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5 BEFORE THE STATE OF WASHINGTON
6 ENERGY FACILITY SITE EVALUATION COUNCIL
7

8 In the Matter of the Application of:

9 Scout Clean Energy, LLC, for
10 Horse Heaven Wind Farm, LLC,
11 Applicant

Docket No. EF-210011

CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA NATION'S
PREHEARING BRIEF

12
13 **I. Introduction**

14 The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) respectfully
15 submits this Prehearing Brief to the Energy Facility Site Evaluation Council (“EFSEC”) to highlight
16 Yakama Nation’s concerns regarding the Horse Heaven Hills Wind and Solar Farm Project’s
17 (“Project”) impacts.¹ Yakama Nation intervened in this proceeding in opposition to the Project due
18 to Scout Clean Energy, LLC’s refusal to avoid or adequately mitigate the Project’s negative impacts
19 on Yakama Nation’s Treaty-reserved time immemorial cultural and natural resources. As EFSEC
20 will hear, these Treaty-reserved resources are both spiritual and physical; in euro-centric legal terms:
21 cultural and environmental; they are interwoven together. The damage that this Project will cause to
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24 ¹ Per Judge Torem’s direction, Yakama Nation understands that the purpose of the prehearing
25 briefs is to provide a summary of each party’s perspective and position through a written opening
26 statement, with the expectation that more granular legal arguments, citations to precedent, and
citations to supporting evidence should be saved for the post-hearing briefs. Yakama Nation
submits this Prehearing Brief without waiving its rights to advocate further regarding all
potential impacts and considerations related to the Project.

1 this spiritual and physical place, along with individual wildlife and environmental resources, is
2 grounds to deny the updated application for site certification submitted by Scout Clean Energy, LLC
3 (“Applicant”).

4 **II. Legal Standard**

5 The Energy Facility Site Locations Act (“EFSLA”) requires EFSEC, when reviewing any
6 application, to encourage development that provides “abundant clean energy at reasonable costs” but
7 still “preserve[s] and protect[s] the quality of the environment . . . enhance[s] the public’s
8 opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources . . .
9 pursue[s] beneficial changes in the environment; and [] promote[s] environmental justice for
10 overburdened communities.” RCW 80.50.010(2)-(4). This balancing of legislative priorities
11 requires EFSEC to examine each individual project and weigh the potential new and affordable
12 renewable energy against the potential impacts to the area and environment where the project is
13 developed. To evaluate whether a project meets these legislative policy goals, EFSEC set forth
14 detailed application criteria designed to “provide the council with information regarding the
15 applicant, the proposed project design and features, the natural environment, and the built
16 environment.” WAC 463-60-010; *see generally* WAC Chapter 463-60.

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19 Before EFSEC can make its recommendation to the Governor, the State Environmental
20 Policy Act (“SEPA”) requires EFSEC to engage in a deliberative analysis of the Project’s
21 environmental impacts; the two acts work together to provide direction to EFSEC in its analysis
22 of the Project’s impacts. When preparation of a full environmental impact statement (“EIS”) is
23 appropriate—as is the case here—EFSEC must prepare an EIS that provides impartial discussion
24 of significant environmental impacts and informs both EFSEC and the public of reasonable
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1 alternatives, including mitigation measures, that would avoid or minimize adverse impacts or
2 enhance environmental quality. In carrying out its analysis under SEPA, EFSEC is not required
3 to take the information provided by the Applicant at face value if that information is incomplete,
4 unsupported, or directly contradicted by other reliable information and evidence. As the SEPA
5 responsible official, EFSEC is ultimately responsible for ensuring a proper environmental impact
6 review for the Project, even though the final permitting authority is vested in the Governor under
7 EFSLA. The information required in each application under WAC 463-60 is solely a starting point
8 for the thorough environmental impact analysis required by both EFSLA and SEPA.
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10 **III. Applicant's Limited Proposal on Project Scope**

11 Applicant has artificially limited the scope of project alternatives to either the full project or
12 no project at all. These manufactured restrictions on the scope of this proposed Project are
13 inconsistent with EFSEC's holistic approach to siting and permitting projects, and forces the parties
14 here to address whether the full Project should be permitted without any possible alternatives. It is
15 important to note that Yakama Nation's opposition to the Project *as it is currently designed* should
16 not be interpreted as opposition from Yakama Nation to *any* renewable energy project development
17 in Eastern Washington. Yakama Nation supports the development of responsible renewable energy
18 projects. Responsible development of new renewable energy projects, including the size, scale and
19 components of each project must be informed by the project's impacts.
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21 Washington law similarly requires a deliberative approach to the permitting of new energy
22 development projects. While Yakama Nation has publicly voiced its general concerns with the lack
23 of comprehensive planning efforts to take a holistic approach to siting and permitting of new projects
24 within Washington State, it understands that EFSEC's process here is limited to the legislative intent
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1 and procedural requirements of EFSLA and SEPA. As discussed above, these two acts work in
2 tandem to ensure that EFSEC can adequately assess all potential impacts of a proposed project,
3 including different alternative designs that may impact the balancing of legislative priorities that
4 EFSEC is required to engage in under RCW 80.50.010.

5 This Project has been proposed without any reasonable alternative designs for review or
6 analysis. During his deposition, Applicant’s representative Dave Kobus emphasized his company’s
7 purpose in building out the Project to the maximum extent possible. The Applicant has put EFSEC
8 and the parties responding to the application in a difficult spot by removing the ability to engage in a
9 deliberative approach that might allow for constructive dialogue regarding various alternative designs
10 which might be better able to achieve the balance required in RCW 80.50.010. The result is a draft
11 environmental impact statement (“DEIS”) devoid of any reasonable alternative designs, based upon
12 the justification that no other design would be able to generate the nameplate capacity “required” by
13 the Applicant². The Applicant – not the other parties to this adjudication – has insisted on an “all or
14 nothing” approach. Due to the Project’s significant negative impacts described below and further
15 identified through testimony and post-hearing briefing, EFSEC should choose the latter option.
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18 **IV. Impacts to Traditional Cultural Places**

19 The Project will have devastating impacts on numerous Yakama Nation Traditional
20 Cultural Properties (“TCPs”). These impacts are discussed through testimony submitted by
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23 ² As instructed by Judge Torem on page 6 of his June 2, 2023 *Order Denying the Parties’*
24 *Motions to Continue/Stay Adjudicative Proceedings Pending Issuance of Final Environmental*
25 *Impacts Statement*, Yakama Nation cites to the DEIS as the only available SEPA analysis at this
26 time and does not waive any arguments regarding the sufficiency of the DEIS, EFSEC’s SEPA
review, EFSEC’s decision to proceed with the adjudicative hearing in the absence of a final
environmental impact statement, or the sufficiency of the final environmental impact statement
once it is published.

1 Yakama Nation members themselves and a summary report from Archaeologist Jessica Lally.
2 While the nature of the cultural resources at issue in this adjudication are extremely sensitive, this
3 information has been provided to EFSEC in order to obtain protection of Yakama Nation's cultural
4 teachings and way of life. These TCPs are also protected by the sovereign and inherent rights
5 reserved by Yakama Nation in the Treaty of 1855 (12 Stat. 951). It cannot be emphasized enough
6 how precious and critically important the Horse Heaven Hills and surrounding geographic features,
7 together with the wildlife and other environmental elements, continue to be to Yakama Nation and
8 its Members.
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10 Due to the importance of this area, Yakama Nation has been advocating for protection of
11 its TCPs in this area well before the Applicant applied to EFSEC. Several TCPs are imperiled by
12 this Project, one of which spans the Project boundaries onto federal lands, have been documented
13 in a formal study commissioned by United States Bureau of Land Management. Yakama Nation
14 attempted to engage with the Applicant prior to and after its submission of the pending
15 application. As Yakama Nation's Chairman stated through public comment regarding the DEIS,
16 Yakama Nation simply seeks protection, preservation, and perpetuation of these resources.
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18 The Project's direct harm to this complex and irreplaceable TCP landscape cannot be
19 mitigated. Legendary and Monumental sites will be forever modified by the installation of the
20 Project's infrastructure within critical viewsheds. The oral traditions associated with these sites
21 are not simply stories passed down through each new generation, these are foundational origin
22 stories that maintain Yakama Members' unique tie to this sacred area. The Legendary,
23 Monumental, and Ceremonial Sites within the Project's zone of influence are spiritual resources
24 of a living culture that cannot be relocated. Along with the traditional use and food gathering
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1 resources within the Project's vicinity, the sites sustain Yakama Members' way of life. There is
2 no mitigation for loss or damage to these resources.

3 There is also no evidence in the record that the Project was designed to avoid or minimize
4 impacts to the TCPs identified by Yakama Nation. While it is true that some impacts to specific
5 TCPs are unavoidable for any large-scale industrial wind development in the Horse Heaven Hills,
6 there are many overlapping impacts discussed in Archaeologist Jessica Lally's TCP Report that
7 could be minimized through a thoughtful redesign process. That process will only occur if EFSEC
8 holds the Applicant accountable to take reasonable efforts to avoid or minimize the Project's TCP
9 impacts on the front end.
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11 The Project should be denied based upon its harmful and wide-reaching impacts to Yakama
12 Nation's TCPs. These sacred and Treaty-reserved cultural resources cannot be replaced or
13 substituted. The currently designed Project's impacts cannot be mitigated. Both the written
14 testimony already submitted, and the supplemental testimony to be provided during the
15 adjudication hearing, makes the critical importance of protecting these TCPs clear. While some
16 impacts could be lessened through meaningful design alternatives, none are available to Yakama
17 Nation or EFSEC at this time for review and analysis. The legislative policies of EFSLA require
18 EFSEC to not only consider the Project's detrimental impacts to the environment in general, but
19 specifically require EFSEC to encourage development that promotes "environmental justice for
20 overburdened communities." By definition, Yakama Nation is one of those overburdened
21 communities. *See* RCW 70A.02.010(11); RCW 10.405.140. The Project creates new environmental
22 injustices on top of those already endured by Yakama Nation by permanently damaging Yakama
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1 Nation's sacred Treaty-reserved resources in the Horse Heaven Hills. The legislative mandate to
2 EFSEC on this issue is clear: EFSEC should deny the Project.

3 **V. Impacts to the Resident Endangered Ferruginous Hawk Population**

4 The Project will have impermissible near- and long-term impacts to the Ferruginous
5 Hawk's breeding range. The Ferruginous Hawk, along with other wildlife species that are found
6 today and historically in the Project area, is a Treaty-reserved cultural and wildlife resource. The
7 Ferruginous Hawk was listed as endangered under WAC 220-610-010 following a comprehensive
8 status review by the Washington Department of Fish and Wildlife ("WDFW") that documented
9 the alarming decline of this avian species. In stark contrast to this dire picture and best available
10 science, a significant percentage of the Project's wind turbines are sited within the sixteen
11 identified nesting territories of the endangered Ferruginous Hawk species. Applicant relies upon
12 outdated formal guidance, and short-term monitoring proposals, as justification to ignore the
13 scientifically-sound recommendations made by WDFW regarding the Project's design.

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16 Based upon best available science, WDFW's leading expert on the Ferruginous Hawk,
17 James Watson, has made clear recommendations against the siting of any Project elements within
18 core use areas. These core use areas take into account many factors, including but not limited to,
19 the breeding pair's range fidelity, foraging needs, and susceptibility to anthropogenic impacts from
20 new development. WDFW's recommendations are not the ideal conditions for recovery of this
21 endangered species. Rather, they represent a compromise between the regional need for new
22 energy development and WDFW's overall mission to conserve and protect Washington State's
23 wildlife. In other words, the existing wildlife and energy compromise by the State's leading
24 wildlife management agency does not support the development of this Project.

1 In order to comply with EFSLA, it is critical for EFSEC to understand WDFW's
2 perspective regarding the need to avoid siting the Project's wind turbines within identified
3 Ferruginous Hawk core use areas. No other entity has the same depth of expertise on this topic
4 combined with the perspective of conservation. WDFW's expert biologists are actively working
5 to update formal guidance documents by incorporating best available science that is already
6 available to reply upon. EFSEC needs to take WDFW's expertise and updated research into
7 account in order to determine if the Project will ". . . preserve and protect the quality of the
8 environment . . . enhance the public's opportunity to enjoy the esthetic and recreational benefits of
9 the air, water and land resources [and] pursue beneficial changes in the environment. . . ." See
10 RCW 80.50.010(2)-(4).
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12 Even without the forthcoming formal guidance, there is sufficient science to show that the
13 Project will negatively impact recovery efforts for the endangered Ferruginous Hawks. Due to
14 EFSEC's disappointing decision to prohibit WDFW's experts from submitting direct testimony in
15 the adjudication, Yakama Nation has submitted into the record depositions and supporting
16 literature that it will discuss further during the hearing and through additional briefing. These
17 depositions and scholarly materials directly support Yakama Nation biologist Mark Nuetzmann's
18 own testimony regarding the Project's unacceptable impacts to the continued viability of the
19 endangered Ferruginous Hawk. Based on the impacts of the Project to this endangered species,
20 the Project permit should be denied.
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22 **VI. Impacts to Reintroduced Pronghorn Population**

23 A century after the extirpation of Pronghorn from the Columbia Plateau by euro-American
24 settlers, Yakama Nation is actively working, in partnership with WDFW, to reintroduce Pronghorn
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1 to its native range. Yakama Nation and WDFW have provided data that clearly shows use of the
2 Project area by members of the reintroduced Pronghorn population. As Mr. Ganuelas testified,
3 Yakama Nation's Wildlife Program is still collecting the necessary data to better evaluate the
4 reintroduced population's range and habitat needs, as well as the impacts of existing development
5 on the Pronghorn population.

6 Because the Pronghorn reintroduction program is still in a nascent phase, the outlook for
7 the Pronghorn population should be understood to be easily threatened by new large-scale
8 development when the impacts of that development are not thoroughly investigated in order to
9 ensure adequate mitigation. In this case, Yakama Nation is concerned regarding the lack of
10 analysis of the Project's potential impacts to the reintroduced Pronghorn population.

11 More information and analysis regarding impacts to Pronghorn is necessary before the
12 Project can move forward. The DEIS clearly states that EFSEC has not obtained sufficient
13 information to analyze the Project's impacts on Pronghorn. Despite being advised by WDFW
14 about the need to obtain information from Yakama Nation regarding the reintroduction program,
15 the Applicant declined to do so. Through the submission of testimony for this adjudication,
16 Yakama Nation has shared information that clearly shows use of the Project area by the Pronghorn,
17 while also highlighting the need for further information. The Project's potential impacts cannot
18 be determined without further analysis.

19 In the absence of sufficient information and analysis, the Applicant asks EFSEC to simply
20 ignore the Project's impacts on this recently-reintroduced species. There is no proposed mitigation
21 for the Project's potential impacts to the Pronghorn Antelope, despite recent evidence of multi-
22 year use of the Project area by the species. Rather than presenting evidence that the Project will
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1 have no impact on the Pronghorn population that currently use the Project area, the Applicant asks
2 EFSEC to ignore any potential impacts due to the nascent stage of the reintroduced population.

3 EFSEC should reject Applicant's invitation to ignore the Project's potential impacts on the
4 Pronghorn. EFSLA tasks EFSEC with balancing the increasing demands for energy facility
5 development with "broad interests of the public," including the interest of the public to "preserve
6 and protect the quality of the environment" as well as "pursue beneficial changes in the
7 environment; and to promote environmental justice for overburdened communities." RCW
8 80.50.010. In addition, SEPA requires EFSEC to analyze the Project's impacts to wildlife through
9 a "detailed statement" on the Project's environmental impacts, including impacts that cannot be
10 avoided. RCW 43.21C.030(c). In order to fulfill these legislative mandates, EFSEC needs to
11 understand the Project's impacts to all wildlife species that use the Project area.

13 **VII. Unknown Impacts to Water Resources**

14 To date, Applicant has not secured a viable and legal water source for the Project. Although
15 WAC 463-60-165(2) required Applicant to provide evidence of a legal water source for the Project,
16 EFSEC accepted the application without the documentation required by its own regulations.
17 Instead, it relied upon Applicant's representation, without proof, that it would be able to source
18 the Project's water needs from the City of Kennewick. Applicant has since amended its application
19 to state that it will source its water from the Port of Walla Walla, but still does not have the
20 documentation required by WAC or any actual contract demonstrating its ability to source the
21 Project's construction *and* operational water from the Port of Walla Walla. Most recently,
22 Applicant has tried to point to a land use license with DNR as proof of a legal water source for the
23 Project. However, by its plain text that land use license provides Applicant with nothing more
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1 than the opportunity to test a well that does not have a legal water right associated with it. None
2 of the materials provided to EFSEC in the original or amended application demonstrates a legal
3 viable water source for the Project.

4 The Project's potential water resource impacts are unknown at this time. The DEIS
5 contemplates and analyzes the Project's water resource impacts using outdated information from
6 the original application. Even if Applicant is able to find legally available water for the Project in
7 the coming months, neither the parties nor EFSEC staff that are responsible for completing the
8 final environmental impact statement have that information now in order to determine the impacts
9 of an eventually-secured water source. For example, even if the Port of Walla Walla can legally
10 supply the Project's construction water, no environmental analysis has been completed regarding
11 the potential impacts of trucking that volume of water all the way to the Project site.³ EFSEC
12 simply does not have enough information at this time to properly analyze the Project's water
13 resource impacts.
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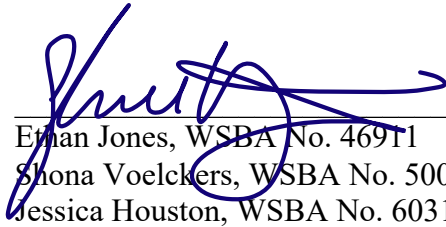
15
16 The impacts of the Project cannot be adequately considered until Scout Clean Energy has
17 secured and disclosed legally and physically available water to support the Project's full
18 construction and operation needs. Based on this lack of disclosure, the Project permit should be
19 denied.

20 **VIII. Conclusion**

21 For the foregoing reasons, and as will be further established through the development of
22 witness testimony and legal briefing, EFSEC should recommend that the Governor deny Scout
23 Clean Energy, LLC's application for the Project.
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25 ³ Yakama Nation reserves all arguments regarding the ability or inability of the Port of Walla
26 Walla to deliver water outside of its legally restricted water service area.

1 Dated this 9th day of August, 2023.

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3 Ethan Jones, WSBA No. 46911
4 Shona Voelckers, WSBA No. 50068
5 Jessica Houston, WSBA No. 60319
6 YAKAMA NATION OFFICE OF LEGAL COUNSEL
7 P.O. Box 151 / 401 Fort Road
8 Toppenish, WA 98948
9 Telephone: (509) 865-7268
10 ethan@yakamanation-olc.org
11 shona@yakamanation-olc.org
12 jessica@yakamanation-olc.org

13 *Counsel for the Confederated Tribes and Bands*
14 *of the Yakama Nation*

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CERTIFICATE OF SERVICE

I, Shona Voelckers, certify that on August 9, 2023 I electronically filed the foregoing document and all attachments with the Energy Facility Site Evaluation Council (“EFSEC”) at Adjudication@efsec.wa.gov.

I further certify that on August 9, 2023 I served the same upon all parties of record and identified EFSEC staff in this proceeding by electronic mail as follows:

Party	Counsel of Record
Scout Clean Energy, LLC	Tim.Mcmahan@stoel.com Ariel.Stavitsky@stoel.com Emily.Schimelpfenig@stoel.com Willi.Perlmutter@stoel.com
Benton County	Kharper@mjbe.com Zfoster@mjbe.com Julie@mjbe.com
Counsel for the Environment	Sarah.Reyneveld@atg.wa.gov CEPSeaEF@atg.wa.gov Julie.Dolloff@atg.wa.gov
Tri-Cities C.A.R.E.S	Rick@aramburulaw.com Aramburulaw@gmail.com
EFSEC	AdamTorem@writeme.com Jonathan.Thompson@atg.wa.gov Lisa.Masengale@efsec.wa.gov Sonia.Bumpus@efsec.wa.gov Andrea.Grantham@efsec.wa.gov Alex.Shiley@efsec.wa.gov

Dated this 9th day of August, 2023.



Shona Voelckers, WSBA No. 50068
Counsel for Yakama Nation