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

MOTION TO SUPPLEMENT THE RECORD

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13 **I. Introduction**

14 The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) respectfully  
15 moves the Energy Facility Site Evaluation Council (“EFSEC”) to supplement the record with the  
16 following Washington Department of Fish and Wildlife (“WDFW”) employee deposition transcripts  
17 in the above-captioned proceeding: Michael Ritter’s Deposition taken on May 31, 2023 (“Attachment  
18 A”); James Watson’s Deposition taken on July 14, 2023 (“Attachment B”); and Jason Fidorra’s  
19 Deposition taken on July 20, 2023 (“Attachment C”). Attachments A-C are directly relevant to  
20 EFSEC’s deliberation in this adjudication because they address the proposed Horse Heaven Hills  
21 Wind and Solar Farm Project’s (“Project”) impacts on wildlife and habitat. Due to EFSEC’s  
22 interpretation of its own regulations and existing contract with WDFW, Yakama Nation was  
23 prevented from both informally gathering information from WDFW regarding the Project’s potential  
24 impacts and formally calling WDFW employees as witnesses in this proceeding. EFSEC’s  
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1 interpretation of its regulations and contract with WDFW presents an exceptional circumstance that  
2 prevents Yakama Nation from procuring the employees to testify directly. Washington Superior Court  
3 Rule (“CR”) 32(D)-(E) applies to this exact situation. The interests of justice also support this Motion.

## 4 II. Facts

5 WDFW publicly expressed concern about the impact of the Project on wildlife and wildlife  
6 habitat in the State. Attachment A, Exhibits 1-2, 6-7. After Yakama Nation was granted intervenor  
7 status to this proceeding, Yakama Nation attempted to communicate with WDFW about the Project.  
8 Declaration of Shona Voelckers in Support of Motion to Supplement the Record (“Voelckers Decl.”),  
9 ¶ 5. EFSEC has a contract with Mr. Ritter in his capacity as a WDFW employee to assist in the  
10 Project’s State Environmental Policy Act (“SEPA) analyses. *Id.* at Exhibit 1. EFSEC has interpreted  
11 the contractual limitations upon Mr. Ritter’s participation in this proceeding to extend to *any*  
12 WDFW employee that Mr. Ritter discussed the project with. *Id.* at ¶¶ 6-7. EFSEC has also  
13 interpreted the restrictions in WAC 463-30-200(5) to apply to any WDFW employees that Mr.  
14 Ritter discussed the project with. *Id.* at ¶ 8.

15 After initial attempts to communicate with WDFW regarding the Project, counsel for Yakama  
16 Nation, WDFW and EFSEC conferred regarding the parameters of WDFW’s involvement in the  
17 adjudication. Based upon EFSEC’s interpretation of its regulations and the contract attached as  
18 Exhibit 1 to Ms. Voelckers’ Declaration, WDFW declined to engage in further informal discussions  
19 with Yakama Nation regarding the Project. Voelckers Decl. at ¶¶ 5-8. Yakama Nation then issued a  
20 formal subpoena request for both document production and deposition testimony for Mr. Ritter.  
21 Voelckers Decl. at ¶ 9, Exhibit 2. When Yakama Nation formally requested direct testimony from  
22 Mr. Ritter, WDFW again declined to make him available for direct testimony. Voelckers Decl. at ¶  
23 10, Exhibit 3. Yakama Nation’s subpoena was amended to reflect EFSEC’s request for certain  
24 sideboards on questions asked by Counsel for Yakama Nation during Mr. Ritter’s deposition.  
25 Voelckers Decl. at ¶ 11, Exhibit 4. Yakama Nation scheduled the depositions for WDFW biologists  
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1 Jason Fidorra and James Watson based upon Mr. Ritter’s identification of them as individuals with  
2 knowledge and perspectives that are key to understanding WDFW’s concerns with the Project.  
3 Voelckers Decl. at ¶¶ 12-13, Exhibits 5-6.

4 Yakama Nation deposed Michael Ritter on May 31, 2023, James Watson on July 14, 2023,  
5 and Jason Fidorra on July 20, 2023. Attachments A-C. Counsel for all parties were present or had the  
6 opportunity to be present at the three depositions. Voelckers Decl. at ¶ 14. Counsel for Scout Clean  
7 Energy LLC attended every deposition and was able to ask questions of each deponent. *Id.* Yakama  
8 Nation now moves EFSEC to supplement the record with Mr. Ritter’s, Mr. Watson’s, and Mr.  
9 Fidorra’s full deposition transcripts.

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11 **III. Argument in Support**

12 EFSEC proceedings are governed by Washington Administrative Code (“WAC”) Chapter  
13 463-30. WAC 463-30-190 permits discovery by the presiding officer which “shall be conducted in  
14 accordance with [Revised Code of Washington (“RCW”)] 34.05.446.” Pursuant to RCW  
15 34.05.446(3) and not precluding other agency rules, “the presiding officer may decide whether to  
16 permit the taking of depositions, the requesting of admissions, and all other procedures authorized  
17 by rules 26 through 36 of the superior court civil rules.” Furthermore, “evidence, including hearsay  
18 evidence, is admissible if in the judgment of the presiding officer,” and with reference to the  
19 Washington Rules of Evidence as guidelines for evidentiary rulings, “[the evidence] is the kind  
20 of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their  
21 affairs.” RCW 34.05.452.

22  
23 Under the Washington Rules of Evidence, “all relevant evidence is admissible,” if not  
24 otherwise prohibited. ER 402. Relevant evidence “means evidence having any tendency to make  
25 the existence of any fact that is of consequence to the determination of the action more probable  
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1 or less probable than it would be without the evidence.” ER 401. Under the Superior Court Civil  
2 Rules, the deposition of a witness is admissible, regardless of whether they are a party, when “the  
3 party offering the deposition has been unable to procure the attendance of the witness by  
4 subpoena,” or “upon application and notice, that such exceptional circumstances exist as to make  
5 it desirable, in the interest of justice and with due regard to the importance of presenting the  
6 testimony of witnesses orally. . . to allow the deposition to be used.” CR 32(a)(3) (D-E). When  
7 this standard is satisfied, a deposition transcript can be “applied as though the witness were then  
8 present and testifying, [and] may be used against any party who was present or represented at the  
9 taking of the deposition or who had reasonable notice thereof.” CR 32(a).  
10

11 Here, the deposition transcripts of Mr. Ritter, Mr. Watson, and Mr. Fidorra should be admitted  
12 under CR 32(a)(3) because the evidence is relevant to this proceeding, and Yakama Nation has been  
13 prevented by EFSEC’s interpretation of its own rules and contractual relationship with WDFW from  
14 calling WDFW experts as witnesses in the proceeding. The transcripts are relevant because Mr. Ritter,  
15 Mr. Watson, and Mr. Fidorra are qualified witnesses with extensive knowledge of the avian and  
16 wildlife species and habitat throughout the Project footprint, and the Project’s impact on these  
17 resources is squarely at issue between the parties. Yakama Nation took steps to call Mr. Ritter, Mr.  
18 Watson, and Mr. Fidorra directly as witnesses in this proceeding, but were prevented from doing so.  
19 As a compromise, EFSEC’s legal counsel and WDFW’s legal counsel agreed to allow the withheld-  
20 witnesses to sit for depositions with a narrow scope that excluded conversation of the separate SEPA  
21 administrative process. *See* Voelckers Decl. at ¶¶ 11-13. All parties hereto either participated or had  
22 prior notice and the opportunity to participate in each of the depositions. *Id.* at ¶ 14. Each element of  
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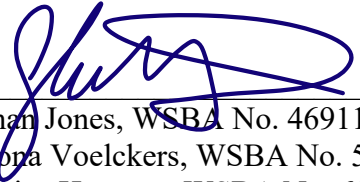
1 CR 32(a)(3) is satisfied with respect to Mr. Ritter’s, Mr. Watson’s, and Mr. Fidorra’s deposition  
2 transcripts, and they should be admitted into the record of this proceeding.

3 Admitting the deposition transcripts also serves the interests of justice. EFSEC contracted  
4 with state employees who have critically important knowledge about the Project at issue in this  
5 proceeding, and then took the position that its contract limited them from freely sharing their well-  
6 informed perspectives. While deposition transcripts cannot replace the value of having Mr. Ritter, Mr.  
7 Watson, and Mr. Fidorra testify, the transcripts serve as a best alternative to their testimony and,  
8 respectfully, ensure that the parties challenging this project are not further prejudiced by EFSEC’s  
9 rules and contracting decisions. These withheld-witnesses must be heard on this Project. In the interest  
10 of justice, Yakama Nation requests that EFSEC supplement the adjudication record with the WDFW  
11 experts’ depositions in Attachments A-C.  
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13 **IV. Conclusion**

14 For the foregoing reasons, and consistent with Washington State law, Yakama Nation  
15 respectfully requests that EFSEC supplement the record with Attachments A-C.  
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17 Dated this 31st day of July, 2023.

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**CERTIFICATE OF SERVICE**

I, Shona Voelckers, certify that on July 31, 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 July 31, 2023 I served the same upon all parties of record and identified EFSEC staff in this proceeding by electronic mail as follows:

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Dated this 31st day of July, 2023.

  
\_\_\_\_\_  
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