construction assurance bond essentially that the  
8 project will get built and then there is a performance bond  
9 when it's operating every year and the question to Paragraph  
10 6.2, as to the ceasing of the generation of electricity from  
11 whatever reason occurs, the bond covers that as well?

12 MR. YOUNG: That is correct. The language in 6.2  
13 is to establish a defined trigger under which the applicant  
14 or project owner at the time would actually have or be  
15 required to decommission the project.

16 JUDGE TOREM: As to the construction specifically,  
17 this addresses what the county's expecting to make sure for  
18 whatever reason that the project gets built or the  
19 construction defaults for whatever reason that everything  
20 that has been done is returned to its status as it is today,  
21 will the similar language be in the SCA, Mr. Peeples, as to  
22 EFSEC essentially having first call on that bond and if  
23 EFSEC didn't call then the county would be able to do that;  
24 is that how we are to understand this language?

25 MR. PEEPLES: Yes, I believe so. I mean, we



1 haven't gotten to the point of drafting it, you know, and  
2 quite frankly I would defer to maybe Erin on that or Tim  
3 McMahan. They're involved in this.

4 I anticipate the language that was in the  
5 agreement will come in to the proposed -- our proposed SCA  
6 and if there needs to be some type of maybe simplified  
7 language to make it clear we might do that. But, of course,  
8 we will check with the county before we propose that. But  
9 essentially we're going to try to use the language in this  
10 agreement to go into the SCA.

11 JUDGE TOREM: Mr. Hurson, anything you would like  
12 to add on that?

13 MR. HURSON: I was just informed from -- there is  
14 a multiple -- I think we can use the same words. What the  
15 county issue is basically is the decommissioning either  
16 through a bond or a letter of credit from PSE or similar to  
17 PSE. The county is required basically -- did not require a  
18 construction bond. We assumed that that would be something  
19 that the lending institutions would require. So that wasn't  
20 part of the county's issue basically because it is -- we're  
21 just making sure if it's decommissioned at some point in  
22 time. So those are two different conflicts. We think it's  
23 important to require to post bond to construct because of  
24 the financial end of the deal.

25 MR. PEEPLES: I think to answer the question to be

1 more clear. Essentially the criteria in this agreement with  
2 the county, we plan to make EFSEC apply criteria to us, so  
3 essentially you would, you know, we would be bound to you as  
4 to the terms of the development agreement.

5 JUDGE TOREM: Mr. Peeples, as far as your  
6 proposing that as the floor plan but that there maybe some  
7 additional restrictions that EFSEC could require?

8 MR. PEEPLES: That's absolutely correct.

9 CHAIR LUCE: Mr. Peeples, I did have one of  
10 question, maybe you or maybe the county, and it's just a  
11 curiosity question and that is the decommissioning scope and  
12 the timing and I don't recall having seen in our previous  
13 agreements anything specific as to the 6.2 (b) irrespective  
14 of the fact that it's at the written request of the county  
15 but decommissioning occurs when the energy generates less  
16 than ten percent of the historical energy production defined  
17 below and then list of exemptions.

18 I was curious how you arrived at that specific of  
19 language.

20 MR. PEEPLES: I will defer to Chris Taylor on  
21 that.

22 MR. TAYLOR: I believe that came directly out of  
23 the planning commission if I am not mistaken. It had to do  
24 with a recommendation of one or more on the planning  
25 commission that drafted it into the relevant text for this

1 purpose.

2 JUDGE TOREM: All right. And then you have got  
3 all sorts of exemptions for force majeure, replacements for  
4 parts, and what happens if the wind doesn't -- I mean, we  
5 have got, you know, global warming, God forbid, we came over  
6 the pass there's no snow, so what happens -- I suppose it's  
7 force majeure in Kittitas County if the wind doesn't blow  
8 for three years.

9 There is actually -- well, I will ask the county  
10 on the record, if the wind doesn't blow for three years in  
11 Kittitas County that would be force majeure and you wouldn't  
12 have to decommission the project, right?

13 MR. HURSON: Actually, we specifically included  
14 that and said that force majeure including an exception for  
15 wind periods.

16 So what this was was the planning commission  
17 was -- they were bouncing around all sorts of things, didn't  
18 want just have it where they just had to produce some  
19 electricity every couple years as far as, you know, so they  
20 kept pounding around all of those numbers and just came up  
21 with this number.

22 So, you know, what our concern is if you drive  
23 over here on the way you'll see what's commonly referred to  
24 as the egg beaters, which is the old '60s wind towers that  
25 have been up since the '60s, and so you kind of local

1 concern of do you want 120 or 150 towers sitting up there  
2 that not doing anything, and so it was --

3 CHAIR LUCE: Got it, thank you very much. That  
4 was my curiosity question.

5 MS. TOWNE: I have a question.

6 JUDGE TOREM: 6.3(a).

7 MS. TOWNE: There is a sentence about a third of  
8 the way down, "The performance bond shall be in an amount  
9 equal to the decommissioning funds," we've got two separate  
10 funds or is it equal to the decommissioning process found in  
11 the Exhibit F or something. It looks like two pots of  
12 money.

13 MR. TAYLOR: I think that the exhibit that you  
14 referred to, that stack of exhibits that would be reviewed,  
15 at the top, it will be reviewed for adequacy throughout the  
16 life of the project. That number may change but that number  
17 is agreed upon. That is the current estimate of the future  
18 costs. So five years from now when you look back at this  
19 and say this was 5.34 million dollars for the actual cost  
20 decommissioning will change. That would become quote the  
21 decommissioning clause and the performance bond would not  
22 have to be an amount but would be an appropriate at the  
23 time.

24 MS. TOWNE: So it should read or I should read it  
25 as meaning as an amount equal to that found in Exhibit F as

1 modified over time; is that the intent?

2 MR. TAYLOR: I believe that's --

3 MR. HURSON: Yes, I think that that's a fair  
4 characterization. That's why we're saying we're using the  
5 same terms and it can get confusing and we've been working  
6 on this a long time and it's gotten kind of confused.

7 But, yeah, the performance bond isn't performance  
8 to construct it is to perform the decommissioning and it  
9 does have the review process in it so it can be updated as  
10 to over time given the length of the project.

11 JUDGE TOREM: It appears to me Councilmember Towne  
12 further up in Paragraph 6.3 describes the terms of the  
13 decommissioning funds, it makes it clear from my perspective  
14 there at least that funds, even though it sounds like a  
15 plural, is referring only to what is found in Exhibit F.

16 MS. TOWNE: That's F.

17 JUDGE TOREM: All right. Anything other things on  
18 Section 6?

19 MS. ADELSMAN: When you do the reevaluation and  
20 say you need adjusting is that then a process by the county  
21 and is it just adjusted by management?

22 MR. YOUNG: It is my anticipation that it would be  
23 adjusted, you know, on the EFSEC level. I don't know if  
24 that has been really discussed and analyzed.

25 I think we can come back, you know, get an

1 estimate like we had before. That would be submitted and  
2 our -- I think the way I would conceive the language is that  
3 EFSEC will enforce that and we would have to go back and get  
4 a new estimate every five years and in my view it would be  
5 enforced by EFSEC.

6 MS. ADELSMAN: That's all my questions.

7 JUDGE TOREM: Mr. Hurson, is that your  
8 understanding that EFSEC take the lead in making sure the  
9 numbers are adequate?

10 MR. HURSON: I frankly don't remember off the top  
11 of my head. Our discussions were with the public works  
12 director who did the -- I think he envisioned that it would  
13 be a matter of we did study and if he thought it was okay  
14 then that was -- the public works director if he felt that  
15 was an adequate amount then we just bring that and have the  
16 county administrative approval process. I don't remember  
17 thinking through the interplay of EFSEC.

18 JUDGE TOREM: I think that EFSEC would have an  
19 annual or at least a look at project update of the  
20 operation. I think those are pertinent as part of the  
21 process. So if this is recommended to the Governor and  
22 approved then as long as the recognition from the Board of  
23 County Commissioners is that EFSEC will have its top down  
24 approach and, if you're looking for something different, I  
25 would bring it to EFSEC so we have an opportunity to

1 consider it and concur or reach a supplemental side  
2 agreement for additional protection locally and in addition  
3 to and not at EFSEC expense certainly that would be  
4 agreeable.

5 MR. HURSON: We're not trying to negotiate --

6 JUDGE TOREM: And that's I heard early on is that  
7 this is essentially making the language that the county can  
8 live with putting that in proposed site certification  
9 agreement and getting EFSEC approval ultimately and then  
10 everybody is happy.

11 MR. HURSON: And I just can't remember this, you  
12 know, we were trying to figuring out exactly what the  
13 interplay is because I don't -- off the top of my head, I  
14 don't recall precisely how we're dealing with that. I don't  
15 think we saw a problem with figuring out the numbers.

16 MS. ADELSMAN: The only question that I have is  
17 you said ceiling and the county then as to the 5.2 something  
18 or is less than that and that can go back on us.

19 JUDGE TOREM: See if I understand your question,  
20 Councilmember Adelsman, is if EFSEC for some reason found  
21 the number to be 4.8 million --

22 MS. ADELSMAN: Ten years from now, you know, it  
23 was reevaluated and decided that 5.3 is maybe too much, it  
24 could be less, so they would then go back. Again, this is  
25 my understanding --

1           JUDGE TOREM: My understanding is that this was  
2 the language that's going to be proposed as accurate numbers  
3 from the applicant. If we were to find less, then I would  
4 anticipate applicant would go back to the county before they  
5 brought us that lesser number and then have that approved,  
6 that would be the most sense, and if this was set at too a  
7 high floor for us --

8           MS. ADELSMAN: Not referring to the beginning of  
9 the process --

10          JUDGE TOREM: I understand.

11          MS. ADELSMAN: -- 5.3, you know, and if something  
12 changes --

13          JUDGE TOREM: I would guess that the county would  
14 stay involved at that level of the process because they're  
15 looking down the road to the end result as well and we'll  
16 stay involved.

17          And, Mr. Peeples, correct me if I am wrong, but if  
18 there's going to be a reevaluation on the bond and for some  
19 reason the economy allows it go lower, just because there is  
20 a sale on EFSEC decommissioning your tower, then you could  
21 bring that to us with county concurrence and you would have  
22 a low number rather than having the county feel as though a  
23 presence by EFSEC taking and saying you only need a 3.5  
24 million dollar bond for the next year and the county is  
25 still demanding five, that's the situation I think



1 Councilmember Adelsman was looking at.

2 MR. PEEPLES: First, I would defer this to Mr.  
3 McMahan on this, but I would request that if you just as a  
4 general concept if you come up with something, you know,  
5 below, I mean, what the county would have, then you set a  
6 minimum and allow us through EFSEC to, you know, at least  
7 say a 4.8 million bond, I would hope that you would accept a  
8 5.2 bond, you know, I don't think you need to -- we need to  
9 go back to what we have is you may say we don't think you  
10 need 4.8, you know, and you can state that if you want to  
11 that that's the minimum, but allow us to at least do the  
12 maximum. Thank you.

13 JUDGE TOREM: So if I hear you correctly, if we  
14 say 4.8 and you've agreed to 5.2 certainly we would accept  
15 5.2 and everybody would happy but you would exceeding  
16 EFSEC's requirement.

17 MR. PEEPLES: That would be correct rather than  
18 going back to separate -- handling a separate bond, et  
19 cetera, just let us do it.

20 JUDGE TOREM: So, if you are willing to pay, you  
21 will pay?

22 MR. PEEPLES: Yes.

23 JUDGE TOREM: And you have agreed to this with  
24 county that this is important part of the agreement?

25 MR. PEEPLES: Yes.

1 JUDGE TOREM: Yes, I have it.

2 MR. MCMAHAN: Your Honor, just one quick thing for  
3 the record. Just one perhaps further clarification so we  
4 don't have to have too much discussion during the break on  
5 this question, I guess.

6 I think just to be very clear that the provision  
7 that we've been talking about in Paragraph 16 in the  
8 development agreement, Paragraph 6.3, it is an annual  
9 evaluation of the construction in regard to the draft and  
10 assuming that there is an ongoing monitoring by EFSEC on the  
11 project. I should think that simply by going to the section  
12 of the agreement that the Council will provide notification  
13 to the county of during the five year period so the county  
14 can participate in the evaluation that happens by the  
15 Council and we can do that by way of drafting to assist the  
16 Council with the SCA.

17 JUDGE TOREM: Very well. Anything else on the  
18 decommissioning and Section 6? Counsel for the Environment  
19 any comments or other concerns on the development agreement  
20 and the subparts?

21 MR. LANE: Not particularly. Although, I have a  
22 point of clarification question. In 6.3(b) that refers to  
23 State of Washington by and through EFSEC, its successors, or  
24 designees shall be authorized under the letter of credit, so  
25 in 6.3, the main paragraph where it lists EFSEC and the

1 applicant on behalf of the county is EFSEC in Section 6.3  
2 would also include possible successor designees?

3 JUDGE TOREM: Mr. Peeples, is that the intent?

4 MR. PEEPLES: Yes, that is correct.

5 JUDGE TOREM: The answer is yes to that.

6 Ms. Strand, do you have any concerns at least from  
7 your party's perspective?

8 MS. STRAND: No.

9 JUDGE TOREM: All right. I think now would be a  
10 good time to take a 15-minute break and come back and wrap  
11 up the development agreement. It's now 10:30. We'll try to  
12 come back at 10:45.

13 (Off the record at 10:32 a.m. and back  
14 on the record at 10:48 a.m.)

15 JUDGE TOREM: All right. We're going to reconvene  
16 the land use hearing. It's now about ten minutes to 11:00.

17 I will note that while we were at recess we were  
18 handed copies of what has been marked as exhibits -- will be  
19 marked as Exhibits 5, 6 and 7.

20 They were the ordinances from Kittitas County.  
21 2005-08 will be Exhibit 5, 2005-09 will be Exhibit 6, and  
22 2005-11 will be Exhibit 7. And 2005-08 has a number of  
23 pages attached with all of findings of fact. So, 08 is  
24 going to be No. 5, 09 is No. 6, and 11 is going to be  
25 Exhibit 7.

1 I will give the Council over our recess later  
2 today a chance to review those before we enter them into the  
3 record, so we will them marked as such right now.

4 Mr. Hurson?

5 MR. HURSON: I don't think exactly which copy, I  
6 just want to make sure that Exhibit 2005-08 also in addition  
7 to the findings there is a map. I believe that's the third  
8 page to the -- two pages would be legal description.

9 JUDGE TOREM: All right. They were attached to  
10 the copy that we received. I understand that Councilmember  
11 Ifie is having no difficulty hearing me, but is having  
12 difficulty hearing others. If you have a microphone in  
13 front of you for purposes of the telephonic call, if you  
14 could speak into it that would be helpful for Councilmember  
15 Ifie. Anyone who doesn't have a microphone in front of  
16 them, we will try to pass one down to you. For the  
17 Councilmembers, I will repeat that for Councilmember Ifie  
18 and anyone else that might be on the phone line today.

19 Before we move along with the review of the  
20 development agreement, I want to see if -- Mr. Young, if you  
21 are ready to go back to Exhibit D to that development  
22 agreement and the changes to the SEPA mitigation measures.

23 I understand that you were going to prepare  
24 perhaps a marked up copy of exactly where the changes were  
25 so it would be easier for the Council to see that. If so,

1 would you mark that as Exhibit 8, when he's ready to present  
2 it. Why don't you tell us what you know now and we might  
3 just accept that copy.

4 MR. YOUNG: Very good, Andrew Young, representing  
5 the applicant. Yes, we can provide a redline or a mark up  
6 version of Exhibit D, the proposed SEPA mitigation measures  
7 and indicate and identify alterations to that as part of the  
8 development agreement with the county as Exhibit 8.

9 And I would like to propose that we provide that  
10 right after the conclusion of the EFSEC hearing, so on  
11 Wednesday, if that pleases the Council?

12 JUDGE TOREM: And I think that the only concern  
13 would be whether or not there was any major things that  
14 would raise questions before the acceptance of the  
15 settlement agreements and you have already told us that the  
16 major ones are the guyed towers versus unguyed.

17 MR. YOUNG: I'm prepared to -- the applicant is  
18 prepared to go through those immediately.

19 JUDGE TOREM: All right. I think that would  
20 probably prevent any raising of concerns that slowed down  
21 the proceedings and keep us from getting consistency  
22 established before the adjudication begins this afternoon.

23 Mr. Peebles?

24 MR. PEEPLES: Yes. We can go through this. I  
25 just want to point out that those are not necessarily

1 changes directly related to the county.

2 One of the things that has come out of the process  
3 that we would be proposing as additional mitigation any way  
4 that we have agreed to, the guyed towers we have already  
5 agreed to and there are another few things that are --  
6 additional things that we have already agreed to out of the  
7 entire process and including the EFSEC process, but we can  
8 go over them.

9 I would suggest that we just -- can't we do it  
10 orally right now? Let's just have them orally right now.

11 JUDGE TOREM: That would work into our process  
12 today and then if we can get, Mr. Young, that proposed  
13 Exhibit 8 that you want to put it in Tuesday or Wednesday  
14 for the Council to have and make it part of the record  
15 before we close the hearing which maybe as soon as tomorrow  
16 afternoon depending on how the testimony is scheduled out  
17 and then we can take that matter in. I just don't want to  
18 have to have a session and get it Wednesday solely for that  
19 purpose.

20 MR. YOUNG: No, I think we can have it submitted  
21 before closing on Tuesday.

22 JUDGE TOREM: Okay, all right, we will mark  
23 Exhibit 8 and hold that number for the mark up copy of the  
24 development agreement and go through it verbally now.

25 MR. YOUNG: Okay. Andrew Young, with the

1 applicant. For the record and again just to reiterate the  
2 first alteration is on Page 21 regarding free standing met  
3 towers as opposed to the guyed tower.

4 The next alteration is on Page 32, it has to do  
5 with the SEPA mitigation measures for public services and  
6 utility/recreation and it is the third bullet down from  
7 3.12.4.1 for construction.

8 And the original had said that the applicant  
9 proposes to mitigate by prepaying a sufficient amount of  
10 taxes to provide adequate staffing levels during  
11 construction for law enforcement, and as it reads now, "and  
12 through discussions with the applicant and Puget Sound  
13 Energy met with the sheriff and agreed that the applicant,"  
14 the language should be changed that the applicant shall pay  
15 additional costs for law enforcement associated with  
16 construction impacts and activities to be provided by the  
17 county sheriff's office or a private on-site security as  
18 deemed necessary.

19 JUDGE TOREM: So instead of prepaying some amount  
20 the change is now so that county sheriff will give you a  
21 good faith bill and you'll pay it.

22 MR. YOUNG: Or hire private security. But in  
23 either case, it is on an as-needed basis as opposed to going  
24 into a prepaid situation. I think they were -- they prefer  
25 to have it as opposed to prepay.

1 JUDGE TOREM: All right.

2 MR. YOUNG: The next alteration is on Page 35,  
3 excuse me, Page 34, the very last sentence was added which  
4 reads, "In all cases, the project shall note all concerns  
5 raised through tribe requests."

6 The next alteration --

7 JUDGE TOREM: Before you move on, I want to make  
8 sure understand the content. This is dealing with  
9 archeological excavation and the right to have tribal  
10 representative present during any earth disturbing  
11 construction activities and then it says, "In all cases, the  
12 project shall note concerns," is that referring to anything  
13 that they might see disturbed during the process or is that  
14 a more general concern?

15 Mr. Piercy, is that the county's addition?

16 All right. Mr. Piercy, let me swear you in so you  
17 can give us what your best recollection is as needed.

18 (Witness sworn)

19 JUDGE TOREM: Thank you. What light can you shed  
20 on that?

21 MR. PIERCY: This language was actually one that  
22 was discussed and negotiated to come to an understanding of  
23 how the tribe would be addressed within the agreement.

24 We had a number of letters on file as part of the  
25 public testimony indicating an interest from at least two



1 tribes.

2 In order to fully address those, we felt that  
3 there was some indication needed within the agreement that  
4 would recognize any legitimate tribal concerns regarding  
5 features that may be found on the land.

6 Rather than specifically limit those to a single  
7 or even two tribes, we felt that it was appropriate to leave  
8 that fairly wide open and to provide for a process in which  
9 following both federal and state law those tribes of  
10 interest could be notified at the time of construction and  
11 participate as well during construction if they so chose.

12 JUDGE TOREM: Have you heard from any other tribes  
13 besides the two, the Yakama and Colville, that have  
14 identified themselves?

15 MR. PIERCY: At the present time, those are the  
16 only two we've heard from and there is testimony on record  
17 from those two tribes.

18 JUDGE TOREM: The purpose of this though is that  
19 it allows for further tribal interests that may come in and  
20 access.

21 MR. PIERCY: At a minimum at least those two that  
22 have provided written testimony but others as well that may  
23 be identified as having an interest during the course of  
24 construction.

25 MS. TOWNE: I have a follow-up question. Mr.

1 Piercy, it does not seem to indicate the action of the  
2 enforcement mechanism other than note be received but then  
3 what?

4 MR. PIERCY: I think that follow-up action is  
5 actually that is as is described in federal and state law.  
6 So it would be to provide for state a recognition of  
7 interests as part of the process, as part of the  
8 construction, and then the requirement that would be  
9 addressed and identified under the state and federal law as  
10 would become appropriate.

11 MS. TOWNE: Thank you.

12 CHAIR LUCE: I have a follow-up question, Mr.  
13 Piercy, Jim Luce, Chair. If there are artifacts or other  
14 artifacts discovered or there are remains and  
15 representatives of the tribes are not present, would you  
16 clarify whether you'll make known to the tribe the fact that  
17 these artifacts or remains are known and then call them in  
18 at that point in time?

19 MR. PIERCY: Again, it's my understanding of how  
20 state law works is there is as requirement that there be  
21 notification requirement, if an artifact were found, that  
22 construction would immediately stop and an appropriate party  
23 would be notified.

24 JUDGE TOREM: I understand that. I just wanted to  
25 get that particular statement as to what was required under

1 federal and state law on the record so that there was no  
2 misunderstanding as to what was required.

3 MR. PIERCY: Thank you.

4 MR. HURSON: Mr. Chairman, one of the issues here  
5 and we're trying to avoid opening a can of worms on tribal  
6 jurisdiction issues because Kittitas County is in the area  
7 of the Yakama Indian Nation, but not for any other tribe.

8 Occasionally, we have other tribes that claim an  
9 interest or a right for hunting and other purposes within  
10 the county and what if any of those other tribes might have  
11 is a very issue specific process.

12 So we're trying to avoid -- trying to eliminate  
13 any potential claims of jurisdiction for a tribe but also  
14 didn't want to create any additional rights as far as who  
15 could control what and so the idea was we would notify the  
16 tribes as required and then the rights under the state and  
17 federal law could then be enacted.

18 And we frequently run into this -- I run this on  
19 the other side of our office, the criminal side, for hunting  
20 rights. So, we give notice and comply with state and  
21 federal law.

22 We didn't want to start adding any names as far as  
23 anybody beyond the Yakamas who would be notified.

24 CHAIR LUCE: Understood.

25 JUDGE TOREM: That's the purpose of the vague

1 language to address an open door policy to any tribe that  
2 makes such an interest to the proceedings?

3 MR. HURSON: Correct.

4 JUDGE TOREM: Throughout construction?

5 MR. HURSON: Right. Then whether they have state  
6 or federal rights or treaty rights is a different issue but  
7 the idea is to get information out there so that they may be  
8 notified.

9 JUDGE TOREM: Certainly the applicant wouldn't  
10 have any intention of combining beyond any of the  
11 controlling laws. The penalties are so steep.

12 Let's see, Mr. Young, what's next on the list of  
13 changes?

14 MR. YOUNG: The next change to make note of is a  
15 small one, it's on Page 35, it's first square bullet. One  
16 3.14.4.1, it is under the traffic and transportation  
17 section. And this is to provide verification, on the first  
18 bullet, SEPA mitigation measures, it says that we will  
19 provide the traffic management plan to be submitted to  
20 EFSEC. We added Kittitas County. So instead it will be  
21 submitted to EFSEC and Kittitas County prior to construction  
22 for review.

23 The next change I will have, Council, Tim McMahan  
24 address, but I will point you to Pages 5 and 6, that has to  
25 do with the decommissioning plan.

1 JUDGE TOREM: And which pages.

2 MR. MCMAHAN: Tim McMahan, Council, for the  
3 record. Pages 5 through 6, and it's Paragraph 3.1.4.8, and  
4 at the very bottom, let me just tell you why -- what we did  
5 with this change and then I will just literally read it to  
6 you. The county raised an issue pretty early in the  
7 negotiation process for the development agreement that in  
8 development the decommissioning plan it was important for  
9 them to be informed and advised and involved of the drafting  
10 process and approval process by EFSEC. It's kind of a point  
11 that was made earlier on review.

12 So, specifically mitigation measures, when the  
13 FEIS was done and we didn't really anticipate that so we  
14 added some language. This is kind of substantive but more  
15 of a procedural issue.

16 So, let me just read it to you and then if you  
17 have any questions, it's on the bottom of Page 5, after  
18 "approval," we added, "and in consultation with Kittitas  
19 County, established," in carrying on detailed initiation --  
20 or initial site restoration plan, sorry.

21 In other words, with EFSEC involved in approving  
22 the restoration plan that the county would be consulted in  
23 the establishment of that plan. And then onto the next  
24 page, at the very top, right after the word "plan," we have  
25 added language that I will read slowly. Right after the

1 word plan, it says, "pursuant to WAC 463-42-655, again  
2 referring back to what we had, and then continuing with the  
3 new sentence, "The plan shall be developed with the active  
4 participation of the county in consultation and coordination  
5 with EFSEC. It shall be submitted to the county for review  
6 and approval, provided however such approval shall not be  
7 unreasonably withhold," now that is a little different and  
8 amplifies I think some of the development agreement, we had  
9 drawn maybe some contract between the applicant and the  
10 successors and the assigns.

11 And, again, basically this was something that we  
12 were proposing as additional mitigation measure in the DEIS  
13 that dovetails back into it.

14 Again this was developed through negotiations with  
15 PSE and the applicant to address their concern about SEPA  
16 mitigation measures that were left out in the agreement and  
17 I am sure that the county would be happy to elaborate on  
18 those issues too.

19 JUDGE TOREM: Councilmembers, is there any need  
20 for elaborating on this? It appears to be cooperative with  
21 the county, but recognizing that the ultimate approval of  
22 any decommissioning plan is going to come from this body and  
23 I think they have county concurrence, I think that it's  
24 generally our mandate to make sure that consistency and  
25 respect for county laws and needs is also there.

1           Is there any other questions or elaborations?  
2           Councilmember Towne?

3           MS. TOWNE: Yes. As to the first sentence of  
4 3.1.4.8. First, you have get EFSEC approval and then you  
5 establish an initial restoration plan. Is there something  
6 else that am I missing there?

7           MR. MCMAHAN: Well, the sequence there, prior to  
8 commencing construction would obtain EFSEC approval. I  
9 think it would go to the -- would be entirely within the  
10 same process and in consultation of the county to establish  
11 detailed initiation -- or initial site restoration plan.

12           So it's the establishment of the plan that would  
13 require consultation with Kittitas County and I am looking  
14 over to the county, Mr. Piercy is nodding his head correct,  
15 so that would be our proposal to EFSEC to revise the  
16 mitigation DEIS to have at that time developed initially  
17 consultation with the county.

18           MS. TOWNE: After you come to EFSEC for approval?

19           MR. MCMAHAN: I think it's an integrated process.

20           MS. TOWNE: Thank you.

21           JUDGE TOREM: Mr. McMahan, so if I understand  
22 correctly that this phrase on consultation Kittitas County  
23 probably should have come directly after the applicant in  
24 consultation with the county will bring something forward  
25 that both agree on and EFSEC makes the -- is there anyway

1 that the applicant and the county can come to EFSEC for the  
2 final plan approval?

3 MR. MCMAHAN: That is correct. The record would  
4 establish with the parties that ultimately EFSEC would  
5 approve the separate steps of the decommissioning plan.

6 JUDGE TOREM: And I think the Council would be  
7 happy to approve those things that meet its requirements  
8 especially since the county has weighed in on in advance and  
9 make sure, as I said earlier, there's a harmonious agreement  
10 as to all requirements being met.

11 MR. MCMAHAN: Correct. As I said, this language  
12 was put in here early in the procedure process.

13 Frankly, Andrew Young has -- brought them back in  
14 here because it was -- really, they were carried over --  
15 came up on the program and this language was -- but I think  
16 it's explaining the intent and the language might have been  
17 more artful, but that was what we proposed.

18 JUDGE TOREM: Councilmember Adelsman?

19 MS. ADELSMAN: Is this true the first sentence  
20 refers to the next sentence where you say that the plan,  
21 then it is developed with the county in consultation so now  
22 it's this.

23 JUDGE TOREM: No, it's not.

24 MS. ADELSMAN: And then it said in consultation  
25 you get approval so in the beginning we do it in



1 consultation with the county and we approve it but now in  
2 the second sentence it says the opposite. So I don't  
3 understand it.

4 JUDGE TOREM: I think the general nature of this  
5 is the wording could be better but it's already been  
6 committed to by the applicant. The process is to come to  
7 EFSEC for final approval.

8 MS. ADELSMAN: That's not what the second sentence  
9 says.

10 JUDGE TOREM: Well, let's get the county's input  
11 on this that there is a recognition from Mr. Hurson and Mr.  
12 Piercy all of this that comes forward from the county and  
13 the applicant to come to EFSEC for -- this is again the  
14 construction process -- not the construction -- the  
15 decommissioning plan in the context is that everything is  
16 going to come forward to EFSEC for final approval.

17 If the county is on board with that and that's  
18 their understanding of this document and then the Board of  
19 County Commissioners has appended to its development  
20 agreement, then I think we can move forward on that and  
21 understand that.

22 The biggest concern I think from where we're  
23 coming from in Olympia is that by statutes we have a  
24 jurisdictional question that has to be respected and we have  
25 to enforce as well. If we can get the county and the

1 applicant on the same page before they come to us more power  
2 to them.

3 Mr. Hurson, do you want to address that real  
4 quick?

5 MR. HURSON: Yes. I think from the county's  
6 perspective we're looking at it as kind of a cooperative  
7 matter. I would assume that in doing this they would talk  
8 with county staff and EFSEC staff on issues that they're  
9 looking at and come up with proposals, send it to both  
10 levels of staff and do that and run it by our folks, by our  
11 commissioners or whoever it needs to be from planning's  
12 perspective, and it would appear that we, which I assume we  
13 will, with EFSEC this is acceptable with the county. That's  
14 where we saw the working relationship.

15 And, in fact, in looking at the language and just  
16 being aware that this is kind of something that we talked  
17 about for a couple of months and maybe if the first sentence  
18 on that paragraph or the last sentence, it flows a little  
19 better.

20 JUDGE TOREM: Let me suggest --

21 MR. HURSON: That's probably the way of looking at  
22 it. I think the second sentence is a more detailed  
23 explanation of what -- how the first sentence works.

24 JUDGE TOREM: Is this simply taken from the draft  
25 EIS with the modifications that have been made. It's still

1 EFSEC's documents that we would go in and adopt the final  
2 EIS, this particular paragraph, as it stands in the draft  
3 EIS and as modified from the county's special requirement.  
4 We can always fix that.

5 MR. MCMAHAN: That proposal is not a substantive  
6 change and I have looked at the Council's table. If there's  
7 substantive change, I think we can work with this and, in  
8 fact, in the SCA we can draft proposed language that works  
9 with consistency. I think this just kind of fell off the  
10 chart in the drafting exercise. As we move forward, the SCA  
11 itself, it has precise language dealing with this, you now,  
12 perhaps even supersedes this a bit. So we will get the  
13 language on the right side and move forward.

14 JUDGE TOREM: So long as the county's  
15 understanding is that does -- like the sound of this is just  
16 a grammarian type of approach to fixing it. It's not going  
17 to change the understanding of the substance of the  
18 agreement the Board County of Commissioners approved.

19 I think that the Council can accept this based on  
20 the record today to explain that.

21 MR. HURSON: Yes. It was intended to work  
22 together. In fact, I think -- well, such will not be  
23 unreasonably withheld suggesting that if people called and  
24 we said no and so -- basically if that was unreasonably  
25 withheld that would be contrary to what the agreement was

1 and then EFSEC would then be in position, but I don't  
2 anticipate that the county would unreasonably withhold that.

3 JUDGE TOREM: Mr. Young, are there any other  
4 substantive modifications to Exhibit D?

5 MR. YOUNG: I believe that concludes our review of  
6 revisions to the Exhibit D or the development agreement.

7 JUDGE TOREM: All right. Let's turn back then to  
8 the development agreement itself. We were on Page 17, go  
9 back to Exhibit 4 on Page 17, Paragraph 7, consistency with  
10 local regulations. This appears just to recite much of what  
11 we have talked about already. Councilmembers, any questions  
12 as to the representation here that consistency has been  
13 achieved?

14 All right, hearing none, let's move to eight, the  
15 amendments and revisions.

16 Mr. Peeples, maybe with this development agreement  
17 for consistency allowing for amendments, can you give us the  
18 applicant's insight as to when this may or may not be  
19 amended and what role EFSEC would play either pre-approval  
20 or post-approval of the project if that is what occurs.

21 Mr. Young or Mr. McMahan?

22 MR. MCMAHAN: Passing the microphone over some  
23 place here. I am actually somewhat inclined to turn to Mr.  
24 Piercy actually. See how many people can get the microphone  
25 before he gets the microphone.

1           JUDGE TOREM: So I guess it's now on Page 18 and  
2 Paragraph 8 about amendments and revisions and the question  
3 was whether or not the parties anticipated any changes or  
4 amendments and what role EFSEC would have in the process of  
5 pre-recommendation to the Governor or post-recommendation in  
6 the monitoring phase if it's approved.

7           MR. HURSON: I believe basically the way it was  
8 written is if you would require it in the site certification  
9 we wouldn't require it as long as it was within the scope of  
10 the application permit as far as height, the number,  
11 setback, locations, maintenance and repair, they still have  
12 the perform all of the other mitigation measures.

13           So this is just a -- I kind of look at it as a  
14 standard provision that I think you want to clarify if they  
15 want to go repair the fence and if a blade breaks they can  
16 replace blade or any those changes without getting further  
17 approval from the county, so certainly that's all that was  
18 intended, but if they wanted to change the scope of the  
19 project then that would be -- an amendment would be required  
20 in a development agreement and undoubtedly would result in a  
21 change of the EFSEC site certification also.

22           JUDGE TOREM: All right, very well, so this is to  
23 avoid unnecessary back and forth with the county that  
24 wouldn't otherwise be required by EFSEC?

25           MR. HURSON: Correct.

1           JUDGE TOREM: Thank you. Mr. Peeples, do you want  
2 to add to that?

3           MR. PEEPLES: Yes. I think essentially what it  
4 comes down to generally is technical amendments. There is  
5 no issue probably and anything beyond a technical amendment  
6 to the application would have to go through your process.

7           I mean, that's just kind of a general overview  
8 because they have segregated out certain types of things  
9 where they say we don't care even if there's EFSEC amendment  
10 which is replacement stuff.

11          JUDGE TOREM: All right, thank you.

12          MR. PEEPLES: Anything major, you know, we have to  
13 go through your process.

14          JUDGE TOREM: And your understanding is that it  
15 would be also define anything major in EFSEC provisions as  
16 well?

17          MR. PEEPLES: Correct, correct.

18          JUDGE TOREM: Councilmembers, any questions on  
19 that section?

20          Moving along to Section 9, termination, I think  
21 that speaks for itself.

22          Section 10 on general revisions, Mr. Peeples or  
23 Mr. McMahan, whoever is in the better position, with the  
24 letter of intent from Puget Sound Energy it would appear  
25 that the assignment is there to address that situation, and

1 let' just cover that under 10.1 first and then we will get  
2 to the other questions under 10.2 through 10.9.

3 Can you give any further elaboration on these  
4 couple pages, Mr. Young?

5 MR. YOUNG: Yes, I can give you an overview on  
6 Section 10.1 with regards to assignment -- on the  
7 assignments.

8 There is two situations for assignment, but I  
9 am -- I will just step through them. There is 10.1 is the  
10 one for the assignments or transfers requiring consent of  
11 county, 10.1.2 is collateral assignments without consent of  
12 county, and 10.1.3 is assignments or transfers without  
13 consent of the county. So those are the primary ones. I  
14 will step through those really quickly to explain more on  
15 those and what we have negotiated with the county on the  
16 assignment and transfer provisions.

17 Under 10.1.1, on Page 19, we're allowed to  
18 transfer or assign the project with provisions set forth  
19 therein under 10.1.1 and the primary focus of that is in all  
20 cases under 10.1, third paragraph on Page 19, it is  
21 basically states in the third sentence, "applicant shall  
22 have the right to assign or transfer all remaining portions  
23 of its interests of the project at any time including  
24 rights, obligations, and responsibilities, and that would be  
25 ensue that financial assurances for decommissioning as set

1    forth in Section 6, which we've had a lot of discussion  
2    about today, are met by the parties," I believe, and that  
3    would be transferees or people or entities if the project  
4    were to be assigned.

5            JUDGE TOREM: Clarify a little bit. What would  
6    require consent of county and what would not?

7            MR. YOUNG: The options for without consent of  
8    county are two, two fold, collateral assignment section  
9    under 10.1.2 that is basically to allow appropriate  
10   financing of the project, lender stepping rights, if you  
11   will.

12           JUDGE TOREM: Okay.

13           MR. YOUNG: And then if you defaulted and a lender  
14   could step in, they would have to go through a reopener of a  
15   full county blown process, just be able to step in and have  
16   unfettered access to the project.

17           JUDGE TOREM: And it looks like under 10.1.3, you  
18   named Puget Sound Energy there specifically as an example as  
19   to what might be pending here, so that sort of investor  
20   owned electric utility would not require county consent when  
21   PSE steps in?

22           MR. YOUNG: That is correct. Under 10.1.3,  
23   assignment to Puget doesn't require reopening of that  
24   process.

25           JUDGE TOREM: If there's a non-investor owned



1 electric utility that would require county consent?

2 MR. YOUNG: If it is a non-investor utility or  
3 another entity that would be kind of covered under 10.1.1  
4 and would require consent of the county, but I will allow  
5 Tim McMahan to address that question further.

6 JUDGE TOREM: Mr. McMahan, just for -- because I  
7 know it's not foreseen as an issue in this particular  
8 project but there maybe other energy generating facilities  
9 that come up in this county, wind or otherwise, that may  
10 want to be built and then sold to a nonindustrial entity,  
11 what sort of entities are those, if you have an example for  
12 the county -- for the Council, and why do you want to have  
13 in this particular question, consent from the county  
14 required? Why do you have that in there?

15 MR. MCMAHAN: Well, there's two elements. I just  
16 want to clear up the one that Mr. Young indicated and I am  
17 going to take you in one second to 10.1.1, which is assigns  
18 requiring consent of the county.

19 There's two different provisions in there that  
20 allow some predictability and frankly safety for the  
21 applicant and the applicant's assignee which is not  
22 unreasonably withheld, conditioned or delayed, that any  
23 refusal to give consent would be for a material reason, this  
24 is in Sub A on the top of 20, and that would include things  
25 such as the transferee's failure to perform material

1 obligations under the development agreement or failure to  
2 demonstrate adequate financial capability.

3 Underneath, B, C, D, and E, are pro predominantly  
4 protection provisions for the applicant or the assignee so  
5 that obligations don't continue to stick to the assignee  
6 after the assignment, so those are really for that purpose.

7 Now back down to 10.1.3, which is to your  
8 question, Mr. Torem, one is another subsection (i) that is  
9 the Puget Sound Energy section or investor utility regulated  
10 by WUTC. You will see farther on down at the beginning of  
11 that sentence is the word "or", all right that "or" dealing  
12 with things that you have in your final of transfer senior  
13 unsecured -- I won't read it to you.

14 But, in any event, it's a performance standard  
15 based upon standard industry criteria for entities  
16 presumptively financially able that could -- could be an  
17 assignee without consent of county other than investor. So  
18 that's what I understand that second element of that  
19 subsection (i) to mean.

20 JUDGE TOREM: The county is essentially waiving  
21 its right to way in on any transfer or assignment if they  
22 meet these particular credit rating requirements.

23 MR. MCMAHAN: That is correct. That is the way in  
24 this particular instance, if they prove they are there, that  
25 would be the intent. That was the intent of that drafting

1 just to counter for another kind of entity what that kind of  
2 entity would be, that's the question. You know, in a way,  
3 it's hard to image 30 years life or whatever it could out  
4 there, there could be another energy company that meets  
5 these criteria.

6           Again, at least as I understand these criteria,  
7 they are not criteria for a company that can't satisfy and  
8 so it's fairly steep notifying underneath that criteria.

9           I will also say that this language was  
10 predominantly developed by general counsel for Puget Sound  
11 Energy and general counsel for Zilkha. So, if we are going  
12 to go in deep on the questions, we do have a representative  
13 from PSE here that's hopefully able to answer questions that  
14 exceed my knowledge level or the knowledge level of those at  
15 this table, but that is the intent in answer to the question  
16 that you were asking.

17           MS. TOWNE: I have a follow-up question. What  
18 about municipals?

19           JUDGE TOREM: The question is what about  
20 municipals; is that a condition?

21           MS. TOWNE: Such as Seattle Light.

22           JUDGE TOREM: I think we should direct that to the  
23 county.

24           MR. HURSON: Basically, one you have the PSE type  
25 and they can transfer without consent -- without consent and

1 they don't have to post the bonds to secure the  
2 decommissioning.

3 JUDGE TOREM: What's the company -- is this like  
4 an ENRON clause?

5 MR. HURSON: This is the deal with like ENRON.

6 JUDGE TOREM: I was hoping you guys would say it  
7 not me.

8 MR. HURSON: The other part is there can be a  
9 transfers without consent of the county as long as they meet  
10 certain financial criteria and they also have to meet the  
11 obligations and responsibilities.

12 So, for instance, if you had a PUD that wouldn't  
13 meet the investor owned utility criteria, but if you had a  
14 PUD that had proper bond rating you could transfer to a PUD  
15 without conditions without consent of the county, but the  
16 PUD would have the condition of then having to post the  
17 performance bond to secure for decommission.

18 So it eliminates the fact that county has review  
19 the bond transfer with those types of entity. We don't have  
20 to approve it or that the entity has to post bond to secure  
21 the decommissioning.

22 And then we have the LLC no back ground, no  
23 information, no anything, we don't have any sort of bond  
24 level there, there we are going to do consent, review it,  
25 they have to post bond, if they transfer it, we have to make

1 sure they have enough finances to build the thing if it  
2 isn't built yet, so we would have to have a private check if  
3 they don't have any sort of bond securities to protect that.

4 So there is -- it's interesting because there is  
5 the one phase there that doesn't require county consent but  
6 they do have to post a bond and then you've also got the  
7 collateral assignment for a lender. And their concern is a  
8 default that the lender needs to be able to step in and take  
9 over to finish up the work and do it. They don't need our  
10 consent. There is the lender that has to post a bond for  
11 decommissioning.

12 So if we're -- I guess you have three subsections  
13 and there's four scenarios that are dealt in there.

14 JUDGE TOREM: For the benefit of the council's  
15 perspective, these are floor and the county can be consulted  
16 on any transfers. The one that is foreseen and foreseeable  
17 is the PSE and that's been addressed and the county is  
18 comfortable with that; is that correct, Mr. Peeples?

19 MR. PEEPLES: That's true. And I would just give  
20 you a bit of warning we will probably have at least the PSE  
21 one in our proposed SCA and I would be requesting that  
22 because that way we wouldn't have to come back to the  
23 Council at least for PSE.

24 We will want some language in there because our  
25 time line is going to be short and I know the public process

1 and we can assign it pretty quick, but we want to build in  
2 the language that the county -- would be developed with the  
3 county would really help on that assignment.

4 JUDGE TOREM: So then the overall projections to  
5 Council is if they're going to recommend approval of this  
6 project and that does occur that you would have essentially  
7 the ability to transfer seamlessly to PSE.

8 MR. PEEPLES: Correct.

9 JUDGE TOREM: Any other transfers would still be  
10 up to coming back for Council approval whether or not the  
11 county wades in or not?

12 MR. PEEPLES: Well, it depends on how the Council  
13 wishes to do that, the SCA. I think that if you analyse  
14 that has language that comes -- in fact, you have in front  
15 of you, you know, I think you -- I would suggest that you go  
16 back and look at the requirements for transfer and analyse  
17 that language and say, hey, does that solve our problem with  
18 this criteria that we can use for Puget because I think you  
19 may find that they are. And it may be even the approach you  
20 might take in the future. I will say at a minimum, we're  
21 going to have the option proposed in our SCA for the  
22 seamless transfer to Puget Sound Energy.

23 JUDGE TOREM: All right. And perhaps it would be  
24 helpful if Council is familiar with past issues that have  
25 come up with this that would be more complicated with that

1 being addressed in the post hearing brief as to why this  
2 particular language should be adopted not only for PSE but  
3 also for any future issues of transfer or assignment.

4 MR. PEEPLES: We could -- I guess I am trying to  
5 say at this time we would let the PSE one in there, you  
6 know, I think we need to justify any group of that kind.

7 I don't know if we will include the other, but at  
8 this point I would point out to the Council that you may for  
9 your own self want to review that and put it in because I  
10 think they're pretty workable --

11 JUDGE TOREM: Okay.

12 MR. PEEPLES: -- for a lot of Council purposes.

13 JUDGE TOREM: All right. Anything else on  
14 transfers or assignments?

15 MR. HURSON: Yes. From the county's perspective,  
16 just in the context of this, is the idea was that county  
17 would preapprove PSE? The rest of it is basically PSE  
18 decides to sell whenever. How is the county doing to deal  
19 with it or if for some reason the very, very unlikely chance  
20 that PSE doesn't themselves, the county needs a way of  
21 dealing with that particular issue.

22 As I understand the EFSEC process and you could  
23 have one of those -- one that the county doesn't need  
24 consent because the finances are okay and they going to post  
25 a bond, realize they would also have to probably go through

1 EFSEC to get the change in ownership, so we took notice of  
2 that, no county consent, because we're preapproved, and I  
3 would assume that if they wanted a transfer we could say,  
4 they don't need our consent unless they post a bond, feel  
5 free to go forward with the case, basically it's one less  
6 hoop to go through and have them seek permission from the  
7 county. I believe anytime that somebody just transfers an  
8 ownership you always go through a process of approval.

9 CHAIR LUCE: EFSEC has requirements, this is Jim  
10 Luce, Chair, requiring -- regarding transfers of licenses  
11 and site certificate agreements and many of the provisions  
12 in there regarding letters of credit, financial security,  
13 and otherwise look pretty familiar.

14 JUDGE TOREM: All right. Let's move on to the  
15 rest of 10.2 to 10.9. The only one that I wanted to raise  
16 was under 10.3 and 10.4 of the application of Washington law  
17 and I recognize that this sort of choice of law provision is  
18 pretty standard boilerplate in any contract, but I wanted to  
19 ask the county's interpretation as to whether or not this  
20 also is a -- perhaps just a note of preservation of any  
21 EFSEC jurisdiction which is statutory under 80.50 and also  
22 is -- doesn't directly refer to EFSEC regulations under  
23 Chapter 463 of the Washington Administrative Code, but those  
24 are adopted in the final with the authority of RCW 80.50, is  
25 that also what is intended with a reference to Washington



1 law in the severability provisions, Mr. Hurson?

2 MR. HURSON: Yes. The Washington law reference  
3 was to deal with that, county code, state statutes, all of  
4 the federal regulations.

5 The concern was to avoid obviously, if you get a  
6 corporation from Louisiana, we don't want to get into  
7 conflicts of law issues as far as whose regulations, or we  
8 have a bonding company out of the New Jersey, we don't want  
9 to have a concern of the choice of law for conflict issues.

10 So that was intended to speak to generic --  
11 recognizes EFSEC, the county code, GMA and the rest.

12 JUDGE TOREM: Okay, thank you. Any further  
13 comments from Councilmembers on that particular issue? We  
14 had discussed it a little bit last night and I want to see  
15 if that addresses the jurisdictional concerns that may have  
16 come up.

17 CHAIR LUCE: Just to follow up, Mr. Hurson, you  
18 recognize that we have had lots of discussions over many,  
19 many months, RCW 80.50 in its provisions regarding EFSEC's  
20 jurisdiction as part of this discretion on Washington law.

21 MR. HURSON: In terms of this meeting EFSEC  
22 standards; is that correct?

23 CHAIR LUCE: Yes.

24 MR. HURSON: I am not good at memorizing 80.50.

25 CHAIR LUCE: I haven't memorized it either.

1           MR. HURSON: Yes. It was intended to include the  
2 RCWs and the WACs.

3           CHAIR LUCE: Thanks.

4           JUDGE TOREM: Council, I think the rest of the  
5 agreement, the development agreement, the written notice,  
6 and the development agreement between the applicant and the  
7 county, speaks for themselves.

8           We've already addressed the tort liability and the  
9 decommissioning provisions of five million dollar in Section  
10 13 and the integration clause at Section 14 is again  
11 standard legal -- for any oral agreements that may be  
12 suggested on the side.

13           Is there any other questions about the development  
14 of agreement or its attachments before we take -- when we're  
15 done with questions, recess the land use hearing, give us  
16 over lunch to review this and discuss it and review the  
17 other proposed exhibits which are five, six, and seven, the  
18 ordinances that we just got handed, and then we would go on  
19 to the prehearing conference and hear from Counsel for the  
20 Environment and Mr. Peeples on the Fish and Wildlife  
21 settlement. So if there's any questions now on the  
22 development agreement, let's get those, before we recess the  
23 land use hearing itself.

24           I don't hear any other Councilmember questions, so  
25 I think it's appropriate at this time to see if there are

1 any public comments.

2 We have in the back a typical EFSEC sign up sheet  
3 and I was informed that there's nobody that has signed up  
4 for additional public comment as part of the land use  
5 hearing.

6 If there are any written comments, there is a  
7 comment form as well, that does need to be filled out and  
8 actually handed to Ms. Makarow if anybody wants to file  
9 those before the close of the land use hearing which will,  
10 when we reconvene, occur after the lunch hour as 1:15, we  
11 will reconvene.

12 And I would hope that in that time if there's  
13 additional Councilmember questions that we can take those  
14 and then have a vote as to whether or not to accept this  
15 settlement agreement and note the consistency under WAC  
16 463-26-090.

17 All right, no other Councilmember questions, we do  
18 have one person raising their hand back there, Jeff  
19 Slothower.

20 MR. SLOTHOWER: Yes, Jeff Slothower. Jeff  
21 Slothower on behalf of Mr. Lathrop. I just want to point  
22 out to the Council that there is a pending LUPA, land use  
23 petition act, petition that was filed on behalf of Mr.  
24 Lathrop challenging the fact that the portion of the project  
25 that we believe -- that require a conditional use permit

1 that those conditional use permits were not issued by the  
2 board of adjustment. I just wanted you to be aware that  
3 actually was pending at the present time.

4 JUDGE TOREM: All right. Councilmembers, any  
5 questions for Mr. Slothower about the pending lawsuit under  
6 LUPA?

7 MS. ADELSMAN: Can you describe the process they  
8 are in?

9 JUDGE TOREM: My understanding, Mr. Slothower,  
10 chime in if I am incorrect on this, is because this is a  
11 land use decision the only way to appeal that is through the  
12 land use petition act and, therefore, my understanding is  
13 about two or three weeks ago, or maybe less, there was a  
14 lawsuit filed by Mr. Lathrop because the board of  
15 adjustments was at a meeting that the county commissioners  
16 held in the course of their proceedings and then dismissed  
17 them essentially as not being essential to the decision  
18 making process, so they appeared but didn't actively  
19 participate aye or nay on the project, and its  
20 recommendation is part of development agreement and these  
21 ordinances.

22 And, Mr. Slothower, clarify this for me, because  
23 they did not actively participate and did not issue the  
24 conditional use permits which may be part of the standard  
25 process under county land use, he's filed an appeal to

1 challenge that.

2           It may be that if that is correct, Kittitas County  
3 Superior Court would remand that action back to the county  
4 for the board of adjustment to consider the matter and  
5 decide if they're going to issue those conditional use  
6 permits. What effect it might have on our proceedings  
7 again, I don't know.

8           Mr. Slothower could tell us what the potential  
9 impact is at this time if he wins that lawsuit and we can  
10 hear from that and then we can see what Mr. Hurson thinks of  
11 the impact if any on the development agreement.

12           Mr. Slothower?

13           MR. SLOTHOWER: Yes. The issue is that the board  
14 of -- the county commissioners determined that the board of  
15 adjustment did not have the authority for this particular  
16 application to hear and decide the conditional use permit,  
17 that's the issue.

18           I suspect that if the lawsuit is -- continues  
19 forward and if we prevail that the logical remedy would be  
20 for the court to remand the matter back to the board of  
21 adjustment for consideration of those limited aspects of the  
22 project of the project that require additional use permits.  
23 The only two are the county back plan and that is an action  
24 that prior to issuing the permit on the county's back plan  
25 will involve litigation in the county in a superior court

1 decision to be consistent with the action that the county  
2 commissioners took and there are certain offsetting  
3 substations that will also require conditional use permits.  
4 There isn't only two offsets of the project that would  
5 impacted and I suspect as I said the county land use  
6 agreement back to the board of adjustment for consideration  
7 of those portions of the project.

8 JUDGE TOREM: Thank you. Mr. Hurson, let me see  
9 if you concur if that were the case and Mr. Lathrop was  
10 successful in his lawsuit and remand occurred would that  
11 affect at all the declaration of consistency that we have  
12 got -- the certificate we got earlier today and would it  
13 affect the settlement agreement whatsoever with the  
14 development agreement between you and the county -- between  
15 you and the applicant?

16 MR. HURSON: Well, first of all, I don't think  
17 that it would be successful. I think what the commissioners  
18 did is they recognized that when we adopted the wind farm  
19 research overlay done in the process it was done in a  
20 consolidated process with the elected board and its  
21 decisions were related to a wind farm and it was not  
22 intended to have it piecemealed out on various other issues.  
23 They were all integral part of the process.

24 So the board determined that the code as written  
25 and intended precluded the usual PUD -- that the board of

1 adjustment because, for instance, the back plan would exceed  
2 mitigation measures related to the project itself. So you  
3 need to approve the back plan in order to do the mitigations  
4 under SEPA as part of the consolidated process, the comp  
5 plan, the building, and developments and development of the  
6 program. And those are all, I believe, related parts of the  
7 process. So we're comfortable and confident in that  
8 position that this was the appropriate way of dealing with  
9 it.

10 The challenge that's in effect or the action  
11 that's from the LUPA, I have had people ask this, you know,  
12 does this stop the process? No, it doesn't. There was no  
13 request or attempt to stop the county from completing its  
14 process. I don't believe it would impact the consistency  
15 certification that we have provided to the board.

16 JUDGE TOREM: Mr. Slothower, a question back to  
17 you, if the -- if the lawsuit was successful, as part of  
18 that, have you asked for -- I am not sure LUPA has any  
19 provisions to allow it -- a stay of the EFSEC proceedings or  
20 county's adoption of development agreement? I think your  
21 lawsuit was filed prior to last week, so did you ask for  
22 such remedy?

23 MR. SLOTHOWER: We didn't. LUPA allows for a stay  
24 in certain situations. We did not ask for one and do not  
25 intend to.

1           JUDGE TOREM: All right. So I would think that  
2 that would answer most of what the council's concern might  
3 be about proceedings while that lawsuit is still pending.

4           All right, any other questions about the  
5 development agreement itself, Councilmembers?

6           Council for the Environment, any comment on the  
7 remainder that we have discussed since the break?

8           MR. LANE: No.

9           JUDGE TOREM: All right. I see from the Economic  
10 and Development Group no comment as well. Then I would say  
11 that, unless there are objections, we will move Exhibit 4  
12 into the record and admit the development agreement and all  
13 of its eight attached exhibits.

14           Any objection to admitting Exhibit 4 to the  
15 record?

16           And I know, Council, that you haven't yet looked  
17 at Ordinance No. 2005-08, 2005-09 and 2005-11 which are  
18 Exhibits 5, 6, and 7, but I think it would be appropriate  
19 for us move them into the record at this point so we don't  
20 forget to do it later.

21           Exhibits 5, 6, and 7, any objections?

22           All right, seeing none, they are part of the  
23 record as well. We will hold a spot for Exhibit 8, when we  
24 get done for Mr. McMahan to provide the mark up document to  
25 Exhibit 4, subparagraph -- Subsection D, SEPA mitigation, we



1 will get that after the fact.

2 All right, any public comment further on this land  
3 use hearing?

4 All right, seeing none, then the land use hearing  
5 shall be recessed it's now 11:40 a.m. briefly to allow the  
6 court reporter to switch files.

7 (Whereupon, the Land Use Hearing  
8 Recessed at 11:40 a.m. and reconvened at 1:22  
9 p.m.)

10 JUDGE TOREM: We're now reopening or reconvening  
11 the land use hearing of Wild Horse Wind Power Project at  
12 about 1:22 p.m. on March 7, 2005.

13 The Council has before it Exhibits 1 through 7,  
14 which have been admitted into the record and a proposed mark  
15 up copy of Exhibit D to the development agreement, that is  
16 proposed Exhibit 8.

17 Is there any objection to admitting Exhibit 8 into  
18 the record?

19 Seeing none, Exhibit 8 will be moved into the  
20 record.

21 And now, the Council can look in its entirety at  
22 two different items here this afternoon. First, the county  
23 certification letter, Exhibit 1, and then second the  
24 settlement agreement which is supported by Exhibits 2  
25 through 8.

1           So I would like to entertain any discussion that  
2 might be necessary in just a moment with regard to the  
3 certification and the settlement agreement.

4           The Council has made a couple comments that they  
5 wanted me to convey the parties to this set of agreements.

6           First off, they wanted to make the observation,  
7 obvious as it maybe, that this is three party agreement, but  
8 that this is simply the county and the applicant entering  
9 into this development agreement and the stipulation of  
10 certification and that EFSEC again is not a party to the  
11 agreement and is not binding on the Council except as a  
12 floor for where to start our mitigation measures and where  
13 to start the requirements.

14           So the Council just wants to note for the record,  
15 I think it was noted in bits and pieces throughout the  
16 morning, that EFSEC still has the final jurisdiction  
17 approval on the project and final say on what level of any  
18 mitigation that might be required, any other requirements on  
19 the project. It is not that they are thinking of certain  
20 requirements at this time, but simply they might note that  
21 the applicant and county have stricter requirements that  
22 would be put in place and is our floor.

23           And, again, EFSEC is not a signatory to this even  
24 after they voted to approve the settlement agreement between  
25 the two parties and allow the withdrawal of the county as an

1 intervener in this process.

2 So, with that said, is there a motion regarding  
3 Exhibit 1, the county site certification?

4 CHAIR LUCE: So moved.

5 JUDGE TOREM: What are you moving, Chairman Luce?

6 CHAIR LUCE: I am moving for acceptance of  
7 certification.

8 JUDGE TOREM: All right. I will take it that will  
9 be in accordance with Washington Administrative Code  
10 463-26-090.

11 As a reminder, this is indicating that certificate  
12 of land use consistency as regarded as prima fascia prove of  
13 consistency and the only question for discussion after the  
14 motion will be whether or not any contrary demonstration has  
15 been made by anyone present at the hearing.

16 That being the motion there was a second from?

17 MS. ADELSMAN: From me.

18 JUDGE TOREM: Councilmember Adelsman. Council,  
19 any discussion, Councilmembers?

20 Did anyone hear anything that would lead you to  
21 believe that there was a contrary demonstration as to the  
22 certification of land use consistency in Exhibit 1?

23 Okay, again, getting nods of negative and then I  
24 will entertain any further discussion.

25 All right, that's closed.

1           A vote then in favor of this motion would approve  
2 Exhibit 1, the county certification, as prima fascia  
3 evidence and accept land use consistency. That would be a  
4 reversal of our previous vote where we found land use  
5 inconsistencies.

6           So today there would be a change in the Council's  
7 position on what was presented today and of course those  
8 documents that filtered in last Friday.

9           All those in favor of approving the motion?

10          Any opposed?

11          All right, Exhibit 1 the land use certification is  
12 approved.

13          And now the settlement agreement will move on to  
14 the Exhibits through 8, all of the supporting documents.

15          Is there a motion to approve that settlement  
16 agreement between the applicant and the county?

17          CHAIR LUCE: So moved.

18          MS. ADELSMAN: Second.

19          JUDGE TOREM: All right. It's been moved by the  
20 chair and seconded by Councilmember Adelsman.

21          Any discussion on the settlement agreement  
22 necessary at this point?

23          All right, hearing none, I will ask the question  
24 as to all those in favor of approval of the settlement  
25 agreement between Kittitas County and the applicant say aye.

1 Councilmember Ifie, are you --

2 MR. IFIE: I said aye.

3 JUDGE TOREM: We got you that time.

4 Any opposed?

5 All right, so it appears then, Mr. Peeples and Mr.  
6 Hurson, everything has been approved unanimously as to the  
7 site certification and the settlement agreement and its  
8 parts.

9 Thank you for your presentation this morning.

10 Is there any further business with the land use  
11 hearing? Is there any other public comment on these matters  
12 that have now been approved?

13 All right, seeing none, the land use hearing is  
14 adjourned and with a fact finding of consistency.

15 We will take a brief five minute recess and get  
16 ready to open the adjudication in this matter.

17 \* \* \* \* \*

18 (Whereupon, the land use hearing  
19 adjourned at 1:45 p.m.)

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IN RE: APPLICATION NO. 2004-01  
WIND RIDGE POWER PARTNERS, LLC & WILD HORSE WIND POWER  
PROJECT

A F F I D A V I T

I, Roger G. Flygare, CCR, do hereby certify that the  
foregoing transcript prepared under my direction is a full  
and complete transcript of proceedings held on March 7,  
2005, at the hour of 9:15 a.m., at Ellensburg, Washington.

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ROGER G. FLYGARE, CSR  
CCR No. 2248

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19	No. 8	60	Marked Up Copy of Exhibit D			Not Acted Upon

20

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