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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Application of:

Scout Clean Energy, LLC, for
Horse Heaven Wind Farm, LLC,
Applicant

Docket No. EF-210011

CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA NATION'S POST
HEARING BRIEF

ORAL ARGUMENT REQUESTED

REDACTED VERSION

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1 **I. INTRODUCTION**

2 On March 10, 1957, Yakama Members stood high on the cliffs of the Columbia River
3 Gorge above their traditional fishery at Celilo Falls, looking down upon the rocks where their
4 ancestors had managed the most successful fishery in the Pacific Northwest since time
5 immemorial. The importance of Celilo Falls to Yakama Nation cannot be understated. On that
6 horrific day in 1957, Yakama Members watched as the United States closed the gates at the newly
7 constructed Dalles Dam and drowned Celilo Falls. Entire village sites were flooded, and never
8 replaced. Healthy and abundant fisheries central to Yakama Nation’s economic spiritual wellbeing
9 were devastated. Even the solemn treaty executed between the United States and Yakama Nation
10 that constitutionally protected these critical resources did not stop the inundation of Celilo Falls.
11 The United States committed cultural genocide to develop the renewable energy resources that
12 still serve each of our homes today.

13
14 This is not ancient history. Yakama Members are alive today, including the Yakama
15 Nation Tribal Council Chairman, that witnessed the devastation that renewable energy
16 development brought to the Yakama Nation’s doorstep. Despite this trauma, Yakama Nation has
17 recognized the need for renewable energy to replace the harmful energy sources that are
18 contributing to our warming planet. Yakama Nation supports renewable energy development, but
19 it must be carried out responsibly—not on the backs of tribal peoples and their resources.

20
21 The proposed Horse Heaven Wind and Solar Project is a shining example of how not to
22 develop renewable energy. It features wind turbines that span the monumental features that are
23 central to the Yakama Nation’s traditional stories, and the ceremonial sites where Yakama
24 Member’s practice spiritual rites of passage. The Project threatens traditional food gathering
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26

1 places, and disrupts migratory patterns of reintroduced Pronghorn herds that were previously
2 extirpated by European American settlement. As the single largest renewable energy development
3 proposed in Washington State history, it was sited across critical nesting and foraging habitat for
4 the endangered Ferruginous Hawk. Rather than address these significant environmental cultural
5 concerns and community opposition, the Project is proposed on a take it or leave it basis. No
6 project amendments have been formally proposed for the parties' consideration in the adjudication.
7

8 Applicant has not supplied the Energy Facility Site Evaluation Council with sufficient
9 information to evaluate the benefits and risks of the Project. For example, Applicant has not
10 secured a water source for the Project, or leases for every parcel within the Project footprint. The
11 rushed procedures of this adjudication deprived Yakama Nation and other parties of the
12 opportunity to develop a complete record for the Council, which proceeded ahead of the Council
13 issuing its Final Environmental Impact Statement in violation of the State Environmental Policy
14 Act. The Project is also noncompliant with local land use regulations that EFSEC is tasked with
15 applying in Benton County's place. Based on these dispositive issues alone, the Council should
16 go back and follow the appropriate process in a new adjudication.
17

18 If the Council continues its review regardless of the procedural deficiencies, the testimony
19 and evidence is clear that constructing the full scope of the Project would devastate the cultural
20 and natural environment for Yakama Nation, local communities, and the State. While many of
21 these impacts can be avoided by dramatically reducing and conditioning the Project, no such
22 options were presented in the adjudication. In the absence of any reasonable middle ground, the
23 Council should recommend that the Governor reject the project proposal. Yakama Nation asks
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1 that this Council demonstrate that we have learned from the atrocities of our past, like the
2 inundation of Celilo Falls, with the simple act of not repeating them.

3 **II. REQUEST FOR ORAL ARGUMENT**

4 Given the magnitude and complexity of issues raised by this adjudication, Yakama Nation
5 respectfully urges the Council to hear oral arguments. As the Council weighs the record before it and
6 strives to make a recommendation to the Governor that is consistent with the Energy Facility Site
7 Locations Act (“EFSLA”), important precedent is likely to be established for a new wave of
8 renewable energy development. Given the wide array of complex procedural and substantive issues,
9 the nuances of the administrative record, and the new information gleaned from the August hearing,
10 oral argument before the Council would be time well spent. Oral argument would allow an
11 opportunity for the parties to distill the arguments, and for the Council to ask questions of the parties
12 about issues in dispute. To promote efficiency and clarity, counsel for Yakama Nation will make
13 themselves available to travel to whichever location is most convenient for the Council.
14

15 **III. PROCEDURAL TIMELINE**

16 The Applicant submitted an Application for Site Certification (“ASC”) to the Energy
17 Facility Site Evaluation Council (“EFSEC”) for a proposed wind, solar, and battery facility on
18 February 8, 2021.¹ Over a year later on December 1, 2022, the Applicant submitted an Updated
19 Application for Site Certification (“Updated ASC”), which significantly modified sections of the
20 original ASC.² EFSEC issued a Draft Environmental Impact Statement (“DEIS”) two weeks later
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22

23 ¹ Application for Site Certification, Feb. 8, 2021,
24 https://www.efsec.wa.gov/sites/default/files/210011/00001/20210208_Application.pdf, (accessed on Oct. 12, 2023)
25 (“ASC”).

26 ² Updated Application for Site Certification, Dec. 1, 2022,
https://www.efsec.wa.gov/sites/default/files/210011/001/01_HHWF_Updated%20ASC_Main%20Text_Clean.pdf,
(accessed on Oct. 12, 2023) (“Updated ASC”).

1 that analyzed the ASC. Applicant further amended the scope of the Project on the eve of the
2 adjudication hearing, memorializing the changes in a Memo to EFSEC dated August 9, 2023
3 (“Moon Memo”).³

4 On December 15, 2022, EFSEC issued an Order Commencing Agency Adjudication on
5 this Project. The Applicant, Benton County, and Counsel for the Environment (“CfE”) were
6 automatically deemed parties. Yakama Nation and Tri-Cities C.A.R.E.S. (“TCC”) each filed a
7 Petition to Intervene under Washington Administrative Code (“WAC”) 463-30-091.⁴ On March
8 9, 2023, Judge Adam Torem (“ALJ”) issued a Preliminary Order on Intervention granting TCC
9 and Yakama Nation party status to the adjudication with the caveat that the “exact scope of these
10 parties’ intervention is reserved and will be promptly determined following the previously
11 scheduled pre-hearing conference on Friday, March 10, 2023.”⁵ More than two months later, the
12 ALJ issued Pre-Hearing Order No. 2, which set a discovery schedule, offered a list of disputed
13 issues and outlawed issues, placed limits on TCC’s participation, and unilaterally appointed CfE
14 and Benton County as “lead party” on certain issues.⁶ Benton County, Yakama Nation, and TCC
15 all filed objections to Pre-Hearing Order No. 2 which were overruled by the ALJ.⁷

16
17
18 On May 18, 2023 Yakama Nation, Benton County, and TCC all filed motions outlining the
19 parties’ concerns related to the timing of the adjudication and EFSEC’s parallel State
20

21
22 _____
23 ³ EXH_4014_X

24 ⁴ Pet. to Intervene by Tri-Cities C.A.R.E.S; Pet. to Intervene by the Confederated Tribes and Bands of the Yakama
25 Nation.

26 ⁵ Prelim. Order on Intervention at 1.

⁶ *Id.*

⁷ Yakama Nation’s Obj. to Second Pre-Hearing Conference Order; Benton County’s Obj. to Second Prehearing
Conference Order; TCC’s Obj. to Second Pre-Haring Conference Order; Order Overruling Parties’ Obj. to Second
Prehearing Conference Order.

1 Environmental Policy Act (“SEPA”) evaluation.⁸ Applicant filed a response on May 25, 2023.⁹
2 After Yakama Nation, Benton County, and TCC filed rely briefs, the ALJ denied the parties’
3 motions to continue or stay the adjudicative proceeding.¹⁰

4 Each party was allowed to submit three rounds of pre-filed witness testimony.¹¹ During
5 this time, Yakama Nation sought information from the Washington Department of Fish and
6 Wildlife (“WDFW”) about public comments WDFW made regarding Project concerns.¹² EFSEC
7 rejected numerous attempts by Yakama Nation to call WDFW employees as witnesses, and to
8 make them available for cross examination during the adjudication.¹³ Ultimately, Yakama Nation
9 was permitted limited access to depose three WDFW employees, and the deposition transcripts
10 were admitted as part of the record.¹⁴ Dave Kobus, Project Manager, was also deposed and his
11 deposition transcripts were likewise admitted to supplement the record. CfE’s wildlife expert Don
12 McIvor was permitted to supplement his pre-filed response testimony based on information
13 disclosed during WDFW employee depositions.¹⁵

14 The adjudication was held over seven and a half non-consecutive days beginning August
15 14, 2023, and ending on August 25, 2023.

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19 ⁸ TCC Mot. for Stay Pending SEPA Compliance; Yakama Nation’s Mot. for a Continuance of Adjudication
Deadlines; Benton County’s Mot. to Stay Adjudicative Proceedings Pending FEIS Issuance.

20 ⁹ Applicant’s Resp. in Opp’n to Mot. to Stay or Continue Adjudicative Proceedings Pending FEIS Issuance.

21 ¹⁰ TCC’s Reply to Applicant’s Resp. to Mot. to Stay Pending FEIS Issuance; Yakama Nation’s Reply to Mot. for
Continuance of Adjudication Deadlines; Benton County’s Reply in Supp. of Mot. to Stay Adjudicative Proceedings
Pending FEIS Issuance; Order Den. (without Oral Argument) Parties’ Mot. to Continue or stay Adjudicative
22 Proceedings Pending Issuance of Final Environmental Impact Statement.

23 ¹¹ Pre-Hearing Order No. 2 at 3.

24 ¹² Decl. of Shona Voelckers in Supp. of Mot. to Suppl. the Record.

25 ¹³ Shona Voelckers letter to EFSEC (Aug. 24, 2023); Order 888; Pet. for Recons. of Order 888.

26 ¹⁴ Mot. to Suppl. the Record; Order Granting Mot. to Suppl. the Record; EXH-4018_Dep_REDACTED; EXH-
4019_Dep; EXH-4020_Dep.

¹⁵ Counsel for the Environment’s Mot. to Suppl. Responsive Test. of Expert Donald McIvor; Order Granting
Counsel for the Environment’s Mot. to Suppl. the Record with Responsive Pre-Filed Test. of Donald McIvor; EXH-
3016_R.

1 **IV. PROJECT DESIGN AND ELEMENTS**

2 The Project encompasses approximately 72,428 acres of land located in the Horse Heaven
3 Hills area of Benton County, Washington, with a nameplate energy generating capacity of 1,150
4 megawatts (“MW”).¹⁶ The ASC explores two turbine layouts; either 244 wind turbines at a height
5 of 499 feet or 150 wind turbines with a height of 657 feet.¹⁷ It proposes installing three solar arrays,
6 and two or three Battery Energy Storage Systems (“BESS”), which will be enclosed by fencing.¹⁸
7 The Project represents the largest potential renewable energy project in the State of Washington
8 by far,¹⁹ and the Applicant has been clear that their goal is to build the largest Project possible to
9 maximize profits.²⁰

11 While the Project description summarizes the Updated ASC, it’s important to note that the
12 Project’s design has since been modified outside the record of the adjudication. These changes
13 include but are not limited to: the maximum number of turbines allowable under Option 1 due to
14 a mitigation agreement with the Department of Defense;²¹ the size, placement, and capacity of the
15 solar arrays;²² the placement of turbines;²³ removal of select turbines;²⁴ the addition of radar
16 towers;²⁵ and the size and placement of BESS.²⁶ None of these modifications are accurately
17 captured in the record of the adjudication.
18

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20 _____
21 ¹⁶ Updated ASC § 2.0 at pg. 2-1.

22 ¹⁷ *Id.*

23 ¹⁸ *Id.*; Compare Updated ASC at Table 2.1-1 (identifying three BESS facilities in the Project) with Updated ASC, §
24 2.3.5 (identifying two BESS facilities in the Project).

25 ¹⁹ EXH_4018_Dep, Ex. 7 at Ritter-01892.

26 ²⁰ Dave Kobus Dep. at 104.

²¹ Dave Kobus Dep. at 35.

²² EXH_4014_X § 1.1 at 2.

²³ *Id.* § 1.2 at 2-3.

²⁴ *Id.* §§ 1.3-1.5 at 3-4.

²⁵ *Id.* § 1.8 at 5.

²⁶ *Id.* § 1.11 at 8.

1 Although the Applicant has been making adjustments to the Project’s design outside the
2 record of the adjudication, it has not put forth substantive design alternatives for the Council’s
3 review or analysis. Applicant rejected Yakama Nation’s request to reduce the amount of turbines
4 before the Updated ASC was published and has similarly declined to engage in meaningful design
5 alterations in response to the evidence presented by Yakama Nation throughout the adjudication
6 proceedings.²⁷ Applicant has maintained its plan to site turbines within core use areas of the
7 endangered Ferruginous Hawks despite years of protest from the Washington State Department of
8 Fish & Wildlife (“WDFW”).²⁸ The two turbine options only contemplate different sizes and
9 quantities of turbines – not a substantive change in the location of the “micrositing corridors”
10 themselves.²⁹ Despite Applicant’s concession that the Project is commercially viable without all
11 the design elements included within the Updated ASC, Applicant refused to engage in an analysis
12 of either a “solar only” or “wind only” alternative design under SEPA because such alternatives “.
13 . . . would not generate the designed nameplate generating capacity required by the Applicant.”³⁰
14

15 **V. LEGAL STANDARD**

16 The Washington State Legislature enacted the EFSLA to “balance the increasing demands
17 for energy facility location and operation in conjunction with the broad interest of the public . . .
18 .”³¹ The “interest of the public” contemplates the need “to preserve and protect the quality of the
19 environment; to enhance the public’s opportunity to enjoy the esthetic and recreational benefits of
20 the air, water and land resources; to promote air cleanliness; to pursue beneficial changes to the
21
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24 ²⁷ See EXH_4003 at TYN0014.

25 ²⁸ EXH_4014_X §§ 1.2-1.5 at 2-4.

26 ²⁹ *Id.*

³⁰ Compare Dave Kobus Dep. at 152-53 with DEIS at § 2.2.2.

³¹ RCW 80.50.010.

1 environment; and to promote environmental justice for overburdened communities.”³² EFSLA is
2 therefore based on the fundamental principle that clean energy development is necessary, but must
3 be weighed against environmental interests, and the environmental justice interests of
4 overburdened communities.³³

5 EFSEC is charged with administering this balancing test through a four-step process.
6 EFSEC (1) holds public meetings, (2) considers whether the application is consistent with city,
7 county, or regional land use plans or zoning ordinances, (3) completes an environmental review
8 under the State Environmental Policy Act, and (4) conducts an adjudication under EFSLA and its
9 implementing regulations.³⁴ This process culminates in EFSEC making a formal recommendation
10 to the Governor based on whether the application is in compliance with EFSEC’s guidelines.³⁵
11 EFSEC’s recommendation is subject to judicial review under RCW Chapter 34.05.³⁶

12
13 Specific to the adjudication, and co-extensive with the balancing factors detailed above,
14 EFSEC’s duty is to determine whether the proposed project will affect the environment, health, or
15 safety of the citizens of the state of Washington.³⁷ EFSEC must then condition the proposed
16 project to protect state, local, or community interests, as well as overburdened communities.³⁸
17 Overburdened communities include federally recognized Indian tribes (i.e. communities in Indian
18 Country).³⁹ EFSEC adopted a detailed regulatory framework designed to evaluate whether a
19 project meets these statutory goals, set forth in WAC Chapter 463-60.
20

21
22 ³² RCW 80.50.010(2).

23 ³³ RCW 80.50.010.

24 ³⁴ RCW 80.50.090; RCW 80.50.040(7); WAC 463-47-140.

25 ³⁵ RCW 80.50.040(8)(a).

26 ³⁶ RCW 80.50.140(1); *Friends of the Columbia River Gorge, Inc. v. State Energy Facility Site Evaluation Council*,
178 Wn.2d 320, 333 (2013).

³⁷ RCW 80.50.040(11).

³⁸ RCW 80.50.100(2).

³⁹ RCW 70A.01.010(11); RCW 19.405.020(23).

1 During the adjudication, the applicant bears the burden of demonstrating that its application
2 substantially complies with EFSLA and its implementing regulations.⁴⁰ Where the application
3 does not substantially comply with one or more of EFSLA’s implementing regulations—and
4 excepting minor deficiencies in the application that do not alone warrant reversal—the applicant
5 must show that either the regulation does not apply, or that EFSEC waived the requirement.⁴¹
6 Applications that do not meet these statutory and regulatory requirements, or that cannot be
7 sufficiently conditioned to protect the interests of the state, the local community, and overburdened
8 communities, must be denied.

9
10 **VI. ARGUMENT**

11 **A. EFSEC Should Not Approve the Project Until Significant Procedural Deficiencies**
12 **Have Been Remedied**

13 **1. EFSEC’s Failure to Comply with SEPA**

14 EFSEC’s decision not to issue its final environmental impact statement (“FEIS”) before
15 engaging in this adjudication violated SEPA and constitutes a dispositive reversible error. SEPA
16 prohibits EFSEC from adjudicating the Updated ASC before EFSEC issues its FEIS for the Project
17 to ensure that all reasonable alternatives are considered and to prevent duplicative or conflicting
18 efforts to determine the environmental impacts of the Project. EFSLA was enacted to protect the
19 quality of the environment and promote environmental justice for overburdened communities like
20 the Yakama Nation when siting energy facilities, which EFSEC failed to uphold when it
21 adjudicated this application in the absence of its FEIS.
22
23

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25 _____
⁴⁰ *Friends of the Columbia River Gorge, Inc.*, 178 Wn.2d at 335-36.

26 ⁴¹ WAC 463-60-115.

1 Yakama Nation filed its Motion for Continuance of Adjudication Deadlines on May 18,
2 2023, which sought a decision from EFSEC that it would issue its FEIS before proceeding with
3 the adjudication on Applicant’s ASC in compliance with SEPA.⁴² Both Benton County and Tri-
4 Cities C.A.R.E.S. filed similar motions.⁴³ Applicant responded on May 25, 2023 by opposing the
5 pending motions, while relying on the discretionary authority of EFSEC to determine its own
6 process for developing an FEIS and presiding over an ASC adjudication simultaneously.⁴⁴
7 Yakama Nation’s May 31, 2023 reply brief acknowledged EFSEC’s discretionary authority, along
8 with the fact that EFSEC’s discretion is not absolute—it is constrained by state environmental laws
9 obligating EFSEC to ensure its decision making process is informed by its FEIS.⁴⁵ On June 5,
10 2023, Judge Torem denied the motions.⁴⁶ His decision ensured that the adjudication on
11 Applicant’s Updated ASC only considered a full project option or no project option, without any
12 opportunity for the parties to address project design alternatives that are clearly being considered
13 by EFSEC and the Applicant in the parallel SEPA process.⁴⁷

14
15 EFSEC should have taken the early opportunity provided by Yakama Nation, Benton
16 County, and Tri-Cities C.A.R.E.S. to save its adjudication from this dispositive procedural error.
17 Instead, EFSEC chose to pursue an adjudication on a project design that was no longer being
18 advocated by the Applicant or considered by EFSEC. The entire adjudicative record is based on
19 a fictitious project. Yakama Nation was forced to disclose highly sensitive expert and elder
20
21

22 ⁴² Yakama Nation’s Mot. For Continuance of Adjudication Deadlines (May 18, 2023).

23 ⁴³ Benton County’s Mot. To Stay Adjudicative Proceedings Pending FEIS Issuance (May 18, 2023); Intervenor Tri-
24 Cities C.A.R.E.S. Mot. For Stay Pending SEPA Compliance (May 18, 2023).

25 ⁴⁴ Applicant’s Resp. in Opp’n to Motions to Stay or Continue Adjudicative Proceedings Pending FEIS Issuance
26 (May 25, 2023).

⁴⁵ Yakama Nation’s Reply to Mot. For Continuance of Adjudication Deadlines (May 31, 2023).

⁴⁶ Order Denying (Without Oral Argument) Parties Motions to Continue or Stay Adjudicative Proceedings Pending
Issuance of Final Environmental Impact Statement (FEIS) (June 5, 2023).

⁴⁷ See EXH_4014_X.

1 testimony to protect its interests from a fake project, while EFSEC and the Applicant designed the
2 actual project behind closed doors in a separate environmental review. As a result, the adjudicative
3 record does not reflect the proposed project design. It is not informed by any of the environmental
4 analysis being conducted in the parallel SEPA process. EFSLA and SEPA require more.

5 SEPA is a procedural statute that obligates governmental decision makers to ensure that
6 environmental impacts and alternatives are properly considered.⁴⁸ Where a project is likely to
7 have probable significant adverse environmental impacts, EFSEC—as the SEPA responsible
8 official—must prepare an environmental impact statement (“EIS”).⁴⁹ The EIS details the
9 significant environmental impacts of the proposed project and identifies reasonable alternatives,
10 all in an effort to “avoid or minimize adverse impacts or enhance environmental quality.”⁵⁰ This
11 concept of “environmental quality” is central to EFSLA as well. EFSLA is based on the goal of
12 “preserv[ing] and protect[ing] the quality of the environment”⁵¹ It is therefore unsurprising
13 that EFSLA does not set forth its own framework for accomplishing the preservation and
14 protection of environmental quality, but instead simply incorporates the SEPA framework into its
15 own regulations.⁵²

16
17
18 The issue here is whether EFSEC can “preserve and protect the quality of the environment”
19 in an adjudication under EFSLA, without first undertaking the SEPA process designed to evaluate
20 project impacts on environmental quality.⁵³ It cannot, and as a matter of policy should not. EFSLA
21 expressly incorporates WAC 197-11-406 from SEPA, which requires that an FEIS “be prepared
22

23 _____
24 ⁴⁸ *Save Our Rural Env't v. Snohomish Cnty.*, 99 Wn.2d 363, 371 (1983).

25 ⁴⁹ WAC 197-11-360.

26 ⁵⁰ WAC 197-11-400(2).

⁵¹ RCW 80.50.010(2).

⁵² WAC 463-47-020.

⁵³ RCW 80.50.010(2).

1 early enough so it can serve practically as an important contribution to the decision making process
2 and will not be used to rationalize or justify decisions already made.”⁵⁴ By pursuing an
3 adjudication before EFSEC issues its FEIS, this critically important decision-making process was
4 uninformed by the FEIS in violation of WAC 197-11-406. While an adjudication is not the place
5 to challenge an FEIS, the adjudication should absolutely have been informed by EFSEC’s
6 impartial analysis of the project’s impacts on environmental quality.

7
8 EFSLA and SEPA also prohibit EFSEC from taking any governmental action before
9 issuing its FEIS that would limit the choice of reasonable alternatives for a project proposal.⁵⁵
10 “Reasonable alternatives” are defined as “actions that could feasibly attain or approximate a
11 proposal’s objectives, but at a lower environmental cost or decreased level of environmental
12 degradation.”⁵⁶ EFSEC’s adjudication here has the effect of limiting reasonable alternatives, and
13 therefore stands in direct violation of this regulatory prohibition. Because the only alternatives
14 analyzed by EFSEC are the full project option and the no project option, the adjudication record
15 focuses solely on Applicant’s original Project-design, without any opportunity to grapple with
16 reasonable project alternatives. There is nothing in the record to reflect any number of other
17 reasonable alternatives—like removing or relocating turbines and/or solar panels—which
18 impermissibly limits the presentation of reasonable alternatives to EFSEC and ultimately the
19 Governor.

20
21 EFSEC should remedy this error by holding a second adjudication following issuance of
22 its FEIS. A second adjudication would allow Yakama Nation and other parties to address the
23

24
25 ⁵⁴ WAC 463-47-020 (adopting WAC 197-11-406).

26 ⁵⁵ *Id.* (adopting WAC 197-11-070).

⁵⁶ WAC 197-11-440(5)(b).

1 actual project design, and provide testimony and evidence that is informed by the FEIS. Anything
2 less violates EFSLA and SEPA, and raises the need for further legal clarity on EFSEC’s obligation
3 to complete its environmental analysis of a project proposal before engaging in an ASC
4 adjudication.

5 **2. Applicant’s Failure To Provide Sufficient Information For Evaluation of Battery**
6 **Energy Storage Systems**

7 Applicant did not meet its burden to demonstrate that its intended installation of lithium-
8 ion battery energy storage systems (“BESS”) substantially complies with EFSLA and its
9 implementing regulations.⁵⁷ Specifically, Applicant failed to offer reliable testimony or evidence
10 necessary for EFSEC to consider whether the proposed BESS installation will protect state, local,
11 community, and overburdened communities’ interests, or otherwise meet the environmental
12 protection goals inherent to EFSLA.⁵⁸ In the absence of any such demonstration, Applicant must
13 show that the applicable regulations do not apply to the proposed BESS installation, or that EFSEC
14 has waived the requirement for Applicant to provide sufficient information on the impacts of BESS
15 facilities to the Horse Heaven Hills.⁵⁹ Applicant has made no such showing.

17 Applicant has not designed its BESS facilities yet, and can offer no details beyond the
18 storage capacity it hopes to achieve.⁶⁰ It is not clear how many of the BESS facilities are proposed
19 for construction.⁶¹ The initial proposal included installation of a water-based fire suppression
20

22 ⁵⁷ *Friends of the Columbia River Gorge, Inc.*, 178 Wn.2d at 335-36; WAC 463-60-010 (“[t]he application shall
23 provide the council with information regarding the applicant, the proposed project design and features, the natural
24 environment, and the built environment.”).

24 ⁵⁸ RCW 80.50.100(2); RCW 80.50.010(2).

25 ⁵⁹ WAC 463-60-115.

25 ⁶⁰ Updated ASC § 2.3.5.

26 ⁶¹ *Compare* Updated ASC Table 2.1-1 (identifying three BESS facilities in the Project) *with* Updated ASC § 2.3.5
(identifying two BESS facilities in the Project) *and* EXH_4014_X § 1.11 at 8.

1 system at each BESS facility,⁶² but after the Project failed to secure a viable water source,
2 Applicant disclosed that it hired a battery storage expert who said it is safer to let the batteries burn
3 themselves out.⁶³ Apparently, water will not extinguish a battery that experiences thermal
4 runaway.⁶⁴ Applicant has not provided EFSEC with a fire prevention plan that addresses thermal
5 runaway events at BESS installations.⁶⁵ According to the Applicant, BESS fires release toxic
6 gases into the environment, but Applicant does not intend to determine the scope of that risk or
7 develop a plan to address it (i.e. Hazard Mitigation Analysis) until after the ASC is approved.⁶⁶
8 The ASC affords very little detail about the quantity, design, operation, maintenance,
9 decommissioning, and disaster planning for the proposed BESS facilities.
10

11 Applicant acknowledges the significant risks associated with BESS facilities in any
12 environment—let alone the arid landscape of the Columbia Plateau—and offers no credible
13 analysis or plans for addressing these significant risks. The primary concern with installing BESS
14 facilities in the Horse Heaven Hills is increased fire risk and environmental contamination.⁶⁷
15 Applicant did not offer a witness qualified to speak about BESS facilities or explain how Applicant
16 proposes to address these concerns. Over the course of the adjudication, Applicant failed to
17 offer any credible evidence sufficient for EFSEC to adequately consider the fire risk posed by
18 BESS facilities in the Horse Heaven Hills, relying solely on limited supplemental testimony of
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23 ⁶² Updated ASC § 2.3.5.

24 ⁶³ Adjudication Transcript at 1713-14.

25 ⁶⁴ Kobus Supp. Testimony Ex. A.

26 ⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Updated ASC § 2.10.2 (“[l]ithium-ion batteries can present a flammability hazard . . .”); Supp. Testimony of David Kobus Ex. A (Aug. 8, 2023) (acknowledging release of toxic gases during BESS fire).

1 Mr. Dave Kobus, who has no professional expertise on BESS facilities.⁶⁸ Applicant's plan is to
2 develop a fire prevention plan and hazard mitigation analysis for its proposed BESS facilities after
3 the ASC is approved.⁶⁹

4 With such an insignificant amount of information on Applicant's BESS facilities plan,
5 EFSEC is not positioned to meet its statutory duties to consider the environmental and community
6 impacts of the Project.⁷⁰ Beyond these statutory failures, Applicant did not ask EFSEC to waive
7 the regulatory requirement that Applicant provide information about the design and features of the
8 BESS facilities, so no waiver has been granted.⁷¹ Applicant holds the burden to provide sufficient
9 information for EFSEC to meet its statutory and regulatory duties, and Applicant did not meet its
10 burden with regard to its proposed BESS facilities.⁷² The ASC should be denied.

12 **3. Applicant's Failure to Demonstrate Available Water Supply**

13 Applicant also failed to meet its burden to provide sufficient details regarding the Project's
14 water supply. Even if Applicant argues that Projects permitted by EFSEC do not have to meet the
15 same standards for water availability as development projects permitted by counties, this Council
16 should not take Applicant's invitation to carve out an exception to Washington State law for this
17 Project.
18

19 Washington State law tasks counties with ensuring that new development is supported by
20 sufficient water resources and protects against the negative impacts of new development on
21

23 ⁶⁸ See Adjudication Transcript at 1069-70 (Applicant's witness Dave Kobus acknowledging that he did not write
24 testimony related to battery storage or battery fire events); Adjudication Transcript at 1434-35 (Applicant directed to
provide BESS facilities expert to testify, but never did).

25 ⁶⁹ Kobus Supp. Testimony Ex. A.

26 ⁷⁰ RCW §§ 80.50.010, 80.50.100(2).

⁷¹ WAC 463-60-115.

⁷² *Friends of the Columbia River Gorge, Inc.*, 178 Wn.2d at 335-36.

1 existing water rights holders.⁷³ At the local planning level, the Growth Management Act (“GMA”)
2 requires counties to consider and address water resource issues in land use planning.⁷⁴
3 Specifically, a county's comprehensive plan must “provide for protection of the quality and
4 quantity of groundwater used for public water supplies.”⁷⁵ The GMA also requires counties to
5 plan for a rural element that “include[s] measures that . . . protect . . . surface water and groundwater
6 resources.”⁷⁶ The role between counties and Ecology on this issue has been clarified by the
7 Washington Supreme Court: “Ecology is responsible for appropriation of groundwater by permit
8 . . . the County is responsible for land use decisions that affect groundwater resources.”⁷⁷
9

10 Specific to potable water, state law requires applicants for new building permits to provide
11 the county permitting agency with “evidence of an adequate water supply for the intended use of
12 the building.”⁷⁸ This requirement acts as a baseline, while allowing counties to impose their own
13 additional requirements for building permits.⁷⁹ Of particular relevance here, the evidence that is
14 acceptable for demonstration of adequate water supply includes “a water right permit from the
15 department of ecology [or] a letter from an approved water purveyor stating the ability to provide
16 water”⁸⁰ Mere applications for a water right are expressly *excluded* as viable evidence that
17 an adequate water supply has been secured.⁸¹
18
19
20

21 ⁷³ RCW 36.70A.070; RCW 19.27.097; see *Whatcom County v. W. Wash. Growth Mgmt. Hr’gs Board* (“*Hirst*”), 186
22 Wn.2d 648, 664 (2016).

23 ⁷⁴ *Hirst*, 186 Wn.2d at 664.

24 ⁷⁵ RCW 36.70A.070(1).

25 ⁷⁶ RCW 36.70A.070(5)(c)(iv).

26 ⁷⁷ *Hirst*, 186 Wn.2d at 681, citing *Kittitas County v. E. Wash. Growth Mgmt. Hr’gs Bd.*, 172 Wn.2d 144, 180 (2011).

⁷⁸ RCW 19.27.097(1)(a).

⁷⁹ RCW 19.27.097(2).

⁸⁰ RCW 19.27.097(1)(a).

⁸¹ *Id.*

1 Even though these water law mandates to counties are not directly incorporated into the
2 EFSLA, EFSEC adopted the same standards for large scale development projects as are found in
3 RCW 19.29.097's mandates for residential development. Applicants are *required* to demonstrate
4 an adequate water supply to serve the Project's construction and operation needs.⁸² The regulation
5 is clear that adequate water supply must be demonstrated:

6 An applicant proposing to use surface or groundwater for the facility
7 shall describe the source and the amount of water required during
8 construction and operation of the energy facility and shall do one or
9 more of the following: (a) Submit a water use authorization or a
10 contractual right to use water supplied by a municipal corporation
11 or other water purveyor; or (b) Submit a water right permit or water
right certificate issued by the department of ecology for the
proposed facility in an amount sufficient to meet the need of the
facility.⁸³

12 There is a third option. In the event that an applicant has a *pending* permit application for a water
13 right, the application must still be submitted to Ecology before EFSEC receives its application for
14 site certification, and the applicant must provide EFSEC with all related documentation, including
15 but not limited to report(s) of examination and any limitations on use, such as time of year."⁸⁴

17 The proper sequence set forth by the Washington legislature in RCW 19.27.072 and
18 affirmed by EFSEC in WAC 463-60-165 is for confirmation of legally available water to come
19 *before* new development is permitted. Unless an Applicant is purchasing water from a municipal
20 corporation or water purveyor (whose water rights have already been confirmed), Ecology is the
21

22 ⁸² WAC 463-60-165(3).

23 ⁸³ *Id.*

24 ⁸⁴ WAC 463-60-165(3)(c). "The application for site certification shall include report(s) of examination, identifying
25 the water rights, or water right changes, submitted to and under review by the department of ecology, the quantities
of water in gallons per minute and acre feet per year that are eligible for change, together with any limitations on
26 use, including time of year. The report(s) of examination shall also include comments by the Washington state
department of fish and wildlife with respect to the proposed water right applications under review by the department
of ecology."

1 agency tasked with confirming that water is, in fact, legally and physically available and will not
2 impair other users. When Ecology reviews applications for new surface or groundwater
3 withdrawals, or water right transfers, it is required to review those applications under a 4-part
4 test.⁸⁵ Ecology may only approve the application if “there is water available for appropriation for
5 a beneficial use, and the appropriation thereof as proposed in the application will not impair
6 existing rights or be detrimental to the public welfare.”⁸⁶ Ecology is the only state agency tasked
7 with conducting this analysis under Washington’s water law framework of prior appropriation.⁸⁷
8

9 Before any regulator issues permits for a new development that will rely upon the
10 application for water, it is necessary to ensure that the new development has a sufficient water
11 supply so that it does not impact senior water rights. This process protects a sustainable and
12 reliable public water supply.⁸⁸ It is also important for permitting authorities like counties and
13 EFSEC to allow Ecology to conduct its review of applications for new/changed water
14 appropriations in order to protect the ability of developers to have reliable water sources, a county
15 responsibility that has been affirmed by the Washington Supreme Court.⁸⁹ Because SEPA requires
16 disclosure and analysis of a Project’s impacts to environmental resources, including water
17 resources, sufficient information regarding a Project’s proposed water supply is also necessary to
18 fulfill SEPA’s mandates.⁹⁰
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23 ⁸⁵ RCW 90.03.290(3).

24 ⁸⁶ *Id.*

25 ⁸⁷ See *Postema v. Pollution Control Hr’gs Bd.*, 142 Wn.2d 68, 79 (2000); RCW 90.03.010; RCW 90.44.040; *Hillis*
26 *v. Dept. of Ecology*, 131 Wn.2d 373, 384-5 (1997).

⁸⁸ *Hillis*, 131 Wn.2d at 383-4.

⁸⁹ *Hirst*, 186 Wn.2d at 658.

⁹⁰ See *King County v. Wash. State. Boundary Review Bd. For King County*, 122 Wn.2d 648, 663 (1993).

1 EFSEC failed to comply with its own regulations when it accepted Applicant's initial
2 application without the information required by WAC 463-60-165(3). The original application
3 did not meet any of the criteria in WAC 463-60-165(3)(a)-(c). The Updated ASC, which changed
4 the proposed source of water from the City of Kennewick to the Port of Walla Walla, likewise did
5 not meet the criteria in WAC 463-60-165(3)(a)-(c). No water right authorization or contract to use
6 water for either the construction of the Project or its operation was provided by the City of
7 Kennewick or Port of Walla Walla. Likewise, no permit from Ecology has been provided, or even
8 proof of any application to Ecology for such a permit.
9

10 To date, Applicant has not secured any water for the Project or demonstrated a pathway to
11 obtaining a water permit from Ecology. Most recently, Applicant has tried to point to a land use
12 license with DNR as proof of a legal water source for the Project.⁹¹ Although that land use license
13 is likewise absent from the record, even if the Applicant made it available it would still not satisfy
14 the requirements of WAC 463-60-165(3). The legal insufficiency of reliance on such a license is
15 consistent with the practical reality: a land use license is not a contract or permit to use water.
16 There is no evidence of any such contract or permitting process being started at all, let alone
17 confirmed.
18

19 The impacts of the Project cannot be adequately considered until Applicant has secured
20 and disclosed legally and physically available water to support the Project's full construction and
21 operation needs. The DEIS contemplates and analyzes the Project's water resource impacts using
22 outdated information from the original application.⁹² It is unclear which water source proposal
23 will be evaluated in the FEIS. If the Port of Walla Walla is still considered as a potential source,
24

25 ⁹¹ EXH_4014_X at 8-9.

26 ⁹² DEIS § 4.4.2.

1 it has only contemplated providing construction water—not the Project’s full operation needs. If
2 the FEIS considers the potential use of the Gould Well no environmental analysis has been
3 completed regarding the potential impacts of trucking that volume of water all the way to the
4 Project site.

5 The EFSLA is clear: “It is the policy of the state of Washington to . . . ensure through
6 available and reasonable methods that the location and operation of all energy facilities and certain
7 clean energy product manufacturing facilities will produce minimal adverse effects on the
8 environment, ecology of the land and its wildlife, and the *ecology of state waters* and their aquatic
9 life.⁹³ EFSEC cannot fulfill this policy of the state, or complete its environmental analysis under
10 SEPA, without sufficient information regarding the Project’s proposed water source.

12 This Council should not compound EFSEC’s error in accepting a noncompliant application
13 by recommending approval of a Project that is still without *any* valid legal water source.
14 Applicant’s failure to meet the requirements to demonstrate a sufficient valid water supply call
15 into question whether water is truly available in this location to serve the needs of such a massive
16 Project. What *is* clear is that Applicant has been attempting to secure a local water supply for
17 years and has not yet succeeded. Given the increasing likelihood that water is not, in fact, available
18 to serve the full needs of the Project, EFSEC cannot yet evaluate the Project’s environmental
19 impacts to water resources as required by SEPA and EFSLA. Lastly, not only would approval of
20 the Project without a water supply run counter to water law policies that apply to local regulators
21 throughout Washington State; it will set a dangerous precedent for the numerous other projects
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23

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25
26 ⁹³ RCW 80.50.010 (emphasis added).

1 being proposed within these arid landscapes where new development will have certain impacts to
2 an already limited—and at many locations overallocated⁹⁴—water supply.⁹⁵

3 This Council should reject Applicant’s request that it carve out an exception to foundational
4 Washington water law principles and recommend that the Governor deny the application for site
5 certification for its failure to comply with WAC 463-60-165(3). Based upon the information
6 before it, EFSEC cannot find that the Project will “produce minimal adverse effects on the
7 environment . . . and the ecology of state waters and their aquatic life.”⁹⁶
8

9 **4. *Lack of Factual Support for the Updated ASC and Misrepresentations by Applicant***

10 Applicant carries the burden to demonstrate that its application substantially complies with
11 EFSLA and its implementing regulations,⁹⁷ and Applicant chose not to offer the principal drafters
12 or editor of the ASC as witnesses during the adjudication. Significant portions of the ASC are
13 therefore unsupported by either evidence or testimony, and are uncited in the Updated ASC.
14 Applicant is asking EFSEC to trust the representations that it made in the Updated ASC, but such
15 trust is unwarranted given Applicant’s misstatements about the positions and actions of other state
16 agencies related to the Project that came to light through development of the administrative record.
17 In light of these misrepresentations, Applicant’s unsupported statements in the Updated ASC
18
19
20

21 ⁹⁴ Washington State Department of Ecology Pub. 16-12-001 “2016 Columbia River Basin Long-Term Water Supply
22 and Demand Forecast, Modules To form Key Policy Issues” at 194.

23 <https://apps.ecology.wa.gov/publications/parts/1612001part2.pdf> (last accessed Oct 13, 2023).

24 ⁹⁵ Not one of the applications for site certification currently under review by EFSEC have identified a water supply
25 source that meets the projects’ full projected needs, let alone complies with WAC 463-60-165(3). *See* Badger
26 Mountain Solar Energy Project Application for Site Certification, Part 2 §§ B.8.d, B.8.e; Carriger Solar Project
Application for Site Certification, Part 2 §§ B.8.d, B.8.e; Hop Hill Solar and Storage Project Application for Site
Certification, Part 2 §§ B.8.d, B.8.e, Wautoma Solar Energy Project Application for Site Certification, Part 2 §§
B.8.d, B.8.e.

⁹⁶ RCW 80.50.010.

⁹⁷ *Id.*

1 should not be afforded evidentiary weight as EFSEC considers whether Applicant has provided
2 sufficient information for EFSEC to carry out its statutory and regulatory duties.

3 For example, Applicant attributes statements to WDFW concerning protection of
4 ferruginous hawks that are directly at odds with the recommendations of WDFW’s ferruginous
5 hawk expert. The ASC represents that Applicant sited turbines consistent with the WDFW
6 recommendations during the pre-application phase “to reduce impacts to suitable raptor foraging
7 and nesting habitat”⁹⁸ Specifically, Applicant attributes to WDFW a recommendation that
8 the turbines have a setback of 0.25 mile or greater from occupied ferruginous hawk nests.⁹⁹ When
9 WDFW’s ferruginous hawk expert, Mr. James Watson, was asked whether these supposed WDFW
10 recommendations were consistent with the best available science and his own professional
11 recommendations to the Applicant on WDFW’s behalf, he confirmed that they are not
12 consistent.¹⁰⁰ Rather than following best available science communicated by Mr. Watson,
13 Applicant chose to rely on WDFW’s outdated guidelines for the protection of ferruginous hawks
14 and other avian species instead.¹⁰¹ Applicant’s representations about WDFW’s recommendations
15 for protection of an endangered species, as well as the outdated WDFW guidance that Applicant
16 purports to rely upon, in its updated ASC were inaccurate.
17
18

19 The ASC also represents that the State of Washington Department of Natural Resources
20 (“DNR”) “agree[d] to issue project-related leases and easements for five DNR parcels”¹⁰²
21

22 ⁹⁸ Updated ASC § 2.22.2.

23 ⁹⁹ Updated ASC § 3.4.3. When asked directly by Counsel for the Environment about the genesis of the 0.25 mile
24 buffer, Applicant’s consultant Troy Rahmrig could not identify it in the very guidelines cited by the Updated ASC.
Adjudication Transcript at 854-856.

25 ¹⁰⁰ EXH_4019_Dep at 63-66.

26 ¹⁰¹ *Id.* at 54-55.

¹⁰² Updated ASC § 2.23.2.1. Applicant’s Legal Memorandum regarding Land Use Consistency goes further, stating
“[b]ecause the final Project design remains to be finalized, Scout has executed leases covering all potentially
affected parcels (the “Project Lease Boundary”) an overarching area encompassing approximately 72,428 acres . . .

1 Based on these representations, EFSEC issued Order No. 883 which states that Applicant
2 “has *executed* leases covering all potential affected parcels within the project lease boundary, a
3 total area encompassing approximately 72,428 acres. Much of this land is privately owned and
4 actively managed for drylands agriculture (primarily wheat farming) and livestock grazing; *some*
5 *parcels are managed by the Department of Natural Resources.*”¹⁰³ Yakama Nation inquired
6 directly with DNR’s Public Lands Commissioner and was surprised to learn that Applicant has not
7 leased any of DNR’s land within the Project boundary.¹⁰⁴ Applicant obtained a land use license
8 from DNR for the purpose of data collection on the subject parcels, and nothing more. *Id.*
9 Applicant’s misrepresentation that it has executed leases from DNR, or at the very least that DNR
10 has already agreed to issue project-related leases, materially misrepresents the facts. Applicant
11 does not have leases for DNR parcels within the Project area and Applicant’s misrepresentations
12 to the Council resulted in an erroneous factual statement within Order No. 883.

14 Yakama Nation points out these misrepresentations in the ASC to demonstrate Applicant’s
15 lack of commitment to accuracy, rather than to suggest any bad faith or gamesmanship. However,
16 these inaccuracies challenge the credibility of every statement in the ASC that is not specifically
17 supported by testimony or evidence. As discussed above, the adjudication’s compressed schedule
18 did not afford the parties sufficient time to explore or verify the accuracy of Applicant’s factual
19 assertions within the Updated ASC and its numerous Appendices. Due to the lack of sufficient
20 discovery processes and the examples of misrepresentations that were identified, Applicant should
21

23 .” Applicant’s Legal Memorandum re Land Use Consistency at 4 (March 25, 2021) (available at
24 https://www.efsec.wa.gov/sites/default/files/210011/00014/20210325_Scout_%20LegalMemo_LandUse.pdf)

25 ¹⁰³ Order Finding Proposed Site Consistent With Land Use Regulations at 3 (May 17, 2022) (available at
26 https://www.efsec.wa.gov/sites/default/files/210011/00057/883_HH_LandUseConsistencyOrder.pdf).

¹⁰⁴ Email from Michael Kearney, DNR Leasing Division Mgr., to Jessica Houston, Yakama Nation Office of Legal
Counsel (Oct. 6, 2023) (on file with Yakama Nation Office of Legal Counsel and available upon request).

1 not be afforded the benefit of the doubt on any uncited and unsupported assertions as EFSEC
2 considers whether Applicant provided sufficient information for EFSEC to carry out its statutory
3 and regulatory duties.

4 **B. The Project Does Not Comply With Local Land Use Regulations**

5 Applicant is urging this Council to read into Order 883 a finding of compliance with local
6 land use regulations that does not exist.¹⁰⁵ Applicant treats EFSEC's Order 883 as a substantive
7 finding that their site will be consistent and compliant with Benton County Codes and that EFSEC
8 will recommend approval of a Conditional Use Permit (CUP).¹⁰⁶ However, Order 883 does not
9 provide Applicant with a CUP, nor does it confirm that EFSEC has determined that the conditional
10 use criteria have been met.¹⁰⁷ What Order 883 *does* do is confirm that because the Applicant is
11 not asking this Council to initiate preemption proceedings, EFSEC cannot recommend that the
12 Project receive a CUP if it does not satisfy Benton County's land use regulations.¹⁰⁸ As
13 Applicant's own witness Ms. McClain conceded, "the relevant question in the present stage of
14 adjudication boils down to 'whether applicable conditional use criteria are in fact met.'"¹⁰⁹ Simply
15 put, EFSEC's general preemption authority has not been invoked with regard to the question of
16 whether or not the Project should receive a CUP.
17
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21 ¹⁰⁵ See Applicant's Amended Pre-Hearing Brief at 8, lines 6-9, "[g]iven that Order 883 found that the Project is
22 'consistent and in compliance' with Benton County's zoning ordinance and land use plans, the sole issue for
23 consideration in the land use adjudication is whether, informed by CUP criteria, the Council should impose
24 conditions akin to those that the County would impose in its local permitting process."

25 ¹⁰⁶ *Id.*

26 ¹⁰⁷ See Order 883 at 4, footnote 4; Order 883 at 4, footnote 6 (citing WAC 463-26-090); Order 883 at 7, "[t]he
Council's land use consistency determination does not prejudice whether the Facility has met or can meet Benton
County's conditional use criteria."

¹⁰⁸ Order 883 at 8, "(7) the matter will be scheduled for an adjudication to consider whether the Council *should*
recommend approval of the Application and, if so, to determine specific conditions to include in a draft site
certification agreement that address the County's criteria for issuance of a conditional use permit."

¹⁰⁹ See EXH_1023_R at 7.

1 EFSEC should not recommend approval of the Project because it does not meet Benton
2 County's land use criteria. Benton County has repeatedly demonstrated that the Project does not
3 comply with Benton County's Growth Management Act Agricultural District ("GMAAD"), nor
4 does it meet Benton County Code's requirements for a CUP.¹¹⁰ The Project is significantly more
5 grand in scope, size, and intensity than any other project proposed in the County and therefore
6 cannot be compared to past projects that may have met Benton County's CUP criteria.¹¹¹
7 Furthermore, Benton County raises legitimate concerns regarding the legality of the Site's land
8 use, should the project be approved.¹¹² The Project is located on lands that meet the criteria for
9 ALLTCS in WAC 365-190-050, and which cannot be de-designated without County action.¹¹³ If
10 the County improperly de-designates ALLTCS, it may be subject to consequences from the
11 Growth Management Hearings Board for non-compliance with the GMA, and be forced to rescind
12 its de-designation.¹¹⁴ The Project does not comply with land use criteria in the Benton County
13 Code or the purpose of Benton County's GMAAD and should be denied.

14
15
16 ***C. The Project Will Have Devastating Negative Impacts to Yakama Nation's Traditional
Cultural Properties***

17 This Council has the discretion and responsibility under the EFSLA to put aside
18 Applicant's business interests and honor Yakama Nation's request of EFSEC that it protect,
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22 ¹¹⁰ See Benton County's Pre-Hearing Brief at 4, lines 19-26; *id.* at 7, lines 6-18; EXH-2001_T at 10 -11; EXH-
2004_R at 6 "[...] there is no set of conditions that would allow the HHWF to meet the conditional use criteria
found at BCC 11.50.040,"; *id.* at 8; Benton County's Post-Hearing Brief at 5, lines 9-11.

23 ¹¹¹ See BCC 11.50.40 and 11.17.010; Benton County's Pre-Hearing Brief at 4, lines 19-26, "[...] regardless of any
24 conditions that EFSEC may impose on the HHWF, due to grossly disproportionate scale compared to any other
permitted uses in the GMAAD, among other fatal flaws, it cannot satisfy Benton County's CUP criteria.,"; EXH-
2001_T at 12; EXH-2004_R at 7, lines 18-25.

25 ¹¹² EXH_2004_R at 10-11.

26 ¹¹³ *Id.*

¹¹⁴ *Id.* at 11-12.

1 preserve, and perpetuate Yakama Nation’s sacred Traditional Cultural Properties (“TCPs”).¹¹⁵ The
2 legislative policies of EFSLA require EFSEC to not only consider the Project’s detrimental
3 impacts to the environment in general, but specifically require EFSEC to encourage development
4 that promotes “environmental justice for overburdened communities.”¹¹⁶ By definition, Yakama
5 Nation is one of those overburdened communities.¹¹⁷ This Council has a moral and statutory
6 responsibility to protect Yakama Nation’s ability to continue practicing its way of life and to teach
7 that way of life to future generations as EFSEC carries out its role to balance Washington State’s
8 goals for developing renewable energies with its responsibility to “preserve and protect the quality of
9 the environment.”¹¹⁸

11 Because the Project’s impacts to Yakama Nation’s TCPs can only be understood and
12 identified by Yakama Nation, it is critically important that this Council give strong evidentiary weight
13 to Archaeologist Jessica Lally’s TCP Report and testimony from Yakama Nation Members.
14 Applicant’s own archaeologist confirmed that Ms. Lally was “absolutely” the most qualified witness
15 in this adjudication to provide a professional opinion regarding the Project’s impacts to Yakama
16 Nation’s TCPs.¹¹⁹ The testimony from Yakama Nation’s Members was direct and unrefuted
17 regarding the significance of the Project area and surrounding lands to their spiritual practices and
18 teachings.

20 When examining “places of importance,” Yakama Nation’s Cultural Resource Program
21 developed internal methodologies that build upon inherent knowledge and archaeological training
22

23 ¹¹⁵RCW 80.50.010.

24 ¹¹⁶ *Id.*

25 ¹¹⁷ See RCW 70A.02.010(11); 10.405.140.

26 ¹¹⁸ RCW 80.50.010(2).

¹¹⁹ Hearing Transcript at 581. Ms. Ragsdale also confirmed that analysis of TCP impacts was not within the scope of work for any of Applicant’s cultural surveys included in Appendix R to the Updated ASC.

1 and education to identify and characterize different types of TCPs, which include legendary sites,
2 monumental sites, traditional use sites, ceremonial sites, and burial sites.¹²⁰ Due to the
3 interconnectivity of these cultural resources, TCP studies assess each project's full zone of influence,
4 as explained further in Ms. Lally's TCP Report and verbal presentation during the adjudication.¹²¹

5 The Council heard through oral testimony and supporting evidence the numerous ways the
6 Project will irreparably harm the complex landscape of TCPs within and around the Horse Heaven
7 Hills. The Project's damage to numerous Yakama Nation legendary and monumental sites cannot be
8 mitigated—this is an unrefuted truth supported by multiple fact witnesses as well as Ms. Lally's
9 professional TCP report. What *can* be accomplished through intentional design alternatives, is a
10 minimization of the number of TCPs irreparably damaged by this Project.¹²² Because the Applicant
11 has instead insisted on putting forth a Project design that makes no attempt to avoid or minimize
12 negative impacts to numerous sacred and irreplaceable TCPs, this Council cannot recommend
13 approval of the Project without violating the EFSLA.¹²³

14
15
16 Yakama Nation's TCPs are an essential part of Yakama Nation's cultural existence and the
17 spiritual wellbeing of its members. Yakama culture, traditions, and history, reside on the land to be
18 passed down to generations yet unborn in the manner practiced since time immemorial. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]¹²⁵ The TCP impacts

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24 ¹²⁰ EXH_4003_CONFIDENTIAL at TYN0012-14.

¹²¹ EXH_4003_CONFIDENTIAL at TYN0014.

¹²² Hearing Transcript at 694.

¹²³ RCW 80.50.010; *see also* WAC 463-47-110(1).

¹²⁴ EXH_4004_CONFIDENTIAL at 2.

¹²⁵ EXH_4004_CONFIDENTIAL at 10 (emphasis in the original).

1 identified in Ms. Lally’s TCP Report and testified to by Yakama Nation Members are not artifacts of
2 previous cultural practices; they are integral to continued spiritual practices by Yakama Nation’s
3 Members today.¹²⁶ They are necessary to pass down continued teachings and cultural practices to
4 new generations. [REDACTED]

5 [REDACTED]
6 [REDACTED].¹²⁷ Former Councilmember George Selam also explained how, despite the impacts of
7 significant development in this area since the Treaty of 1855, the oral traditions and teachings
8 continue:
9

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 Although exact details of these teachings and stories were retained due to the sensitivity of the
15 information, the witness testimony was clear about the continuing critical importance of the identified
16 TCPs to Yakama Nation Members’ way of life and connection with the Creator.¹²⁹

17 Yakama Nation’s decision to submit Ms. Lally’s TCP Report and direct Tribal Member
18 testimony is a reflection of the magnitude of importance of the Horse Heaven Hills and the concern
19 about the Project’s devastating impacts. This sensitive information is not normally shared with non-
20 Members, let alone written into the record of legal proceedings.¹³⁰ “In the Yakama culture, these oral
21

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24 ¹²⁶ EXH_4004_CONFIDENTIAL at 3-4; EXH_4005_CONFIDENTIAL at 3; Hearing Transcript at 706, 708, 715-
16, 725.

25 ¹²⁷ EXH 4007_CONFIDENTIAL at 2; EXH_4003_CONFIDENTIAL at TYN0016.

26 ¹²⁸ Hearing Transcript at 713-14.

¹²⁹ EXH 4005_CONFIDENTIAL at 4; EXH_4006_CONFIDENTIAL at 3, 5.

¹³⁰ EXH_4003_CONFIDENTIAL at TYN0013; Hearing Transcript at 737-8.

1 traditions are not to be written down – they are to be conveyed verbally through deep connection to
2 location and orientation to the greater landscape.”¹³¹

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]¹³⁶

15
16 The Project’s direct harm to this complex and irreplaceable TCP landscape cannot be
17 mitigated.¹³⁷ While certain types of TCP impacts may be potentially mitigable,¹³⁸ the majority of
18 the Project’s impacts here will be to ceremonial, legendary, and monumental sites.¹³⁹ These cannot
19 be mitigated because they do not occur anywhere else – once they are damaged these resources
20

21 _____
22 ¹³¹ EXH_4003_CONFIDENTIAL at TYN0013.

23 ¹³² *Id.* at TYN0016; EXH 4006_CONFIDENTIAL at 2.

24 ¹³³ EXH_4004_CONFIDENTIAL at 6-8; EXH 4005_CONFIDENTIAL at 3; EXH 4007_CONFIDENTIAL at 3.

25 ¹³⁴ *Id.*

26 ¹³⁵ EXH_4005_CONFIDENTIAL at 4; EXH_4006_CONFIDENTIAL at 3; Hearing Transcript at 705.

¹³⁶ EXH_4004_CONFIDENTIAL at 7, 10, 12; EXH_4005_CONFIDENTIAL at 4, 6-7; Hearing Transcript at 709-11.

¹³⁷ EXH_4004_CONFIDENTIAL at 12, *see* EXH_4007_CONFIDENTIAL at 3.

¹³⁸ *See* EXH_4003_CONFIDENTIAL at TYN0014.

¹³⁹ *Id.* at TN0016-17.

1 will bear that impact perpetually.¹⁴⁰ [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Even if it were possible to mitigate the Project’s impacts to Yakama Nation’s TCPs, the

6 Applicant has not actually proposed such mitigation. Instead, Applicant commits to creating and

7 implementing a yet-undefined Cultural Resource Avoidance Plan.¹⁴² This plan has not been

8 provided to the Council or parties and so cannot be relied upon by the Council in its adjudication

9 or SEPA analysis. Nevertheless, the loose proposal for this “avoidance plan” contemplates

10 addition surveys and avoidance measures to be determined by the applicant’s consultant.¹⁴³

11 Applicant continues to miss the point—Yakama Nation’s professional archaeologist and Members

12 have already identified numerous cultural resources where Project impacts truly cannot be avoided

13 without significant design modifications.¹⁴⁴ Yakama Nation’s professional archaeologist has also

14 requested avoidance of archaeological sites. Some of these were historic resources subject to

15 disturbance through archaeological testing even before project permitting, despite Yakama

16 Nation’s request.¹⁴⁵

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19 Faced with the gravity of the Project’s negative impacts to TCPs, Applicant has spurned

20 Yakama Nation’s repeated requests to avoid or minimize the Project’s TCP impacts.¹⁴⁶ There is

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22 ¹⁴⁰ Hearing Transcript at 706.

23 ¹⁴¹ *Id.* at 736-7.

24 ¹⁴² ASC § 4.2.5.3.

25 ¹⁴³ *Id.*

26 ¹⁴⁴ EXH_4003_CONFIDENTIAL.

¹⁴⁵ EXH_4003_CONFIDENTIAL at TYN0014.

¹⁴⁶ Rather than address Yakama Nation’s desire to prevent what is certain damage to irreplaceable sacred landscapes, Applicant points to a separate and wholly distinct settlement agreement that it negotiated with CTUIR. See Applicant’s Prehearing Brief at 14. This settlement agreement with the CTUIR, which was not itself submitted

1 no evidence in the record before this Council that the Applicant has made any design modifications
2 (let alone proposed design alternatives) to address the Project’s certain and irreparable harm to
3 Yakama Nation’s TCPs. Instead, as Ms. Lally testified, after years of communications between
4 the Yakama Nation Cultural Resource Program and Applicant about TCP impacts, she was
5 informed in the fall of 2022 that redesign of the Project would not be considered.¹⁴⁷ Applicant has
6 remained steadfast in its goal to “*build absolutely as much* as [Scout] can to satisfy the market
7 need.”¹⁴⁸ It is clear that the Applicant sees no reason to concede any financial gain in order to
8 avoid or minimize damaging sacred and Treaty-reserved cultural resources; despite their continued
9 use and importance to the continued well-being of Yakama Nation Members.

11 The Project should be denied due to its inevitable and devastating impacts on Yakama culture
12 and history evidenced by numerous Yakama Nation TCPs within the Horse Heaven Hills and the
13 surrounding zone of influence identified in Ms. Lally’s TCP Report. No middle ground option has
14 been provided by the Applicant, and the Project’s impacts to TCPs as it is currently designed will be
15 devastating. Approval of the Project would violate the policies and directives in RCW 80.50.010.

17 **D. The Project Will Negatively Impact the Endangered Ferruginous Hawk
18 Population**

19 The Ferruginous Hawk is facing extinction in the State of Washington. As the Council
20 fulfills its mandate to “produce minimal adverse effects on the environment, ecology of the land
21 and its wildlife, and the ecology of state waters and their aquatic life,” the Ferruginous Hawk must

22 _____
23 into the adjudication record, has no bearing on the concerns and issues raised by Yakama Nation in the course of this
24 adjudication or through engagement on the ongoing SEPA review process.

25 ¹⁴⁷ EXH_4003_CONFIDENTIAL at TYN0014.

26 ¹⁴⁸ David Kobus Deposition at 104 (emphasis added). Mr. Kobus’s full statement was that “Scout has been investing considerable time and capital in building the largest project we can bring to market because that’s what makes us successful. So the commercial case for this site is to build absolutely as much as we can to satisfy the market need. So any whittling away that we do of anything that generates as a part of that mix is hurting our prospects.”

1 be a central consideration.¹⁴⁹ Unlike many of the issues raised by the ASC, the Council benefits
2 from substantial information from scientific experts on the impacts that the Project will have on
3 this endangered species. We know the Project poses an increased risk for bird strike fatalities, and
4 how the changed habitat will favor other predatory species, and how sensitive Ferruginous Hawks
5 are to any human caused habitat changes.¹⁵⁰ We also know that WDFW’s recommended
6 alterations to the Project design are based on best available science, which the Applicant has
7 ignored.¹⁵¹ The Project threatens the continued viability of an endangered species in our State,
8 and where Applicant proposed a take it or leave it project, the Council must carry out its duty to
9 protect this species by recommending that the Governor deny the ASC.
10

11 The Ferruginous Hawk was listed as an endangered species in Washington under WAC
12 220-610-010 after an exhaustive status review by WDFW documented “massive population and
13 nesting contraction in the state of Washington over the last ten years.”¹⁵² This listing means not
14 only that new development will be detrimental, but even maintaining the status quo will be
15 insufficient to restore healthy populations. “That listing means that unless we do active
16 management and, you know, and follow up with tasks to benefit the species and improve the
17 population, that it’s likely to go extinct in Washington.”¹⁵³ Any new large scale anthropogenic
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22 ¹⁴⁹ RCW 80.50.010; WAC 463-47-110(1).

23 ¹⁵⁰ EXH_4019_Dep at 20-22.

24 ¹⁵¹ Updated ASC, Appendix L at 6-7.

25 ¹⁵² EXH-4018_Dep at 89.

26 ¹⁵³ EXH-4019_Dep at 29. Yakama Nation acknowledges that it is not the responsibility of private developers to take actions to improve habitat or improve the status quo for any particular species. However, because WDFW is the agency tasked with determining how best to manage endangered species and their habitat, this Council should give great weight to WDFW’s expertise and recommendations when deciding whether or not to approve the Project in order to avoid undermining recovering efforts.

1 development in the Ferruginous Hawk’s breeding territory will add negative impacts onto what is
2 already a dire trajectory toward extinction of the Ferruginous Hawk in Washington State.¹⁵⁴

3 Due to the dramatic decline in the Ferruginous Hawk population, WDFW has prioritized
4 new research into what the Hawk needs to return to a healthy population. A specific focus of this
5 research has been how wind turbine development impacts the Ferruginous Hawk’s occupation and
6 use of habitat for breeding and rearing young—i.e. habitat necessary for the continuation of the
7 population.¹⁵⁵ This new research, which is regarded as best available science by all biologists in
8 this adjudication except for the Applicant’s contractors, shows the very real threat of new
9 anthropogenic development on the Ferruginous Hawk.¹⁵⁶ WDFW is also actively updating what
10 it considers to be outdated management recommendations to reflect best available science,
11 including numerous peer reviewed studies completed by Mr. Watson.¹⁵⁷

12
13 WDFW Research Biologist James Watson, who has been studying the Ferruginous Hawk
14 for decades, best explained why wind power projects are so detrimental to this species:

15 Q And based upon your research and experience, is it important to
16 avoid siting wind projects close to occupied ferruginous hawk
17 territory?

18 Yes.

19 And why is that?

20 Little background information, ferruginous hawks are a classic
21 sensitive species. They're sensitive to disturbance. They're also a

22 ¹⁵⁴ EXH_4019_Dep at 29.

23 ¹⁵⁵ EXH_4019_Dep at 28 “And these birds ranged over very large areas, very large home ranges relative to birds
24 throughout the rest of their distribution, and that information then was key to providing us an understanding as to the
25 home-range size and core-area size in the projects that we’re looking at like the one today.”

26 ¹⁵⁶ EXH-4019_Dep at 41. “Now, this particular research [Exhibit 4] is in review in The Journal of Wildlife
Management presently, and so it’s actually getting ready to be published...wind power certainly was shown in this
study to be an effect on long-term viability of ferruginous hawk territories.”

¹⁵⁷ See for example EXH-4019_Dep at 72-77 (updating the priority species recommendations for the Ferruginous
Hawk); EXH-4018_Dep_REDACTED at 50, lines 17-20 (developing solar guidelines); *id.* at 166-167 (updating
solar and wind guidelines).

1 specialized species in terms of diet. They're dietary specialists.
2 They feed primarily on burrowing mammals as well as rabbits, and
3 they're specialized on feeding on those. Because of that, they're
4 associated with particular habitats where those species are found -
5 typically shrubsteppe habitats and native habitats. The sensitivity of
6 the species has been demonstrated from years ago. They're much
7 akin to a Spotted Owl, in the owl world, that would be sensitive to
8 human activities.

9 So combining those things, wind projects really have potentially a
10 three-fold impact on ferruginous hawks. Number one, the direct
11 mortality concerns when turbines are built within the core areas that
12 we discussed. Because the birds are using those areas on a regular
13 basis, flying in and out of turbines that are built on the territory, it
14 increases the probability that it's going to be struck by a turbine at
15 some point, which has been demonstrated.

16 But the reality is that's not where [most] impacts of wind turbines or
17 other intense development would impact ferruginous hawks. The
18 longer-term perspective is habitat alteration. These birds, as I
19 mentioned, this species is sensitive to habitat alteration. They are
20 what I would call "anthropogenically sensitive species," unlike other
21 raptors. Anthropogenic is the idea of human activity and how do
22 birds relate to that. So these bird are sensitive to changes within that
23 habitat. In the longer term, then, that presents an issue because as
24 we alter habitat, that we are attempting to protect the quality of that
25 habitat such that new birds will move into that habitat and nest there,
26 we're reducing the probability of that happening with this species
because they're sensitive to that habitat alteration.

There's a third point, though, related to wind turbine development
and other intense development or human activities that is a -- kind
of a really insidious one, and that is we're increasing the probability
of competing or predating species of moving into those developed
areas. Those species would be more anthropogenically favored by
human activities - that is, they're more tolerant of it - and those
would include such things as ravens, common ravens, great horned
owls, red-tailed hawks, Swainson's hawks. But at least the first two
species, critically, those are species that predate -- not just compete
with but they actually predate ferruginous hawks. So the problem
is when we alter these habitats, making them less favorable to future
generations of ferruginous hawks, we may also be inviting these
other species that compete and predate them into those areas, so it's
kind of a double whammy.¹⁵⁸

23 While actively incorporating best available emerging science into updated guidelines for
24 both siting of both solar and wind power project in Ferruginous Hawk habitat, WDFW made
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26 ¹⁵⁸ EXH-4019_Dep at 20-22.

1 recommendations to the Applicant specific to the design of this Project. Applicant refused to
2 follow WDFW’s recommendations in its Updated ASC, relying instead on outdated formal
3 WDFW guidance and data produced by Applicant’s consultants that is neither unbiased nor peer
4 reviewed. According to James Watson, WDFW’s leading raptor expert,¹⁵⁹ in order for new large
5 scale development to truly avoid impacts to the Ferruginous Hawk, turbines should be sited 10
6 kilometers (“km”) outside active and historic nesting sites in order to preserve habitat and home
7 range territories for the revitalization of the species.¹⁶⁰ The Applicant acknowledged in notes from
8 a December 14, 2021 meeting with WDFW that “implementing 10 kilometer buffers would be
9 problematic.”¹⁶¹ As a compromise to accommodate renewable energy development, WDFW has
10 recommended a *minimum* 3.2 km buffer zones round active and historic nesting sites to preserve
11 the ferruginous hawk’s core use areas.¹⁶²

13 Even with the removal of select turbines identified in the Moon Memo, the Project still
14 falls far short of avoiding impacts to the Ferruginous Hawk. Contrary to the Applicant’s position
15 that “it’s no one’s job to recover the [ferruginous hawk species],”¹⁶³ EFSEC’s policy states that
16 the Council must avoid or mitigate adverse environmental impacts which may result from their
17 decisions.¹⁶⁴ As proposed in the Updated ASC, the Project design instead relies on 0.25 mile
18 buffer zone for turbine siting outside activate nests, rather than active *and* historic nesting
19 territories.¹⁶⁵ Applicant claims that this 0.25 mile buffer is based upon WDFW’s outdated
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23 ¹⁵⁹ EXH-4019_Dep at 12, lines 15-22.

24 ¹⁶⁰ *Id* at 47-49.

25 ¹⁶¹ Updated ASC, Appendix L at 5-6.

26 ¹⁶² EXH-4019_Dep at 50, lines 11-16; Adjudication Transcript at 1641.

¹⁶³ Dave Kobus Deposition at 189.

¹⁶⁴ WAC 463-47-110(1).

¹⁶⁵ Updated ASC § 3.4.3 at 3-194.

1 guidelines, but even the 2004 Priority Habitat Species Guidelines do not contain this
2 recommendation.¹⁶⁶ In fact, even in 2004 before the extension research conducted in recent years,
3 the recommendation from WDFW was to “[a]void construction within 1.6 km (1 mi) of nest
4 sites.”¹⁶⁷ As Mr. Watson testified based upon his professional experience and research:

5 [T]he attempt to put – allow turbines within the core area on only
6 active territories is some element – may afford some element of
7 protection for birds that are nesting, but it’s short-sighted. That’s
8 the bottom line here. It’s not addressing the longer term aspects that
9 we’ve discussed at length of maintaining quality of habitats that
10 birds we know used at one time, that we need to maintain in order
11 to recover the species that is taking a nose dive.¹⁶⁸

9 The Project’s micro-siting corridors, based upon Applicant’s business goals even more than
10 outdated science, will have unavoidable impacts to the endangered Ferruginous Hawk. On top of
11 the proposal to site turbines within identified core use areas, Ferruginous Hawks would also lose
12 habitat benefits associated with the larger Project area, including foraging habitat in existing shrub
13 steppe habitat and the Project’s periphery.¹⁶⁹

15 It is important to note that WDFW’s recommendation to exclude all turbines from core use
16 areas represents a compromise between ideal recovery conditions and the state’s goals of siting
17 renewable energy development. One could argue that a Project design that complies with
18 WDFW’s 3.2 km core use area recommendations would already represent a compromise that the
19 Council should not consider further degrading, but such a Project is not before the Council and
20 parties to this Adjudication. As Mr. McIvor acknowledged, the Council is now put in a difficult
21 position given the lack of alternative designs and the clear divide between recommendations based
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25 ¹⁶⁶ *Id.*; Adjudication Transcript at 854-856.

26 ¹⁶⁷ EXH_3018_X at 7-6.

¹⁶⁸ EXH-4019_Dep at 49.

¹⁶⁹ EXH_4011_T at 3.

1 upon best available science and the Applicant’s business goals to build as big of a Project as
2 possible.¹⁷⁰

3 The Project’s proposed solar fields similarly threaten core habitat for the Ferruginous
4 Hawk. As Yakama Nation Wildlife Biologist Mark Nuetzmann explained: “While the solar arrays
5 may not meet the standard of permanent impact that were developed for wind energy projects, the
6 effect on the Ferruginous Hawk may be as harmful as permanent impacts.”¹⁷¹ Applicant does not
7 propose sufficient mitigation for loss of habitat under solar arrays, again because Applicant is
8 relying upon outdated guidance regarding wind power development – this time to argue that such
9 guidelines should apply to solar development despite the clear difference in impacts to native
10 vegetation and its obligate species.¹⁷² After Yakama Nation identified inconsistencies between the
11 Mitigation Plan for replacement habitat and the actual property selected by the Applicant;
12 Applicant then *reduced the mitigation standards* to bring the selected property into compliance.¹⁷³
13 Such reductions are entirely inappropriate when faced with the viability of an entire species within
14 the State.
15

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17 Avian species are critical to Yakama Nation culture. As multiple Yakama Members and
18 Ms. Lally testified, avian species are an integral component of Yakama Nation’s culture which is
19 intrinsically tied to the land and considered a Treaty-reserved resource.¹⁷⁴ The Ferruginous Hawk
20 is in a precarious state and requires protection and intentional habitat management for the
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23 ¹⁷⁰ Hearing Transcript at 1643.

24 ¹⁷¹ EXH_4011_T at 8.

25 ¹⁷² EXH_4011_T at 6-7; EXH_3001_R_CONFIDENTIAL at 9.

26 ¹⁷³ Compare EXH_4011_T at 8-9 and EXH_4012_T at 6 with EXH_1022_R at 14.

¹⁷⁴ EXH-4005-T-CONFIDENTIAL at 4; EXH-4003-CONFIDENTIAL at TYN0016, TYN0018; Treaty with the
Yakama, U.S. – Yakama Nation, June 9, 1855, 12 Stat 951; Petition for Intervention by the Confederated Tribes and
Bands of the Yakama Nation at 4.

1 continuation of the species.¹⁷⁵ Yakama Nation has advocated strongly for this Council to hear
2 from all professionals with expertise that can speak on behalf of the Ferruginous Hawk's needs.
3 Experts from WDFW, Yakama Nation, and CfE all agree that this Project does not sufficiently
4 avoid, minimize, and mitigate impacts to the Ferruginous Hawk consistent with best available
5 science.

6 EFSEC should not recommend permitting this Project because it fails to sufficiently
7 mitigate impacts to ferruginous hawks.¹⁷⁶ The Project will directly remove available habitat for
8 the Ferruginous Hawk, without sufficient mitigation ranges. EFSEC is required to consider
9 avoidance, minimization, and mitigation of adverse environmental impacts when making its
10 recommendation to the Governor in order to ensure that it fulfills its role to “produce minimal
11 adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state
12 waters and their aquatic life.”¹⁷⁷ Due to the dramatic decline in the ferruginous hawk population,
13 and the Applicant's continued refusal to implement the *minimum* WDFW recommendations for
14 3.2 km buffer zones based upon best available science, the Council should recommend that the
15 Project be denied.¹⁷⁸

19 ¹⁷⁵ See EXH_4015_X. Although not formally adopted by WDFW, the updated PHS Guidelines are a summary of
20 WDFW's recent accumulation of best available science and recommendations on how to protect the Ferruginous
21 Hawk from extinction. See EXH_4019_Dep. at 77. To the extent that EFSEC is grappling with how to reconcile
22 different witness's assertions regarding reliance on outdated formal guidelines versus more recent scientific findings
and research, the draft PHS Guidelines in EXH_4015_X are near-final and provide the best guidance on how new
development should be designed and sited with regard to Ferruginous Hawk habitat.

23 ¹⁷⁶ While not included in the Updated ASC as a formal mitigation measure, Applicant includes artificial nesting
24 platforms in its Wildlife and Habitat Mitigation Plan as a voluntary measure. See Updated ASC, Appendix L § 7.5.1,
25 pg. 24. Unfortunately, artificial nesting platforms are considered a misplaced “cure-all for saving ferruginous
26 hawks” in Washington State. EXH-4019_Dep at 68. When located in Washington State, where lack of nesting
substrate is not the limiting factor, artificial nesting platforms are more likely to support species that compete with
the ferruginous hawk and should not be viewed as a viable mitigation tool. *Id.*

¹⁷⁷ RCW 80.50.010; WAC 463-47-110(1).

¹⁷⁸ EXH_4019_Dep. at 55, lines 9-14.

E. The Project Will Negatively Impact the Reintroduced Pronghorn Population

If approved, the Project threatens to undermine and potentially even unravel an ongoing and successful joint reintroduction program for Pronghorn Antelope in Washington State. Again, Applicant carries the burden to demonstrate that its application substantially complies with EFSLA and its implementing regulations,¹⁷⁹ and has chosen to instead urge this Council to ignore the Project’s potential impacts on Pronghorn entirely. The need to gather additional information and conduct scientific due diligence in order to better understand whether the Project sufficiently avoids, minimizes, or mitigates future impacts to Pronghorn is not an excuse to approve a Project where there certainly going to be some level of impact on this species.

As a species, Pronghorn are impacted by anthropogenic barriers to movement because they require open landscapes to feed, migrate, and rear offspring.¹⁸⁰ The amount of anthropogenic development already present within the Horse Heaven Hills and Benton County as a whole, makes it even more critical to the species’ survival that new development not further limit “the existing inter-connection of corridors whether fragmented or intact shrub-steppe habitat [because] this habitat is essential to [P]ronghorn resilience, diversity [and] stability.”¹⁸¹

[REDACTED]

¹⁷⁹ *Id.*
¹⁸⁰ EXH_4008_REVISED at 6.
¹⁸¹ *Id.* at 6-7.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED].¹⁸³

4 WDFW shares Yakama Nation’s concern that the Project will detrimentally impact the
5 Pronghorn reintroduction efforts. When asked what potential impacts first come to mind for new
6 solar development in the Horse Heaven Hills area, WDFW District Wildlife Biologist Jason
7 Fidorra answered with his concerns regarding the impacts of solar fencing on Pronghorn that use
8 the Horse Heaven Hills area.¹⁸⁴ Mr. Fidorra, who has personally observed Pronghorn within the
9 Project area as recently as 2023, testified that EFSEC should consider the information contained
10 in WDFW and Yakama Nation’s joint survey reports when reviewing the Updated ASC.¹⁸⁵ When
11 asked to explain the value of the joint survey reports, he stated that:
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13 We have conducted systematic surveys, in addition to logging, you
14 know, incidental observations as well. And that data is not only the
15 most recent and up-to-date distribution information that we have, it
16 also has been verified to the extent that it should be considered best
17 available science . . . And with this information, we have trained
biologists conducting the surveys as well. So we’re confident in the
results.¹⁸⁶

18 Yakama Nation has acknowledged that there is a need for more research and analysis of
19 the “raw” GPS Collar Data regarding Pronghorn use of the Horse Heaven Hills, as well as studies
20 into the long-term impacts of renewable energy projects on Pronghorn in the Columbia Plateau
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24 ¹⁸² EXH_4008_REVISED at 3; see EXH_4009_CONFIDENTIAL at TYN0112.

25 ¹⁸³ EXH_4009_CONFIDENTIAL at TYN0112.

26 ¹⁸⁴ EXH_4020_Dep at 26.

¹⁸⁵ See *Id.* at 46-51.

¹⁸⁶ *Id.* at 50-51.

1 Ecoregion.¹⁸⁷ Mr. Don McIvor, testifying on behalf of CfE, agreed that concerns raised by Mr.
2 Ganuelas needed further evaluation:

3 Foremost, Mr. Ganuelas presents telemetry data on the antelope that were not
4 incorporated into the Draft EIS or the Revised Application. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 As reported in the revised Appendix K, there are very few studies investigating
8 the impacts of wind or solar energy development on antelope, all conducted in
9 Wyoming, and their findings are mixed and sometimes conflicting. Antelope
10 appear to avoid, or at least reduce their use of landscapes with wind towers. The
11 aversive behavior could be linked to whether a better alternative is available to
12 the animals. [REDACTED]
13 [REDACTED]

14 Solar fields would certainly exclude antelope by virtue of their fencing. It also
15 seems unlikely that an animal of open country would choose to enter a field of
16 densely arrayed solar panels as they avoid structurally similar places like
17 orchards and landscapes with tall vegetation. The East Solar Field would have
18 the greatest impact on native habitats and is adjacent to a north-south
19 connectivity corridor identified by the Washington Wildlife Habitat
20 Connectivity Working Group.¹⁸⁸

21 Applicant's own consultant agrees that more analysis is necessary to understand the extent
22 of the Project's potential impacts on the Pronghorn. Although Mr. Rahmig critiqued Mr.
23 Ganeulas's reliance on studies regarding renewable energy development impacts on pronghorn in
24 Wyoming, he also stated in his rebuttal testimony that "the Project will have minimal impacts on
25 the species" without citing any scientific research or independent studies.¹⁸⁹ When asked by CfE
26 whether he agrees that it would be helpful to incorporate the GPA collar data provided by Yakama

¹⁸⁷ EXH_4009_CONFIDENTIAL at TYN0124; EXH_4013_R at 3.

¹⁸⁸ EXH_3001_R_CONFIDENTIAL at 14.

¹⁸⁹ EXH_1033_R_CONFIDENTIAL at 6.

1 Nation into the Application, Mr. Rahmig said yes, with the caveat that more statistical analysis of
2 the “raw” data was necessary before it could be fully utilized.¹⁹⁰

3 Faced with clear evidence of Pronghorn use within the Project area and the need for more
4 information to best understand the Project’s near and long-term impacts on this re-introduction
5 species, Applicant again refuses to make any business concession or find a middle ground. Not
6 only has Applicant failed to point to any design modifications made to address Pronghorn impacts,
7 but Pronghorn are excluded from the Habitat Mitigation Plan *entirely*.¹⁹¹ [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 [REDACTED].¹⁹² Mr. Fidorra, and Mr. McIvor joined in Yakama Nation’s concerns with
13 the Mitigation Plan’s failure to address impacts to the Pronghorn.¹⁹³

14 EFSEC should reject Applicant’s invitation to ignore the Project’s potential impacts on the
15 Pronghorn and hold the Applicant accountable for working collaboratively with all impacted
16 parties toward solutions that reflect the EFSLA’s legislative intent. EFSLA tasks EFSEC with
17 balancing the increasing demands for energy facility development with “broad interests of the
18 public,” including the interest of the public to “preserve and protect the quality of the environment”
19 as well as “pursue beneficial changes in the environment; and to promote environmental justice
20 for overburdened communities.”¹⁹⁴ In addition, SEPA requires EFSEC to analyze the Project’s
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24 ¹⁹⁰ Hearing Transcript at 1043.

25 ¹⁹¹ See Updated ASC Appendix L.

26 ¹⁹² Compare EXH_1033_R_CONFIDENTIAL at 8 with EXH_4009_CONFIDENTIAL at TYN0118, TYN0122.

¹⁹³ EXH_3001_CONFIDENTIAL at 14-15.

¹⁹⁴ RCW 80.50.010.

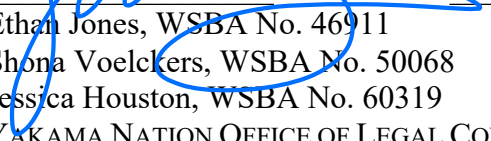
1 impacts to wildlife through a “detailed statement” on the Project’s environmental impacts,
2 including impacts that cannot be avoided.¹⁹⁵ Based upon all information before it, including the
3 Updated ASC and DEIS, EFSEC does not have sufficient information to determine that the Project
4 will “. . . produce minimal adverse effects on the environment, ecology of the land and its wildlife,
5 and the ecology of state waters and their aquatic life.”¹⁹⁶

6 Yakama Nation and WDFW are conducting what is currently a successful reintroduction
7 effort that will benefit the entire community while also restoring a species of cultural significance
8 to Yakama Nation. Mr. Ganuelas testified that “[w]e are working to bring back a traditional food
9 that was taken from us by the progression of settlers in this area when there weren’t any resource
10 management goals.”¹⁹⁷ This Council cannot meet its legal obligations by approving a Project that
11 threatens this effort. The Project should be denied.

12 VII. CONCLUSION

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14 For the foregoing reasons, Yakama Nation respectfully asks this Council to recommend
15 that the Washington State Governor deny Scout Clean Energy’s application to permit the Project.

16 Dated this 13th day of October, 2023.

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25 ¹⁹⁵ RCW 43.21C.030(c).

26 ¹⁹⁶ RCW 80.50.010.

¹⁹⁷ EXH_4008_REVISED at 2.

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

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1 **CERTIFICATE OF SERVICE**

2 I, Shona Voelckers, certify that on October 13, 2023 I electronically filed confidential and
3 redacted versions of the Confederated Tribes and Bands of the Yakama Nation’s Post Hearing Brief
4 with the Energy Facility Site Evaluation Council (“EFSEC”) at Adjudication@efsec.wa.gov.
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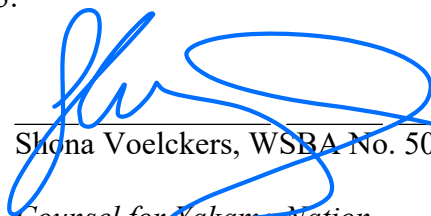
6 I further certify that on October 13, 2023 I served a redacted copy of the same upon all
7 parties of record and identified EFSEC staff in this proceeding by electronic mail as follows, with
8 an unredacted confidential version included for counsel of record and EFSEC staff subject to Judge
9 Torem’s Projective Order dated May 24, 2023:
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21 Dated this 13th day of October, 2023.

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23 _____
24 Shona Voelckers, WSBA No. 50068
25 Counsel for Yakama Nation
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