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August 14, 2023

Horse Heaven Wind Farm v.

EF-210011

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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)	Docket No. EF-210011
Horse Heaven Wind Farm, LLC,)	
)	
)	
Applicant.)	

ADJUDICATIVE HEARING
VERBATIM RECORD OF PROCEEDINGS

VOLUME 1

August 14, 2023

Lacey, Washington

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1 BE IT REMEMBERED that on Monday,
2 August 14, 2023, at 621 Woodland Square Loop Southeast,
3 Lacey, Washington, at 8:31 a.m., before the Washington
4 Energy Facility Site Evaluation Council; Kathleen Drew,
5 Chair; and Adam E. Torem, Administrative Law Judge, the
6 following proceedings were had, to wit:

7 <<<<<< >>>>>>
8

9 JUDGE TOREM: Good morning,
10 everyone. It is now 8:31. We're going to start the
11 Horse Heaven land use -- not the land use. We're going
12 to talk about land use today. We're going to start the
13 adjudicative hearing with a quick housekeeping session.
14 I want to make sure that all the parties are here.

15 For the applicant, who's going to be present this
16 morning?

17 MR. McMAHAN: Your Honor, Tim
18 McMahan here with Emily Schimelpfenig and Ariel
19 Stavitsky. And we had a core team member test positive
20 for COVID last night, Ms. Perlmutter, which is
21 problematic, so we can talk about that. But in any
22 event, we are here, present. Thank you.

23 JUDGE TOREM: All right. Well, I
24 hope she's going to be feeling well enough to do
25 whatever part she needs today. You can let me know

1 more about that in a minute.

2 Ms. Reyneveld, I can see you're back. Good
3 morning.

4 MS. REYNEVELD: Good morning, Judge.

5 JUDGE TOREM: And for Benton County,
6 I can see Ken Harper on my screen.

7 Anybody along with you today, Mr. Harper?

8 MR. HARPER: Good morning, Your
9 Honor. Z. Foster will be joining me today.

10 JUDGE TOREM: Okay. And for the
11 Confederated Tribes and Band of the Yakama Nation, I
12 saw Ms. Voelckers' camera was working.

13 MS. VOELCKERS: Good morning, Your
14 Honor. Yes, Shona Voelckers on behalf of the Yakama
15 Nation. And my colleagues Jessica Houston and Ethan
16 Jones are also on the line.

17 JUDGE TOREM: Great.

18 And, Mr. Aramburu, I saw you pop by earlier. You
19 might be on "mute."

20 Mr. Aramburu, we haven't heard you yet. I saw you
21 earlier.

22 All right. He may be having technical
23 difficulties. Let's just kind of stand by.

24 All right. I see Carol Cohoe's mike came live.

25 MR. ARAMBURU: If you can hear --

1 can you hear me, Mr. Torem?

2 JUDGE TOREM: Yes, I can hear you
3 fine.

4 MR. ARAMBURU: We're having a little
5 trouble -- we're having a little trouble with my
6 computer. I should be on your screen momentarily. But
7 let's look like this for the meantime. I apologize.

8 JUDGE TOREM: No worries. This is
9 what we're trying to do, make sure everything runs
10 smoothly by the time we get to 9:00.

11 All right. This morning we have testimony -- I
12 see my screen's gone dark too. We have testimony
13 coming up from Jessica Wadsworth and Christopher Wiley
14 to adopt their uncontested testimony or at least on
15 cross-exam testimony at 9:00. And I saw Ms. Wadsworth
16 earlier, so she'll be ready to go.

17 And then we have Ms. McClain coming up, Leslie
18 McClain, at 9:30.

19 What I'm anticipating is, it looks like,
20 Mr. Harper, you're going to go first; is that right?

21 MR. HARPER: Yes, Your Honor.
22 That's my understanding.

23 JUDGE TOREM: All right. What I'm
24 hoping is we'll get pretty close to the end of your
25 cross-exam before we need to take a break for the court

1 reporter. And as you're going along, if we really do
2 get started at 9:30 -- it might be a little earlier --
3 then we'll aim for kind of a 10:30 break. What I'm
4 hoping is, by the time we get close to the end of this
5 housekeeping session, we'll have everybody take that
6 five-minute comfort break and come back at 9 ready to
7 go.

8 And the order that's listed in our thing would
9 then be, Mr. Aramburu, you would follow. And,
10 Ms. Voelckers, you would follow with cross-exam and
11 then any redirect that we can get done before lunch, so
12 we'll see how that plays out.

13 If it all goes well, I'm thinking we need an hour
14 and a half, as it says, from 2:30 to 4:00. If we're
15 still running on Ms. McClain's testimony past 2:30,
16 we'll see if that means we need to extend a little bit
17 toward 4:15 or 4:30 today.

18 I'm also anticipating a little bit of how we're
19 going to do objections to questions, if necessary.

20 Mr. McMahan, it sounds like you're going to be
21 defending the witness. And is there one lawyer in your
22 office that's going to be handling any objections that
23 might occur?

24 MR. McMAHAN: Your Honor, that would
25 be me.

1 JUDGE TOREM: Okay. All right. So
2 all of you know the rest of the drill. If there's an
3 objection, we'll all listen for a very quick, hopefully
4 not a long speaking objection. Just the evidentiary
5 grounds. And whoever the questioning witness is, I'll
6 have you respond, and sustain or overrule as the case
7 may be.

8 So I don't want to have a lot of back-and-forth
9 with the objections. We'll just rule on them and keep
10 moving. If I have a question about the objection, I'll
11 answer it. And if you have a further explanation, let
12 me know, but I'd rather have it just state grounds and
13 the rules of evidence, and hopefully that will be
14 self-explanatory and we can keep going.

15 If there's a specific page or something that we
16 need to refer to, call it out, and that might be the
17 basis of why you're making an objection or not.

18 Any issues, questions, concerns about how to
19 handle objections? Hopefully it will be easy enough
20 for us to keep track of who's saying something and for
21 the court reporter as well.

22 Other process questions, Mr. McMahan, for today as
23 we go?

24 MR. McMAHAN: Well, no, Your Honor,
25 other than the issue I brought up concerning

1 Ms. Perlmutter's health.

2 JUDGE TOREM: Okay. Why don't we
3 talk about that, and then we'll go around to the other
4 parties as well.

5 MR. McMAHAN: All right.
6 Ms. Perlmutter is -- has been preparing for and would
7 be handling the wildlife testimony, which commences
8 tomorrow, I believe, with Jansen, Rahmig and ultimately
9 Mr. McIvor as well.

10 As indicated, she has COVID, was tested positive
11 last night. Felt like she got, quote, hit by a truck
12 this morning. So I will just confess we're slightly
13 stumped on kind of how to do that, because she has been
14 in a very, very central role in preparing for this
15 testimony.

16 I'm not sure if there's an opportunity to swing
17 some of this to next week. I -- I'm not crazy about
18 the idea, but I am -- I am definitely concerned about
19 our ability to kind of pick this up without her
20 available.

21 So I'm just putting that on the table, looking for
22 any thoughts and feedback, and hoping that we can get
23 Willa up and well and running sometime soon.

24 JUDGE TOREM: Okay. Well, it's hard
25 to know what the course of COVID is for each individual

1 person.

2 Would she be handling Cooke, Jansen, and Rahmig,
3 all three of them?

4 MR. McMAHAN: I would be handling
5 Cooke. So Jansen, Rahmig, and McIvor is what she would
6 be handling. It comes after the land-use testimony, in
7 other words.

8 JUDGE TOREM: Understood.

9 Okay. And that would carry us from about, if I
10 look at the schedule, 10:40 tomorrow through 11:30 on
11 Wednesday; is that right?

12 MR. McMAHAN: Yes.

13 JUDGE TOREM: Okay. Let's -- let's
14 take a look and see at lunch today if you have a
15 further health report. It may not be anything changing
16 between now and then, and then we can -- maybe you can
17 e-mail the sponsoring parties for each witness and just
18 see if they can have their staff look into availability
19 as well. And then --

20 MR. McMAHAN: Yes. Will do. Yes.
21 Thank you, Your Honor.

22 JUDGE TOREM: Shuffling the -- the
23 testimony may be difficult, because it would mean
24 flipping somebody else sooner, so we'll just see what
25 we can do.

1 Worst-case --

2 MR. McMAHAN: Yeah, I appreciate
3 that.

4 JUDGE TOREM: Yeah.

5 MR. McMAHAN: Yeah.

6 JUDGE TOREM: Worst-case scenario,
7 Mr. McMahan, I think if we have to stay with the
8 witnesses, and if she's unable to proceed, I'm hoping
9 that there'll be somebody else that could step in to do
10 it. But I understand she's got that knowledge between
11 her ears and knows it better than anybody in your
12 office. That's what I'm taking it.

13 Okay. Let's reengage on that when we get to the
14 lunch hour.

15 MR. McMAHAN: Thank you, Your Honor.

16 JUDGE TOREM: Mr. Harper, hopefully
17 there's no such health concerns out of you and Z.
18 Foster.

19 MR. HARPER: No. We think we're
20 ready to go.

21 JUDGE TOREM: Okay. Any other thing
22 that you wanted to talk about this morning just to get
23 ready for the testimony today?

24 MR. HARPER: No. No. I think -- I
25 think we're ready.

1 JUDGE TOREM: Okay. Good.

2 MR. HARPER: Thanks, Your Honor.

3 JUDGE TOREM: Ms. Reyneveld?

4 MS. REYNEVELD: Yeah, I have no
5 objections to continuing the wildlife testimony until
6 all counsel are ready and prepared to present and
7 cross-examine witnesses. I just wanted to -- to
8 mention that for the record.

9 I also don't have an objection to the
10 cross-examination of Mr. McIvor being continued until
11 August 25th, assuming Mr. McIvor is available on that
12 date, and I have reached out to him to confirm his
13 availability.

14 JUDGE TOREM: Okay. Appreciate the
15 flexibility there.

16 Ms. Voelckers. You're on -- there you go.

17 MS. VOELCKERS: Thank you. Thank
18 you, Your Honor. We would need to check with our
19 witnesses. Maybe it would still be okay, though, to
20 just swear them in and have them adopt their testimony
21 this week since that's when they're available and we
22 don't -- the applicant stated they don't intend to
23 cross-examine them. So our preference would still be
24 to at least have our wildlife biologist still
25 participating when they were scheduled to participate,

1 and then we could avoid having to try to reschedule
2 them as well.

3 I know this is not yet the topic of the
4 conversation, but of course we do have our pending
5 motion to continue those exact witnesses at least a
6 month given the impact of the new testimony, or the new
7 information on their testimony. And so I'd like to
8 talk about that more when we're ready for that topic.

9 JUDGE TOREM: Okay. Yeah, when
10 we --

11 MS. VOELCKERS: But --

12 JUDGE TOREM: -- come back around,
13 we'll do that.

14 MS. VOELCKERS: Right.

15 JUDGE TOREM: All right. And
16 Mr. Aramburu.

17 MR. ARAMBURU: I'm ready to go, Your
18 Honor.

19 JUDGE TOREM: Okay. So --

20 MR. ARAMBURU: I do have some
21 questions about the pending motions, and I'm assuming
22 we're going to get to that.

23 JUDGE TOREM: Yes. I'm going to
24 have each party, for the record, summarize those today
25 and then see if there's any new things that came up

1 since last Thursday's prehearing. I saw some e-mail
2 traffic this weekend regarding that. So it might be
3 easier to have everybody summarize where we stand now.

4 All right. As far as Jansen and Rahmig, if we
5 need to reschedule, my understanding is that we
6 would -- Ms. Voelckers, on your witnesses, they're not
7 till, the ones that are adopting testimony, till next
8 week. Remind me which ones are not subject to
9 cross-examination.

10 MS. VOELCKERS: Thank you, Your
11 Honor. They're actually -- they are this week. They
12 are Leon Ganuelas and Mark Nuetzmann, who are currently
13 scheduled for Wednesday at 11:30. And we had asked
14 that that remain on the schedule previously, because
15 that's when their availability has been confirmed. So
16 they are for this week, for this Wednesday.

17 JUDGE TOREM: Got it. Sorry. I
18 missed the page break there as I was scrolling down.

19 All right. Those should be just fine, especially
20 if there's not cross-examination that Ms. Perlmutter is
21 going to be involved in. So those, you're right,
22 Ms. Voelckers. We'll have no problem keeping them on
23 the schedule.

24 All right. Let's shift gears and talk about the
25 outstanding motion, because it -- we don't want to

1 become overcome by events today.

2 But, Ms. Voelckers, if you want to summarize the
3 motion to continue that you've introduced last week.

4 MS. VOELCKERS: Thank you, Your
5 Honor. So we have reviewed now the memo and believe,
6 upon review, that the motion is even more necessary due
7 to the prejudice of the parties. So the motion was
8 based upon the untimeliness, first and foremost. This
9 information has clearly been developed for a while.

10 I did over the weekend go back and confirm that
11 Mr. Kobus, himself, testified during his deposition
12 that he was not disclosing information on particular
13 turbine movement at least, based upon advice of legal
14 counsel. So, you know, I think the timeliness is
15 certainly a concern. It's directly relevant to and, at
16 least for -- for myself -- I don't want to speak for
17 other parties -- you know, has impacted preparation for
18 this hearing.

19 And I sent a highlighted schedule with the
20 witnesses' impacts that I had identified based upon
21 that preliminary review, but I do want to flag -- and
22 I -- and I believe I brought this up last week as well.
23 This is very prejudicial to the Nation's efforts to
24 depose WFW's witnesses and make sure that there was
25 expert testimony about the project design.

1 Two key depositions have been within the last 30
2 days. So, again, I'm looking at the WAC that requires
3 this to have been disclosed 30 days before the hearing.
4 I think it's a very fair basis for the motion today.

5 So you asked for a summary, so I don't want to
6 rehash what we said. But, I mean, it is -- it is
7 extremely untimely. It is very prejudicial. And it
8 should be -- it should not be allowed to go forward and
9 question witnesses on a project design that's been
10 modified without some clarity around which project
11 design we're talking about.

12 And then, you know, we would like the ability,
13 if -- if this is not continued, to -- to reengage,
14 redepose, requestion a number of folks, because this
15 is, you know, directly impacting that testimony that's
16 already been made as well as the next two weeks of
17 testimony.

18 JUDGE TOREM: Thank you,
19 Ms. Voelckers.

20 Mr. Aramburu, I think you and Mr. Harper had
21 joined in the motion, so I'm going to have Mr. Harper
22 talk first, and then I'll come back to you.

23 Mr. Harper.

24 MR. HARPER: Well, Your Honor, I
25 do -- the County does support the motion. It's

1 regrettable that we find ourselves at this spot at this
2 late date, but that is something that -- that -- I
3 think all the non-Scout participants did everything
4 they could through discovery processes, asking
5 Mr. Kobus relevant questions, those questions being
6 objected to. There was really nothing else that --
7 that could be really gained by continuing to pound on
8 this. And then we expected Scout to proceed with that
9 record having been established.

10 And so to find this -- this -- sort of, you know,
11 this revision underway in the midst of last-minute
12 cross-examination preparation certainly for my clients
13 is -- is problematic. I'm not going to embellish it
14 further. I think Ms. Voelckers has already stated why
15 this is problematic. But we certainly do support a
16 continuance. And, frankly, it's -- it's just
17 frustrating, Your Honor. And it's beyond frustrating.
18 It's prejudicial. And I guess that's the -- that's the
19 key.

20 JUDGE TOREM: All right.

21 Mr. Aramburu.

22 MR. ARAMBURU: Thank you, Your
23 Honor. We have provided a couple of e-mails over the
24 weekend detailing our concerns. And we join with
25 Mr. Harper and Ms. Voelckers requesting continuance.

1 We have witnesses here that are now being
2 presented with new information that needs to be
3 incorporated into their testimony. Mr. Apostol has
4 been working for literally months on a set of
5 turbine -- turbines and turbine locations. That's now
6 changed.

7 The fire issues are of utmost importance to
8 everyone in Benton County. And the plans for fire
9 suppression have changed from sprinklers and other
10 things to -- to "let it burn."

11 So that's a big change in -- in what we're doing
12 here and addressing. And it goes to the issues of the
13 various witnesses, Mr. Apostol, and the land-use issues
14 as well. The conditional use now includes 18 acres of
15 battery storage facilities, an increase from what we've
16 seen before, change in location of those facilities,
17 and now a new means of non-fire suppression.

18 So those are all things that came up as surprises
19 to us. They affect what people are going to say. And
20 I should say that Mr. McMahan and the Scout team had
21 months or weeks to look at these things, to prepare for
22 these things, and all -- and at the very last minute,
23 55 minutes before our final prehearing conference, this
24 thing pops up.

25 And so it's extremely prejudicial to the community

1 interests as well as the interests of Benton County and
2 of the -- the Yakama Nation, and extra time, movement
3 of witnesses, of those kinds of things.

4 And I'll also say that, for the Council, itself,
5 what do they -- what do they think they're looking at
6 here? I mean, I can't imagine that people who spent
7 time, for example, last night, reviewing the McClain
8 testimony and other testimonies now find out there's --
9 there's a different proposal that the County witnesses
10 and Ms. McClain's testimony don't address.

11 So I think these are serious concerns. I won't
12 belabor the point. We also have outstanding other
13 motions that have not been decided yet. I know, Your
14 Honor, you know what those are. I won't go into detail
15 about those.

16 So thank you for the opportunity --

17 JUDGE TOREM: All right.

18 MR. ARAMBURU: -- to speak.

19 JUDGE TOREM: Thank you,

20 Mr. Aramburu.

21 Mr. McMahan, I'm going to give you a chance. It's
22 about two minutes. Because I want to be able to rule
23 and then take a two- to three-minute break before we
24 convene the evidentiary hearing. Mr. McMahan.

25 MS. STAVITSKY: Thank you, Your

1 Honor. (Videoconference technical difficulties.)

2 JUDGE TOREM: Hang on. We'll
3 eliminate the -- I hope.

4 Let's try again, Ms. Stavitsky.

5 MS. STAVITSKY: (Videoconference
6 technical difficulties.)

7 JUDGE TOREM: No, we still have an
8 echo. I know where Mr. McMahan came on earlier, we
9 didn't. So I'm wondering if it's in your conference
10 room.

11 Do you want to just change seats?

12 MS. VOELCKERS: Your Honor, while --
13 while Stoel is rearranging, I just did want to flag
14 that my understanding is that this motion was also
15 joined by counsel for the environment last week.

16 JUDGE TOREM: Ms. Reyneveld, while
17 we're trying to get Stoel together -- thank you,
18 Ms. Voelckers -- did you want to add anything?

19 MS. REYNEVELD: Certainly.

20 I understand that this process is fluid, but
21 counsel for the environment has continued to request a
22 continuance in this matter so that we can properly and
23 adequately prepare for the hearing. And I do agree
24 that the memo has impacted preparation for the hearing,
25 and it would be helpful to have more time for our

1 wildlife witness to review the memo and prepare for
2 cross-examination. And I think a brief continuance,
3 particularly from our perspective, of the wildlife
4 witnesses, both to accommodate applicant's counsel and
5 also to allow for witness preparation to really digest
6 that memo, I do think is in order here. Thank you.

7 JUDGE TOREM: Ms. Stavitsky.

8 MS. STAVITSKY: Yes. Thank you,
9 all. Apologies. We're going to be playing multiple --
10 musical chairs today.

11 I would note, we provided a response to the motion
12 in a letter on Friday evening, and we maintain the
13 positions that we articulated in there.

14 **A few things I'd just like to highlight today:**

15 **First, like we mentioned in the -- in the memo,**
16 **strictly speaking, this information was submitted as**
17 **part of the SEPA process, and I just wanted to address**
18 **the WAC that Ms. Voelckers was referencing. The**
19 **information does not represent an amendment to the**
20 **pending application, and the pending application is**
21 **what's at issue in this adjudication.**

22 **This represents the best available current**
23 **information and the current intentions of the**
24 **applicant, which is why we submitted this information**
25 **to make sure that everybody had the most up-to-date**

1 information. However, acknowledging, you know, that
2 this may affect the questions that everyone wants to
3 ask and acknowledging that Your Honor's been very clear
4 that the schedule is what it is and, you know, to the
5 extent that you don't want to move it more, if we need
6 to move forward currently, you know, these questions
7 can be asked during cross-examination.

8 And to the extent that, you know, the parties
9 aren't available to do a complete reanalysis if they
10 want to, we can move forward on the application
11 materials as they've been currently submitted. That
12 will represent, you know, most conservative worst-case
13 analysis. And to the extent that all of these changes
14 represent a net reduction in impacts, particularly
15 where land-use and wildlife impacts are concerned, then
16 again, that is a net reduction, which the benefit
17 should be obvious. Thank you.

18 JUDGE TOREM: All right. Thank you,
19 Ms. Stavitsky.

20 I did some research this weekend as well. And
21 what I'm finding in general, parties, is that a
22 reduction that's within the scope -- changes within the
23 scope of the application that reduce impact still keep
24 the application within its original scope. If anything
25 else, it's narrowed somewhat by eliminating a solar

1 array, by reducing some of the impacts that were
2 originally of concern. The applicant's got mitigation
3 efforts that have been taken through the SEPA process
4 since the draft EIS was issued on the application and
5 their ongoing, as you've seen, response to data
6 requests from EFSEC staff.

7 My evaluation of the project -- and, again, I
8 don't have a vote. The Council has the vote on what
9 gets recommended to the governor. But my independent
10 reading of things is that the impacts have been
11 reduced. And that, again, it changes what happens in
12 the scope of cross-exam. But the parties have, again,
13 done discovery. The parties have read the original
14 prefiled testimony and have an opportunity to ask those
15 questions and cross-exam.

16 This is not something that's a complete surprise
17 based on the original prefiled testimony, based on the
18 application, and on the SEPA side of the house, what we
19 know is in the draft EIS. Again, as Ms. Stavitsky
20 pointed out, a lot of this is coming in, in the SEPA
21 analysis, which is parallel. And the Council will be
22 reviewing the ongoing SEPA documents when they have
23 their deliberations and an ultimate recommendation to
24 the governor.

25 I don't see a compromise of due process that

1 requires another delay of this adjudication. We know
2 the statute requires getting things done within 12
3 months. Notional as they may be, we're now two and a
4 half years into the process. A further delay, I think,
5 disadvantages the applicant, but it also disadvantages
6 this Council from being ready to go forward and saying,
7 We're drawing a line of what the information coming in
8 is.

9 At the end of the year, when they have their
10 deliberations, they'll make a recommendation based on
11 all of that. If parties want to challenge that later,
12 there's an appeal process from the governor's
13 recommendation. What goes into the recommendation and
14 what the governor ultimately gets should be the best
15 available data, the best available evidence, and I
16 think that's what we're going to develop during the
17 course of the adjudication. And EFSEC staff will
18 continue to develop that through the SEPA process.

19 So I'm denying the motions for continuance based
20 on the fact that there's not a due process right to
21 have all of the information as a snapshot and nothing
22 else can develop. It's all within the scope of the
23 original application. And the administrative bodies
24 I've been able to find, they recognize that as well, as
25 have other courts that have reviewed moving forward on

1 applications in front of the Shorelines Board, the
2 Pollution Control Hearings Board, and now we'll see if
3 they uphold those same principles in front of EFSEC.

4 But my decision as the ALJ today is that we're not
5 going to continue the hearing. We're going to continue
6 exactly what we scheduled over the last few weeks. And
7 understanding the limits of the process, we're going to
8 go forward today, have testimony adopted by Mr. Wiley
9 and Ms. Wadsworth, and then begin our cross-examination
10 of Ms. McClain.

11 I'm hoping that the original preparation for
12 Ms. McClain's testimony might be a little bit shortcut
13 if Mr. McMahan has her adopt the testimony and then
14 briefly state and highlight the changes so that, as
15 Mr. Aramburu points out, Council members know what's in
16 front of them. But I don't know that how much there
17 needs to be of that. There might be just a few
18 sentences as to what's been eliminated from the
19 original testimony with a focus on the land-use pieces
20 that she's going to testify to. But other than that,
21 we're going to try to get through the cross-exam as
22 scheduled.

23 I don't want to hear the Council members get into
24 it with a witness as to, "Why did this change, and why
25 didn't you tell us this before?" other than maybe one

1 of you asking, "When was that knowledge done?" But I
2 don't want to have an extended argument. You've got
3 your cross-examination times, and I hope we'll stay
4 within those without deviating too far into this what's
5 new information and what's not.

6 All right. The court reporter's got that on the
7 record. We're going to take a break until 9:00. We'll
8 turn the camera back on here in about three minutes and
9 take a roll call of the Council and then a roll call of
10 all the other parties, and then we'll get going.

11 Thanks. We'll be back in two minutes.

12 (Pause in proceedings from
13 8:58 a.m. to 9:00 a.m.)
14

15 JUDGE TOREM: All right. Good
16 morning, everyone. We're going to try to work with
17 sound and eliminate any of the echoes.

18 All right. We're going to start the Horse Heaven
19 Wind Farm adjudication this morning. Good morning,
20 Chair Drew. We're going to have Andrea Grantham take a
21 roll call of the Council and make sure everybody's
22 here. So I'm going to ask Andrea Grantham to do that
23 now.

24 MS. GRANTHAM: Starting off with the
25 EFSEC Chair.

1 COUNCIL CHAIR DREW: Present.

2 MS. GRANTHAM: Department of
3 commerce.

4 COUNCIL MEMBER OSBORNE: Present.

5 MS. GRANTHAM: Department of
6 Ecology.

7 COUNCIL MEMBER LEVITT: Eli Levitt,
8 present.

9 MS. GRANTHAM: Department of Fish
10 and Wildlife.

11 COUNCIL MEMBER LIVINGSTON: Mike
12 Livingston, present.

13 MS. GRANTHAM: Department of Natural
14 Resources.

15 COUNCIL MEMBER YOUNG: Lenny Young,
16 present.

17 MS. GRANTHAM: Utilities &
18 Transportation Commission.

19 COUNCIL MEMBER BREWSTER: Stacey
20 Brewster, present.

21 MS. GRANTHAM: And for the Horse
22 Heaven project: Department of Agriculture.

23 And Benton County.

24 That is everyone, Judge.

25 JUDGE TOREM: Did we get Benton

1 County, Mr. Brost?

2 MS. GRANTHAM: I'm not -- he didn't
3 call in present, but I can e-mail him and see if he is
4 in.

5 JUDGE TOREM: All right. Let's make
6 sure we have our Benton County representative, and then
7 we'll proceed with the checking in of the parties.

8 MS. GRANTHAM: Since e-mail isn't as
9 quick, would you like me to try to give him a call? I
10 have his number.

11 JUDGE TOREM: Let's see if
12 Mr. Wadsworth is on the line.

13 MS. GRANTHAM: Okay.

14 JUDGE TOREM: Yeah, try to give him
15 a call.

16 MS. GRANTHAM: Okay.

17 JUDGE TOREM: If Mr. Brost is not
18 able to be here, we'll have to have him review the
19 transcript of the recording.

20 MS. GRANTHAM: Okay. I'll give him
21 a quick call.

22 JUDGE TOREM: All right. While
23 staff is reaching out to our Benton County Council
24 representative and member, let me have the applicant
25 state again for the record again during the

1 adjudicative hearing portion, not our housekeeping this
2 morning, who's present for the applicant.

3 MR. McMAHAN: Thank you, Your Honor.
4 No echo. That's great.

5 Thank you, Your Honor. Tim McMahan here on behalf
6 of the applicant. And I'm here with Emily
7 Schimelpfenig and Ariel Stavitsky. And we are here and
8 ready.

9 JUDGE TOREM: All right. For Benton
10 County.

11 MR. HARPER: Good morning, Your
12 Honor. Ken Harper with Z. Foster for Benton County.

13 JUDGE TOREM: And counsel for the
14 environment.

15 MS. REYNEVELD: Sarah Reyneveld is
16 here for counsel for the environment. Thank you, Your
17 Honor.

18 JUDGE TOREM: Good morning.
19 And for the Yakama Nation.

20 MS. VOELCKERS: Shona Voelckers on
21 behalf of the Yakama Nation, joined by my colleagues
22 Ethan Jones and Jessica Houston.

23 JUDGE TOREM: And for Tri-Cities
24 C.A.R.E.S.

25 MR. ARAMBURU: Good morning, Your

1 Honor and Council members. Richard Aramburu
2 representing Tri-City C.A.R.E.S., a local community
3 organization. Thank you.

4 JUDGE TOREM: All right. Thank you,
5 all.

6 Good morning, Council members and Chair Drew.
7 Today we're going to be adopting some testimony of
8 Jessica Wadsworth and Christopher Wiley. We'll be
9 focusing on land-use issues and the conditional use
10 permit that the applicant will be seeking. And that
11 will be trying to look at how Benton County might have
12 done this and having EFSEC focus on what conditions, if
13 any, should be imposed for a conditional use permit if
14 this project is to be recommended for approval. That
15 will come much later in the process after all evidence
16 is in.

17 This morning and almost every day, I'm going to
18 ask you about ex parte communications you may have had
19 with anybody outside of the Council about this project.
20 And I'm not going to go as a poll, but if you have had
21 any, I'll ask you to speak up, identify what the
22 conversation was, maybe what the substance was, and put
23 it on the record so that all parties understand you may
24 have had a contact or somebody asked you about this
25 project, and we go from there.

1 So, Chair Drew and Council members, does anybody
2 want to put on the record today any ex parte
3 communications they may have had about the Horse Heaven
4 project?

5 All right. Hearing none. They may change as the
6 course of the adjudication goes on. I know that
7 there's going to be more press coverage. You may get a
8 phone call. Those are the kind of things that I'm
9 asking you and those that were detailed in the guide to
10 the ex parte communications that was circulated last
11 week. And I think you-all got training on that
12 particular administrative and appearance-of-fairness
13 concern when you first got appointed to the Council.

14 All right. Having no ex parte communications to
15 report today, do we have our Benton County Council
16 member?

17 MS. GRANTHAM: So I called
18 Mr. Brost, and he said he is running a tad late, but he
19 will be calling in. I informed him that he will just
20 need to review the recording of today's hearing at the
21 beginning of what he misses.

22 JUDGE TOREM: All right. Maybe
23 he'll be here by the time we get to cross-examination
24 of Leslie McClain.

25 /////

(Witness Jessica Wadsworth
appearing remotely.)

JUDGE TOREM: All right. At this
time, do we have Jessica Wadsworth?

THE WITNESS: I'm here.

JUDGE TOREM: Good morning,
Ms. Wadsworth. I'm going to swear you in, and then I'm
going to ask your sponsoring attorney to go ahead and
have you identify which exhibits you're adopting. And
I'll put you under oath to do that. And I don't
believe there's any cross-examination scheduled for
you. I'll just confirm that. And then we'll get you
on your way.

THE WITNESS: Thank you.

JUDGE TOREM: All right. If you'll
raise your right hand.

JESSICA WADSWORTH, appearing remotely, was duly
sworn by the Administrative
Law Judge as follows:

JUDGE TOREM: Do you, Jessica
Wadsworth, solemnly swear or affirm that all testimony
you'll present to this Council and adopt today will be

1 the truth, the whole truth, and nothing but the truth?

2 **THE WITNESS: Yes.**

3 JUDGE TOREM: All right.

4 Mr. McMahan, I'm going to turn Ms. Wadsworth over to
5 you to identify all of the exhibits she's sponsoring in
6 for this record.

7 MR. McMAHAN: Thank you, Your Honor.
8 Tim McMahan here. And Ms. Wadsworth is sponsoring
9 Exhibit 1034-R.

10 JUDGE TOREM: All right. And that's
11 what I have on my scorecard as well.

12 So, Ms. Wadsworth, do you adopt that testimony
13 today, and --

14 **THE WITNESS: Yes.**

15 JUDGE TOREM: -- if so, are there --
16 are there any changes or updates to it?

17 **THE WITNESS: I don't believe so.**

18 JUDGE TOREM: All right. There are
19 no changes.

20 Has any counsel changed their mind about
21 cross-examination that needs to speak up?

22 Do members of the Council, having reviewed
23 Ms. Wadsworth's testimony, have any questions for
24 Ms. Wadsworth?

25 All right. Hearing none, Ms. Wadsworth, from the

1 Council either, then we're going to let you go at this
2 time. And I appreciate you being here this morning to
3 adopt your testimony.

4 (Exhibit No. 1034_R

5 admitted.)

6 (Witness excused.)

7 (Witness Christopher Wiley
8 appearing remotely.)

9
10 JUDGE TOREM: All right. We'll see
11 if our next witness, Mr. Wiley, Christopher Wiley is
12 present. And I believe this is going to be
13 Exhibit 1035-R.

14 All right. Mr. Wiley, I'll see if I can --

15 **THE WITNESS: Good morning, Your**
16 **Honor.**

17 JUDGE TOREM: -- get you on the
18 screen there.

19 All right. Good morning, sir. How are you?

20 **THE WITNESS: I'm good. How are**
21 **you?**

22 JUDGE TOREM: All right. It's
23 Monday. We'll see how this goes.

24 All right. I think you probably heard me swear in
25 Ms. Wadsworth, and we'll do the same process for you.

1 Any questions about that?

2 **THE WITNESS: No. No, Your Honor.**

3 JUDGE TOREM: All right. If you'll
4 raise your right hand.

5
6 CHRISTOPHER WILEY, appearing remotely, was duly
7 sworn by the Administrative
8 Law Judge as follows:
9

10 JUDGE TOREM: Do you, Christopher
11 Wiley, solemnly swear or affirm that all testimony
12 you'll present in the course of your prefiled testimony
13 is the truth, the whole truth, and nothing but the
14 truth?

15 **THE WITNESS: I do.**

16 JUDGE TOREM: All right.
17 Mr. McMahan, if you'll inquire again as to any changes
18 or updates.

19 MR. McMAHAN: No, Your Honor. No
20 changes or updates to either testimony. Thank you.

21 JUDGE TOREM: And, Mr. Wiley,
22 everything that you've turned in is best information
23 that we have for the Council?

24 **THE WITNESS: Yes, Your Honor.**

25 JUDGE TOREM: All right. Counsel

1 for the parties, I don't think there was any scheduled
2 cross-exam. Has anything changed in that regard?

3 All right. Chair Drew and Council members, any
4 questions for Mr. Wiley on what he submitted?

5 All right. Hearing none. This is going as
6 quickly as I had hoped. So we're a little bit ahead of
7 schedule.

8 Mr. Wiley, thank you for being present this
9 morning. I do appreciate it.

10 **THE WITNESS: Thank you, Your Honor.**

11 (Exhibit No. 1035_R
12 admitted.)

13 (Witness excused.)

14 (Witness Leslie McClain
15 appearing remotely.)
16

17 JUDGE TOREM: Do we have Leslie
18 McClain already present?

19 MR. McMAHAN: Yes, we do, Your
20 Honor. We're sharing a screen.

21 JUDGE TOREM: Counsel -- all right.

22 So, Counsel, what I think we'll do is go ahead and
23 get Ms. McClain sworn in and have Mr. McMahan go over
24 all of the exhibit numbers that we're talking about,
25 and we'll just get started a little bit early.

1 Has Mr. Brost happened to have joined us at this
2 time?

3 All right. We'll find out when Mr. Brost joins us
4 and make a note of the time, if -- exact as we can get
5 it, so we know that the Benton County Council member
6 can know what he's missed and what he needs to review.

7 Good morning, Leslie McClain. How are you?

8 **THE WITNESS: I'm -- I'm good.**

9 **Thank you.**

10 JUDGE TOREM: All right. I'm going
11 to swear you in, and then we'll have Mr. McMahan
12 actually list the exhibits this time.

13 So if you'll raise your right hand.

14
15 LESLIE McCLAIN, appearing remotely, was duly
16 sworn by the Administrative
17 Law Judge as follows:

18
19 JUDGE TOREM: Do you, Leslie
20 McClain, solemnly swear or affirm that all the prefiled
21 testimony you've turned in and all the answers you'll
22 give today under cross-examination will be the truth,
23 the whole truth, and nothing but the truth?

24 **THE WITNESS: I do.**

25 JUDGE TOREM: All right. Thank you.

1 Mr. McMahan, we'll probably go on "mute" here and
2 let you have her adopt the testimony, and then we'll
3 start, Mr. Harper, with you in cross-exam.

4 MR. McMAHAN: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. McMAHAN:

8 Q Ms. McClain, can you first just quickly state your
9 background and tell us about yourself?

10 A **Sure. Again, my name is Leslie McClain. I live in**
11 **White Salmon, Washington. I'm a senior land-use --**
12 **land-use planner and project manager at Tetra Tech,**
13 **which is an environmental permitting and consulting and**
14 **engineering firm that works in -- primarily our team**
15 **works in the energy industry.**

16 Q Thank you, Ms. McClain.

17 MR. McMAHAN: So, first, exhibits.
18 We have Exhibit 1023_R through Exhibit 1030 and 1040_R.

19 Does that reflect Your Honor's list of the
20 exhibits as well?

21 JUDGE TOREM: I'm just confirming
22 the 1040.

23 Correct. The 1040_R is the reply testimony. All
24 the others came in, in responsive testimony. So 1023,
25 -24, -25, -26, -27, -28, -29, -30 were all in the

1 response. And 1040_R in the reply.

2 All right. Those are all --

3 MR. McMAHAN: Okay.

4 JUDGE TOREM: -- before the Council
5 at this time and subject to cross-exam.

6 (Exhibit Nos. 1023_R, 1024,
7 1025, 1026, 1027, 1028,
8 1029, 1030, and 1040_R
9 admitted.)

10
11 MR. McMAHAN: All right.

12 JUDGE TOREM: Anything else from the
13 applicant before we get started?

14 MR. McMAHAN: Well, and I'm just,
15 you know, kind of trying to remember how this has gone
16 previously. But I do believe that Ms. McClain would
17 indicate that she is -- is and has adopted both her --
18 oh, her rebuttal testimony --

19 JUDGE TOREM: Response.

20 MR. McMAHAN: -- and her reply
21 testimony, yes.

22 JUDGE TOREM: All right. And,
23 Ms. McClain, any updates that you want to speak to in a
24 few moments before you adopt all of those exhibits?

25 **THE WITNESS: No updates.**

1 JUDGE TOREM: All right.

2 Mr. Harper, I'm going to turn to you, and I'll ask
3 everyone else to mute microphones while Mr. Harper does
4 his cross-exam.

5 And, Mr. McMahan, you'll be able to make any
6 objections with the shared screen there.

7 MR. HARPER: Okay. Thank you, Your
8 Honor, Council members. I assume I'm coming across
9 clearly enough?

10 JUDGE TOREM: Yes.

11
12 CROSS-EXAMINATION

13 BY MR. HARPER:

14 Q Ms. McClain, it's nice to meet you. I represent Benton
15 County in this matter, and this is my opportunity to
16 ask you questions that relate to the prefiled testimony
17 you provided in this case.

18 What I'd like to do, Ms. McClain, is focus
19 particularly on the conditional use permit criteria in
20 the Benton County Code. And I want to talk to you
21 about your position on behalf of Scout regarding those
22 CUP criteria.

23 And I really want to focus, Ms. McClain, on the
24 relationship of the CUP criteria to the Council's task
25 in this adjudication. So there are -- there are code

1 provisions that you've testified to that may or may not
2 be germane, but the Council members have your
3 testimony, and they can go back, and of course they can
4 review those code provisions in detail.

5 I'm going to focus a little bit more on a higher
6 level, I think. The County, of course, has concerns
7 about compatibility, and -- and I want to walk you
8 through what some of our concerns are based on.

9 Does this all make sense to you so far?

10 **A Yes.**

11 **Q** Okay. Very good.

12 And also, Ms. McClain, I'll tell you that, to a
13 great extent, I want to try to keep it moving, keep it
14 snappy. I don't want to -- you know, we may not agree,
15 but I don't want to, you know, make our disagreements
16 the focus of the -- the Council's time this morning.
17 So I think it'll be helpful if I share some exhibits as
18 we go along. These will be documents that you've
19 either seen before or certainly -- have -- have had
20 access to.

21 **MR. HARPER:** And, Judge Torem, what
22 I'd like to do now is share my screen and introduce a
23 couple of exhibits.

24 Do I have permission to do that?

25 **JUDGE TOREM:** Certainly. And then

1 we'll try to confirm everybody can see that.

2 MR. HARPER: Okay.

3 Q (By Mr. Harper) So, Ms. McClain, the first thing that
4 I would like to talk with you about is -- bear with me
5 here a moment.

6 MR. HARPER: Okay. Your Honor, I'm
7 having -- we've hit our first snag, Judge.

8 JUDGE TOREM: All right. Let's see
9 if we can work through that.

10 MR. HARPER: Are you seeing -- are
11 you seeing my screen, Your Honor?

12 JUDGE TOREM: It appears that you've
13 now shared. But I'm not seeing anything on your
14 screen. At first, there looked like there was a
15 document, and then it flickered black.

16 MR. HARPER: Okay. You don't have
17 Chapter 11.17 in front of you at this point?

18 JUDGE TOREM: No. It looked like it
19 flickered up, but it did not stay up.

20 MR. HARPER: Okay. I don't
21 understand the problem, Your Honor.

22 JUDGE TOREM: Why don't we stand by
23 for a minute, and we'll see if we can get EFSEC staff
24 to display the exhibit if we have it.

25 MR. HARPER: The exhibits have been

1 filed with EFSEC, Your Honor. We did that just a few
2 moments ago, so we should have a -- we should have a
3 backup here in case.

4 JUDGE TOREM: Yeah, I can -- I think
5 I saw your screen -- is that ours, or was that theirs?

6 MS. GRANTHAM: It's theirs.

7 MS. OWENS: It's theirs.

8 JUDGE TOREM: So, Mr. Harper, why
9 don't you try that one more time, because I saw your
10 screen come up.

11 MR. THOMPSON: There it is.

12 JUDGE TOREM: There it is.

13 MR. HARPER: Okay.

14 JUDGE TOREM: Okay. So whatever
15 magic you did worked.

16 MR. HARPER: All right.

17 JUDGE TOREM: Ms. McClain, can you
18 see the Chapter --

19 MS. MASENGALE: So that --

20 JUDGE TOREM: -- 11.17?

21 MS. MASENGALE: For the record --
22 for the record, Judge Torem, this is actually Lisa
23 Masengale. So I'm the one sharing the exhibit right
24 now. So I'll just need instructions for when I need to
25 go to a particular page or a particular section or zoom

1 in or out, et cetera. Thank you.

2 JUDGE TOREM: Okay. Ms. Masengale
3 is working her magic. We'll see if we can make it so
4 that Ms. McClain can read it. We'll probably need to
5 magnify that a little bit, Ms. Masengale.

6 All right. Let's see if we can -- that's -- at a
7 hundred percent, that looks good.

8 Mr. Harper, can you see the exhibit that you were
9 looking at?

10 MR. HARPER: I can, Your Honor. And
11 this is -- this is why we wanted to make sure and get
12 these filed as well. So excellent.

13 Okay. Well, thank you, Ms. Masengale. I think we
14 can work on this basis.

15 Q (By Mr. Harper) Ms. McClain, you're having no
16 difficulty seeing that?

17 A No. I can see it. Thank you.

18 Q Great.

19 Okay. Well, Ms. McClain, you recognize what this
20 is, of course. This is the Benton County Code Chapter
21 11.17. This is the basic chapter of the Benton County
22 Code that identifies the zoning district that is
23 relevant to the Scout application.

24 Do you agree with me on that?

25 A Yes.

1 And just for clarity, is this the version of the
2 code that was in -- that was adopted at the time that
3 the application was submitted?

4 Q No. Actually, this is the current version.

5 A Okay.

6 Q And I will show you the -- the prior version here in
7 just a moment.

8 MR. HARPER: Ms. Masengale, if you
9 could focus the screen on 11.17.010, the purpose
10 statement.

11 Thank you.

12 Q (By Mr. Harper) Ms. McClain, I'll represent to you
13 that the purpose statement of the Chapter 11.17, the
14 GMAAD Agricultural Zoning District, has not changed. I
15 understand your point that you alluded to a moment ago,
16 that when Scout made this application, of course, there
17 was a version of the code that allowed the Scout
18 application as a conditional use. That's changed. But
19 this purpose statement has not changed.

20 And what I'd like you to do, Ms. Masengale --
21 "Ms. Masengale"; I'm sorry -- Ms. McClain, rather, is
22 just -- just acknowledge, if you will, that the code
23 contains a purpose statement that we can all see here
24 and that the purpose statement of the GMAAD has been
25 identified as Benton County -- or by Benton County

1 as -- as limiting uses or activities therein as far as
2 nonagricultural purposes to those that are compatible
3 with agriculture and sort of commensurately also by
4 establishing minimal lot sizes, et cetera, suitable for
5 agricultural purpose.

6 Do we agree, Ms. McClain, that that is the purpose
7 statement that -- that orients us to the Benton County
8 GMAAD Zoning District?

9 **A Yes.**

10 Q Okay. Very good.

11 So, Ms. McClain, you pointed out that -- that the
12 zoning code that Scout applied under is different in
13 some respects -- not the purpose statement, but it's
14 different in some respects to the current code,
15 correct?

16 **A Correct.**

17 Q And the difference is, as I alluded to earlier, that in
18 the former code that was modified in December of 2021,
19 a facility like Scout's was identified as a conditional
20 use; is that right?

21 **A Correct.**

22 MR. HARPER: Let's have,
23 Ms. Masengale, if you will, please, go to Exhibit 8, or
24 also known as Benton Exhibit 2012.

25 Very good.

1 And if you will, Ms. Masengale, it has internal
2 pagination. If you could go down to Page 7 of 13.
3 You'll see those in the bottom right-hand corner.

4 Okay. Very good.

5 Now, I wonder if it's possible -- Ms. Masengale,
6 you're on the correct page. And I appreciate that very
7 much. But I wonder if it's possible to -- oh, if it
8 can be made full screen or maybe -- yeah. Why don't we
9 do this. Why don't we focus on the bottom third of the
10 page. That's probably the most efficient way to
11 emphasize this.

12 Q (By Mr. Harper) Okay. So, Ms. McClain, there's a
13 certain limit to how much time I think we all want to
14 spend on laying a foundation for each document. This
15 is -- I'll just represent to you, this is the ordinance
16 of Benton County, Ordinance No. 634, that established
17 in April of 2021 the conditional use permit uses, if
18 you will, prior to the version that I showed you a
19 moment ago. So this would be the version that includes
20 wind energy facilities and solar facilities as a
21 potential conditional use.

22 Does that make sense to you?

23 A That makes sense.

24 Q And if we wanted to -- in fact, let's go ahead and do
25 that. Because I don't want you guessing about what I'm

1 showing you. That's -- that's not fair to you.

2 MR. HARPER: But, Ms. Masengale, if
3 you could go down a couple of pages to internal Page 9.

4 There we go. That's good.

5 Q (By Mr. Harper) Ms. McClain, your testimony emphasizes
6 Subsection t of the Benton County Code that formerly
7 existed. That's the subsection that you've testified
8 authorizes wind turbine farms and related support
9 structures and includes solar facilities as well.

10 Do you agree with me on that?

11 A Yes.

12 Q Okay. Very good.

13 So what I'd like to point out here, Ms. McClain,
14 is that --

15 MR. HARPER: If we scroll up,
16 Ms. Masengale.

17 Q (Continuing by Mr. Harper) -- although Subsection t --

18 MR. HARPER: And you can go on up to
19 Page 7, at the bottom, Ms. Masengale.

20 Very good.

21 Q (By Mr. Harper) Although Subsection t made allowances
22 for wind energy facilities as a conditional use, can
23 you agree with me, Ms. McClain, that the other
24 conditional uses that are established under what was
25 in -- in the ordinance at least as section 3 -- it was

1 later codified under 11.17 -- those uses all are
2 focused on agricultural activities or activities that
3 are closely related to agriculture?

4 And I'll give you a chance to look at this as we
5 go along. But as a general proposition, do you agree
6 with that observation, Ms. McClain?

7 **A Can we scroll down and look through the -- all the uses**
8 **that are listed --**

9 Q Certainly.

10 **A -- (videoconference technical difficulties)?**

11 Q Yeah.

12 So I'll speak as we go. So we see feed lots,
13 dairies.

14 MR. HARPER: And then as Ms. McClain
15 suggests, let's scroll on down.

16 Q (By Mr. Harper) Transportation of agricultural
17 products, rodeo arenas, agriculturally based recreation
18 and sales facilities, crop dusting airstrips, spray
19 fields related to on-site processing of agricultural
20 products, dairy spray fields, that sort of thing.

21 We find some aberrations. We find solid waste
22 disposal sites, off-site hazardous waste, asphalt
23 manufacturing, farm labor housing, agricultural
24 production of biodiesel, ethanol-type products.

25 You see these, Ms. McClain, of course?

1 **A Yes.**

2 MR. HARPER: And keep going,
3 Ms. Masengale. You're doing great.

4 Q (By Mr. Harper) All right. Storage facilities for
5 agricultural machinery, storage facilities for
6 agricultural chemicals.

7 So, again, to come back to the point of the
8 question, Ms. McClain: Acknowledging Subsection t made
9 allowances for wind turbine farms, the majority of the
10 conditional uses that Benton County allowed at this
11 time were agricultural in emphasis.

12 Do you agree with that?

13 **A I would agree the majority, but there are obviously**
14 **other uses in addition to wind turbine facilities that**
15 **are not agriculturally related that were conditionally**
16 **allowed in the GMAAD.**

17 Q Yeah. I think we are in agreement on that.

18 So let's -- let's change gears a little bit. I
19 think we've established a little about the Benton
20 County Code regarding conditional uses in GMAAD in
21 terms of the -- the characterization of those uses.
22 Let's talk a little bit about the process now.

23 MR. HARPER: The point I'd like to
24 draw your attention to now, Ms. Masengale, requires a
25 different exhibit. This would be Exhibit 2, also known

1 as Benton County Exhibit 2006.

2 Yeah, very good.

3 And I'd like you to, if you would, go to the
4 second page of this document. You'll see some
5 highlighting there.

6 Very good.

7 Q (By Mr. Harper) Okay. Ms. McClain, your testimony
8 talks quite a bit about Benton County Code 11.50.040.

9 You recognize this, don't you?

10 **A Yes.**

11 Q And so that the Council members are clear, although we
12 had to sort of lay out the distinction between the
13 former Benton County Code regarding 11.17, the types of
14 conditional uses that were permitted under Scout's
15 application, this portion of the code, 11.50, has not
16 changed during the pendency of the application.

17 Do you agree with me on that?

18 **A To my knowledge, that's -- that's true.**

19 Q Okay. Very good.

20 So, Ms. McClain, what I've emphasized on this --
21 the highlighting, of course, is mine. What I've
22 emphasized here is the -- the general purpose of a
23 conditional use under the Benton County Code.

24 And you can read just as well as the Council
25 members what I've highlighted. You can see that the

1 intent of the application process, it was to allow the
2 hearing examiner to ensure that developments in each
3 zoning district protect the integrity of that district.

4 You see where I got that from?

5 **A Yes.**

6 Q Do you agree with me that the role of EFSEC in this
7 adjudication is essentially a substitution because of
8 the preemption of the EFSLA for that of the hearing
9 examiner under other circumstances?

10 **A Yes. The Council ultimately will make the decision to**
11 **approve the conditional use permit through the approval**
12 **of the site certificate.**

13 Q Exactly right.

14 And the Council's task, then, is to ensure the
15 development in the GMAAD zoning district protects the
16 integrity of that district, correct?

17 **A Correct.**

18 Q All right. Do you agree, Ms. McClain, that not all
19 conditional uses must be allowed, as a general
20 proposition?

21 Is that something you can subscribe to?

22 **A I agree that, based on what we see right in front of**
23 **us, that ultimately it's a discretionary decision by**
24 **the hearings examiner -- or in this case, the**
25 **Council -- to decide whether to approve a conditional**

1 **use permit.**

2 Q Very good.

3 And so it's conceivable that a conditional use
4 could be listed in 11.17 under what we just walked
5 through a moment ago regarding the -- the uses
6 requiring a conditional use permit but that it
7 nevertheless might be properly denied?

8 **A That is conceivable.**

9 Q And that's going to be EFSEC Council's role in these
10 proceedings, based on testimony, evidence, the
11 application for site certification, et cetera, right?

12 **A It will be EFSEC Council's role to make that**
13 **determination, whether to approve the CUP.**

14 Q And in doing so, the focus of the Council should be on
15 the compatibility criteria and the Benton County Code.

16 Do you agree with that?

17 **A The CUP criteria. They should review that as part of**
18 **their decision.**

19 Q Right.

20 And that's the source of law that would apply to
21 their deliberations and ultimately their position on
22 this topic of land-use compatibility, right?

23 **A On this topic of the CUP approval, yes.**

24 Q Now, we can walk through the compatibility criteria.

25 But to be candid, you've done a nice job of explaining

1 those criteria in your testimony, so I don't -- I don't
2 think it serves our purposes to just have you reread
3 your testimony. But if you wish to refer to it, of
4 course, you're free to do so.

5 Is it -- is it the case that the basic idea of
6 compatibility review under the Benton County Code is a
7 focus on congruence or harmony between the proposal and
8 the surrounding uses?

9 **A I feel like that's a -- your summary of the**
10 **compatibility criteria, but I would actually go look at**
11 **the actual language under the CUP criteria.**

12 Q Okay. We can do that. And I was -- I was summarizing,
13 but there's no reason we can't just put those in front
14 of us.

15 MR. HARPER: Ms. Masengale, on this
16 same exhibit, if you can go to internal Page 4.

17 And go down to the bottom quarter.

18 Okay. Very good.

19 Q (By Mr. Harper) So here, Ms. McClain -- excuse me --
20 again, this is text that you've seen many, many times
21 and that your testimony is -- is really very much keyed
22 to. But it's helpful to -- to just put it on the
23 screen so that Council members can see it.

24 I was, in fact, like you say, I was trying to just
25 provide some shorthand terminology to describe

1 compatibility. But we see here that the compatibility
2 criteria under the code is broken out. And, in fact,
3 we have five different factors.

4 We can see the first two on this screen.
5 Compatibility requires the examiner -- or in this case,
6 the Council -- to make findings of fact based on the
7 evidence that a proposal as conditioned -- and you can
8 take it from there -- will be compatible with uses in
9 the surrounding area or will be no more incompatible
10 than any other outright permitted use, correct?

11 **A Correct.**

12 **Q** Yep.

13 And we go on down. No material endangerment to
14 health, safety, or welfare. Again, the baseline is
15 with reference to the surrounding community. And the
16 reference further --

17 **MR. HARPER:** And if Ms. Masengale
18 will pop onto the next page. Yeah.

19 **Q** (By Mr. Harper) With respect further to other
20 permitted uses in the zoning district, and so on and so
21 forth.

22 I don't know that there's anything in particular
23 on 3, 4, and 5, Ms. McClain, that I need to ask you to
24 speak to. If there's something there that you think is
25 particularly relevant, feel free to speak up. But I

1 think those are all fairly pedestrian. Clearly, in the
2 next case. Pedestrian and vehicular traffic.

3 Anything there that really changes the -- the
4 general point that I made earlier that the emphasis on
5 a CUP review is -- is congruence and compatibility or
6 harmony with surrounding uses?

7 **A I would say that the CUP criteria is what we just read**
8 **in front of us, yes.**

9 Q Okay. Fair enough. The law is the law. I'm not
10 trying to oversimplify. Just trying to keep it moving
11 here.

12 So but my real point here, Ms. McClain, is to ask
13 you this.

14 Can we agree that -- that these are essentially
15 subjective tests?

16 **A The -- the decision on whether or not a use meets the**
17 **CUP criteria is a discretionary decision by the**
18 **decision-making body, yes.**

19 Q That isn't exactly the question I asked you.

20 Things can be discretionary, but they can be
21 discretionary based on objective performance standards,
22 for instance.

23 And there's no performance standard for
24 compatibility, is there?

25 **A When I look at determining whether we meet the**

criteria, I think of it more as objective standards.

Q Is there an objective performance standard that identifies when a use is no more incompatible than any other outright permitted use in the applicable zoning district?

A I think you can look at some of the other uses that are permitted in the zoning district and look at what potential impacts they have to the surrounding uses and take objective measurements and comparisons from those.

Q Are there any portions of the ASC that identify performance standards for gauging compatibility?

A I think we outline, we provide plenty of evidence to show -- to show that compatibility with the surrounding uses in the ASC, in the land-use section of the ASC.

Q You've provided your subjective analysis of that, but I don't see any performance standards.

Are there any?

A I -- it was -- from my perspective, it was an objective analysis responding to the -- what's allowed in the -- the GMAAD and within the conditional use permit criteria.

Q Well, and I said earlier I don't want to -- I don't want to argue with you, and I'm not going to.

But what -- what would be the performance standard benchmark that you used in your materials to identify

1 compatibility? Because I didn't see one.

2 A Well, I'm not sure what you're referring to as
3 benchmarks, but we -- we discuss what the impact would
4 be to the existing uses and the surrounding area, which
5 is primarily dryland wheat, and that the project would
6 be compatible with those dryland wheat uses.

7 I think we can look at the Nine Canyon wind farm
8 as a great example where agriculture can coexist with
9 wind farms, and many other wind projects across the
10 Northwest where farmers are able to farm right up to
11 the wind turbine pads.

12 And in many cases, the wind farms actually bring
13 benefits to these ranches and wheat farmers by
14 improving their access roads, reducing erosion and dust
15 issues off their roads, and also lease payments helping
16 the farmers be able to reinvest in their farms and
17 upgrade their equipment.

18 So I would say that dryland wheat farming is
19 compatible with wind projects and that there's plenty
20 of examples to show that objectively.

21 Q I know you would show that it is -- or that you would
22 state that it is compatible. That's very clear in your
23 testimony.

24 But my question was about performance standards.
25 And you stated earlier that you didn't know what I

1 meant by something like a benchmark for a performance
2 standard. Let me be clearer about that.

3 For instance, for a noise impact, an EDNA receptor
4 decimal rating would be a performance standard.

5 Do you agree with that?

6 **A Yes.**

7 Q For traffic mitigation, a local comprehensive plan
8 level of service that's been established by traffic
9 engineering principles, that would set a -- an
10 objective benchmark, correct?

11 **A Correct.**

12 Q For wetlands remediation or wetlands investigations,
13 soil saturation standards, planting plan survivability,
14 those would be objective performance standards.

15 Do you agree with me?

16 **A Yes.**

17 Q Okay. I'm going to shift gears a little bit,
18 Ms. McClain. I want to ask you about the Horse Heaven
19 wind farm now.

20 These are just some raw numbers. I don't think
21 this will be a surprise, but I just want to make sure
22 it's part of the -- part of the record for your
23 questioning.

24 This facility proposes up to 244 turbines,
25 correct?

1	A	Correct.
---	---	----------

2 | Q 499 feet tall?

3	A	What was that?
---	---	----------------

4	Q Up to 499 feet?
---	-------------------

5 | A I believe that's correct.

6 Q Unless we go -- unless Scout, rather, goes with
7 Option 2, in which case the turbines would be 657 feet
8 tall, and there would be 150 of them.

9	(Videoconference background
10	speaking interruption.)

12 JUDGE TOREM: Hold on one second,
13 Mr. Harper. We're going to have to mute another caller
14 just to make sure we're not garbled.

15 All right. I think we can go ahead now,
16 Mr. Harper. Thanks.

17 MR. HARPER: Okay.

18 Q (By Mr. Harper) So, Ms. McClain, I'll just repeat that
19 so that -- I think you know where I was going, but just
20 so it's all on the record.

21 The Option 2 proposal of Scout in the amended ASC
22 is for 150 turbines. Each would be 657 feet in height,
23 correct?

24 A I believe that's correct.

25	Q	A 6,000-acre solar array, four new meteorological
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1 towers, up to four new substations.

2 Do those basic statistics seem right to you?

3 **A Yes.**

4 Q Do you agree with me that this is the largest wind farm
5 proposal in the state's history?

6 **A I don't actually know if that's true, but I believe**
7 **that is true for Benton County.**

8 Q Do you agree with me that the footprint of the
9 permanent disturbance area is greater than ten square
10 miles?

11 **A I haven't done that calculation, but I know the**
12 **permanent footprints are around 6,800 acres.**

13 Q Yeah. I'll represent to you that if you break out the
14 math, it does come in to about ten miles.

15 By the same token, I suppose you haven't done the
16 math either, but do you have any basis to disagree if I
17 tell you that the area that will be occupied -- not
18 permanently disturbed necessarily, but occupied by the
19 Horse Heaven wind farm facility encompasses little over
20 110 square miles?

21 **A Are you referring to the lease boundary area?**

22 Q I'm referring to the occupied area, not the lease
23 boundary necessarily.

24 **A I guess I don't know what -- what the definition of**
25 **"occupied area" is.**

1 Q Okay. We can take that from -- and if you'll forgive
2 me, Ms. McClain, if I should have related that to the
3 lease boundary. I wasn't clear that that's what that
4 statistic referred to. But these are -- these are bare
5 facts, and the record will speak for itself.

6 I would just orient you and the commission to
7 the fac- -- or the Council, rather, to the fact that
8 the acreage that has been identified by Scout can
9 certainly readily be computed as square miles. And if
10 the overall acreage of the facility is reduced to
11 square miles, my -- my calculations show it's about 110
12 square miles.

13 But you've not done that kind of math, so you
14 don't -- you don't have a view on that; is that
15 correct, Ms. McClain?

16 A I have not converted to square miles.

17 But I will say that I think the key number is the
18 permanent footprint. While the lease boundary, which
19 is much larger area, will have agricultural uses within
20 it throughout the construction and operational period
21 of the project. So it's not displacing that many acres
22 of agricultural. It's the permanent acreage that we
23 should focus on here.

24 Q Yeah, I understand that. I understand that.

25 Ms. McClain, let's go back to -- and I may need --

1 I may need Ms. Masengale's assistance here again.

2 MR. HARPER: Let's go back to
3 Exhibit 8, Ms. Masengale.

4 And if you could go to internal Page 7.

5 Q (By Mr. Harper) Now, Ms. McClain, we spent a little
6 bit of time with this earlier.

7 MR. HARPER: And what I would ask
8 Ms. Masengale to do is show us the bottom of the page.

9 Very good.

10 Q (By Mr. Harper) Again, Ms. McClain, this is the
11 portion of the Benton County Code that existed at the
12 time that Scout made its application. We've already
13 agreed this is the section of the code that the Council
14 should be considering as operative on this -- on this
15 topic.

16 You and I walked through this earlier with the
17 highlighting that I emphasize to show a -- I think you
18 agreed -- a majority of agricultural uses.

19 Now what I'd like to do is have Ms. Masengale just
20 briefly go through these, a, b, and then just scroll on
21 down.

22 And the question for you, Ms. McClain, is: Do you
23 agree with me that all these uses, with the exception
24 of the formerly allowed conditional use of wind energy
25 farms, all of the other uses that we see here are going

1 to be principally oriented to a parcel or at most a
2 couple parcels?

3 **A I would not agree to that. I think a lot of -- a lot**
4 **of the uses that are related to agricultural use in --**
5 **in the GMAAD can often include more than one parcel.**
6 **Farms and ranches often include more than one parcel,**
7 **and they have a lot of different uses related to**
8 **agricultural use. Some of them may be some of these**
9 **conditionally allowed uses that are listed here.**

10 **Q Well, the farms and ranches aren't conditionally**
11 **allowed uses. They're allowed outright.**

12 And my question actually identified that these
13 would be uses that would occur on a parcel or a couple
14 of parcels, is actually what I asked.

15 But we're not going to find farm labor housing,
16 for instance, that occupies ten square miles, are we?

17 **A No. But then, like, Item j there, facilities for power**
18 **generation, other than nuclear, wind, and solar. I**
19 **mean, that could take additional parcels. I mean, I**
20 **just wouldn't make that as a blanket statement for**
21 **everything in here that would be limited to one or**
22 **three parcels.**

23 **Q No, and I'm not trying to -- I'm sorry. I don't mean**
24 **to talk over you.**

25 No, that's right, Ms. McClain. I'm not trying to

1 oversimplify it. But can we agree that none of the
2 proposed uses that -- that Ms. Masengale has showed us
3 have the kind of permanent disturbance footprint area,
4 much less overall occupied area, of the Horse Heaven
5 wind farm facility, tens or hundreds of square miles?

6 There's nothing like that here, is there?

7 **A I would not agree with that. I -- I don't think that's**
8 **a fair comparison. I mean, there's a lot of uses that**
9 **are listed here, so it's kind of a broad observation, I**
10 **think.**

11 **Q** It is a broad observation. I agree.

12 I think the exhibit will speak for itself on that.
13 Let's move on.

14 When we go to the criteria of the Benton County
15 Code for conditional uses, another relevant
16 consideration is the uses that are permitted outright.

17 Do you agree with that?

18 **A Yes.**

19 **Q** Yeah.

20 And for permitted-outright uses, we can also use
21 the same exhibit.

22 MR. HARPER: Ms. Masengale, here, if
23 you could go to Page 6. And, yes, scroll on down a
24 little bit to Section 2.

25 **Q** (By Mr. Harper) Okay. So, Ms. McClain, here we have

1 the listing -- again, circa the time period applicable
2 to this case -- of the allowable uses permitted
3 outright. Of course, agricultural is permitted
4 outright.

5 Same question, though, that I asked you earlier
6 that you and I seem to have a disagreement over. The
7 preponderance of other allowable uses are generally
8 focused on a parcel level.

9 Acknowledging agriculture, itself, may extend
10 across parcels, that's certainly true. Anything could
11 cross a parcel line. I'm not trying to oversimplify
12 it, as I said earlier. But we go through this list, we
13 see agricultural stands. We see bakeries, where the
14 product being sold is derived from grain or other crops
15 on the parcel. Single-family homes, animal raising,
16 adult family homes are sort of a special requirement
17 under the law to be allowed here. Grange halls.

18 I don't mean to be tedious about this, but -- but,
19 again, I'm just curious. Do you disagree with me here
20 as well that -- that the typical focus in the GMAAD
21 zoning district is on uses that encompass a parcel or
22 at least are no more than a couple of parcels?

23 **A Again, I -- I think where you're going with this line**
24 **of questioning is to -- to bring up this concept of**
25 **scale and that the project scale is inherently not**

1 **compatible.**

2 **And I would disagree with that, that there's**
3 **nothing in here that says the scale of the project**
4 **is -- makes it not compatible with agricultural uses.**

5 Q That's the subjective determination this Council will
6 have to reach, isn't it?

7 A **They will, yes.**

8 Q Okay. I think we're in agreement there.

9 And on scale and scope and breadth, this is a
10 landscape-wide change, isn't it?

11 A **The -- on a landscape level, there will still be**
12 **farming and ranching going on in the site lease**
13 **boundary. So I would say that they are compatible**
14 **uses, but there will be both uses occurring in the same**
15 **area.**

16 Q Do you agree, Ms. McClain, that the predominant feature
17 to anyone in this area -- if this project is
18 recommended to the governor and if the governor
19 approves it and if it survives any challenges, the
20 predominant feature in this area will be the Scout wind
21 farm and solar array facilities?

22 A **I don't agree. I think if you drive through the area**
23 **after it's constructed and operating, you'll see wheat**
24 **fields and other agricultural uses side by side with**
25 **the wind turbines and the solar arrays.**

1 Q The predominant feature of the landscape will not
2 change?

3 A I think that your -- that is a subjective opinion, like
4 you said. And it's your opinion on what -- what's
5 predominant. I mean, I think that the wind turbines
6 are definitely large, but I would say that the majority
7 of the landscape, majority of the area is still going
8 to be dryland wheat farming.

9 And we can get into this later, but I think that,
10 in fact, this project will help maintain those wheat
11 farms into the future rather than letting them be under
12 threat for zone changes and urbanization, which then
13 that would be the predominant landscape if it were to
14 be urbanized. It'd be houses.

15 Q Do you acknowledge that any particular number of
16 turbines or height or density would be incompatible
17 with the GMAAD zoning district?

18 A Can you re- -- restate your question again?

19 Q Be happy to.

20 Do you acknowledge that any number of turbines or
21 height of turbines or density of turbines or associated
22 solar facilities would be simply too much and
23 incompatible with the GMAAD zoning district?

24 A Any number? I -- I would not agree with that. I think
25 that scale is not in and of itself a determination of

1 what's compatible. I think you have to look at how
2 it's been sited and the best management practices, the
3 minimization measures, all of the elements that will be
4 pulled into the conditions of the approval if the
5 Council decides to approve the project. And they can
6 make sure they fold in these conditions as they're
7 outlined in the ASC but also the -- the EIS to ensure
8 that this project is compatible with the agricultural
9 uses in the GMAAD.

10 MR. HARPER: Ms. Masengale, I wonder
11 if you can go back to Exhibit 1. And I'd be interested
12 in the very first page of Exhibit 1.

13 Yeah, very good. Thank you, Ms. Masengale.

14 Q (By Mr. Harper) So, Ms. McClain, your testimony is
15 that -- is that, in fact, that the -- the purpose
16 statement of the GMAAD zoning district would never
17 reach a breaking point where a -- a particular number
18 of turbines -- let's say it's twice the number that
19 Scout is proposing -- would never, per se, become
20 incompatible. Is that right?

21 A You're coming up with a hypothetical situation that
22 I -- I think every project needs to be examined on its
23 own merit and its own evidence that's brought forward
24 to the Council.

25 Q It is a hypothetical, but sometimes hypotheticals are

1 useful.

2 Well, then let's take a look at -- let's take a
3 look at a position Scout has taken.

4 MR. HARPER: Ms. -- Ms. Masengale,
5 if we could take a look at Exhibit 3, which I'll also
6 identify for the record is Benton County Exhibit 2007.

7 Q (By Mr. Harper) Ms. -- Ms. McClain, Mr. Kobus provided
8 testimony in a deposition that occurred in late July.

9 Are you familiar with that?

10 A **I was familiar that he provided a deposition. I have**
11 **not reviewed this document in front of us.**

12 Q All right.

13 MR. HARPER: If you would,
14 Ms. Masengale, let's go down to the highlighted portion
15 of this.

16 Okay.

17 Q (By Mr. Harper) Ms. McClain, what I'd like you to do
18 is -- is read along with me -- excuse me -- again.

19 This is the questioning of Mr. Kobus in his
20 deposition. And he was asked --

21 MR. HARPER: And if we could go up
22 just a little bit, Ms. Masengale, so that the witness
23 can see.

24 There we go. Thank you.

25 Q (By Mr. Harper) He was asked, "Why don't we just build

1 Phase 1 of the project?"

2 The "we" is the royal "we" here. He means -- the
3 questions is asking, Why don't you just build Phase 1
4 of the project?

5 "What are the economies of scale that prevent you
6 from just building that project?"

7 And then Mr. Kobus testified, as you see in the
8 first paragraph, "Scout has been investing considerable
9 time and capital in building the largest project we can
10 to bring to market because that's what makes us
11 successful."

12 And then the second part is what I really want you
13 to orient to, Ms. McClain. Mr. Kobus testified, "The
14 commercial case for this site is to build absolutely as
15 much as we can to satisfy the market need. So any
16 whittling away that we do of anything that generates as
17 a part of this mix is hurting our prospects."

18 Do you see where I got that from?

19 MR. McMAHAN: Your Honor, Tim
20 McMahan objecting to this question. This is testimony
21 from Mr. Kobus. Mr. Kobus is not called here to answer
22 this question, and this is not within Ms. McClain's
23 source of information and knowledge.

24 MR. HARPER: Well, to the contrary,
25 Your Honor, this is related precisely to the

1 distinction between mitigation measures that might meet
2 a performance standard versus the demand that Scout is
3 making for the maximum commercial build-out without
4 concern to what we believe to be the proper
5 compatibility analysis under CUP.

6 JUDGE TOREM: Mr. McMahan, with that
7 limitation to the question, I'll allow -- if
8 Ms. McClain understands the question -- for her to
9 comment.

10 Again, Mr. Harper, this may be outside her
11 expertise given the commercial aspects. Again,
12 commercial viability I don't think she can comment on.
13 But I understand you're asking for the number and the
14 density of turbines, if I understand you correctly.

15 MR. HARPER: I'm not even going
16 there, Your Honor. So I'm going to keep this within
17 her testimony. I appreciate Mr. McMahan's objection
18 out of due caution, but I am not trying to -- to ask
19 this witness to speak to commercial viability.

20 So if I may proceed, Your Honor.

21 JUDGE TOREM: Yeah, why don't you
22 rephrase this so it's within Ms. McClain's expertise,
23 and we'll go from there.

24 MR. HARPER: Very good.

25 Q (By Mr. Harper) Ms. McClain, you see Mr. Kobus's

1 position that the desire of Scout is to build
2 absolutely as much as it can to satisfy the market
3 need, correct?

4 **A I see the highlighted text on the screen.**

5 Q That's all I'm asking. Just, I want to make sure we're
6 looking at the same page.

7 Is there -- is there any concession
8 contemplated -- as you can read Mr. Kobus's testimony,
9 is there any concession being made to scale back the
10 project to support congruence, harmony, compatibility
11 with surrounding uses?

12 **A I mean, I feel like this is taken out of context.**
13 **You're applying a quote from this deposition to the --**
14 **the consistency analysis in the CUP.**

15 But what I do think is important to maybe point
16 out here is that -- that the project has been described
17 in the ASC with a maximum building envelope. And so
18 what has been put forward as the proposed action, the
19 proposed project, in the ASC is what Mr. Kobus has and
20 Scout has identified as the -- the size of the project
21 that they want to bring forward, and it has a phasing
22 approach.

23 So to make sure that the environmental analysis
24 and -- and the EFSEC Council knows all the extent of
25 the project and the full build-out, it's all been

1 examined in the ASC and the whole extent of potential
2 impacts.

3 And so in that case, when you -- when you -- this
4 is totally typical in the development process that you
5 identify a largest footprint and the largest potential
6 effects, and then when the project goes to closer to
7 construction and more detailed design, typically the
8 footprint shrinks as it gets more and more detailed
9 design.

10 And a really good example of that is the
11 additional information that was submitted last week
12 which showed a decrease in the total solar array area
13 and other things. And a lot of those inputs that come
14 from the environmental impact assessment and also from
15 this adjudication process and the -- and the review,
16 the reason why we go through these reviews is to inform
17 the project and make sure that it is sited in the most
18 environmentally conscientious way possible and to
19 minimize the impacts and to make sure that everything
20 is mitigated as much as possible.

21 Q But there is no proposal, Ms. McClain, to reduce the
22 scale, the scope, the intensity of the project to
23 accommodate compatibility criteria.

24 You've talked about mitigation measures. The ASC
25 talks about mitigation measures. We've identified that

1 compatibility relates to scale and scope.

2 And what Mr. Kobus is stating here, unless you
3 disagree with it, is that Scout's wish is to build as
4 much as the market will justify, correct?

5 **A I think you made the point that scale and scope is**
6 **related to compatibility. I disagreed with that point,**
7 **and that this project as described in the ASC is**
8 **compatible with the GMAAD.**

9 The existing agricultural uses that are going on
10 out there will continue to operate through the
11 operation of this project. So the scale and the scope
12 is not in and of itself a reason for the project to not
13 be compatible with the GMAAD.

14 **Q Does the market demand relate to the Benton County**
15 **compatibility criteria?**

16 **A I don't know how to answer that question. I think that**
17 **might be outside my wheelhouse.**

18 **Q Yeah. Okay. Fair enough.**

19 Last thing I want to touch on, Ms. McClain, I want
20 to correct what I think is a mistake in your testimony,
21 your prefiled testimony.

22 Ms. McClain, are you familiar with your testimony
23 in which you made the claim -- if you bear with me
24 here, I can get a little bit more oriented.

25 You made the claim, Ms. McClain, that the County

1 has generally, I guess -- generally shown that it is
2 not -- I don't want to paraphrase unfairly, but that it
3 is essentially -- well, be blunt, I guess: It's
4 essentially being hypocritical regarding the -- the --
5 the disruption of the GMAAD zoning district because, as
6 you say in your testimony, that the County has
7 encouraged conversion of habitat for sprawling
8 residential development.

9 Are you familiar with using those words,
10 Ms. McClain?

11 **A Can you reference me what page of my testimony so I can**
12 **take a look --**

13 **Q** I certainly can, yeah. That would be Page 10 of your
14 rebuttal testimony.

15 In your rebuttal testimony --

16 JUDGE TOREM: Mr. Harper.

17 MR. HARPER: Excuse me, Your Honor.

18 JUDGE TOREM: This is Judge Torem.

19 For the benefit of the Council, can you dial us in to
20 the exhibit as well?

21 MR. HARPER: I'm about to, Your
22 Honor. It's Exhibit 1023_R.

23 And, Ms. Masengale, if you can go to Page 10 of
24 that document, we'll all be looking at the same thing.

25 And I would like you to emphasize the Paragraph 1

1 starting on Line 8. That will make it easier for
2 everyone, I think.

3 There we go.

4 Q (By Mr. Harper) Ms. McClain, I'll just pause for a
5 second and give you a moment. You've seen this, of
6 course, but I'll just give you a moment to look at it.

7 Give Council members a chance.

8 I don't really want to put words in your mouth on
9 this, Ms. McClain. I'd rather just have you identify
10 for yourself.

11 Is the point of what you're discussing here
12 that -- that the County has not itself demonstrated
13 what we -- we haven't acted consistent with what we say
14 because you think we have lost GMAAD lands since 2006?

15 A This statement was made in response to Ms. Cooke's
16 testimony, where she is making the -- was making some
17 points about the project was going to permanently
18 remove, you know, X number of acres from the GMAAD and
19 that, overall, that would be a threat on the County's
20 GMAAD, you know, supply of land.

21 And so my point is that if you look at the 2006
22 comp plan and the 2018 comp plan and compare the total
23 acreage of GMAAD, you see that there has been a
24 significant decrease. And when you look -- and that is
25 telling that the -- that those acres have been rezoned

1 into a different zone.

2 And when you look at aerial photos of the urban
3 areas of the county, that the urban footprint continues
4 to grow. And based on some -- looking at old zoning
5 maps, I was able to conclude that most of those
6 acreages are -- are being urbanized, that are being
7 moved out of the GMAAD.

8 And so from my perspective, I see that as more of
9 a threat on the GMAAD, is the urbanization of the
10 Tri-Cities area in particular, and relative to this
11 project where in our case we would not be rezoning. We
12 would continue to have ag uses. And the project would
13 not only be consistent with the GMAAD zone because it
14 would allow for the uses to continue, but it would also
15 actually support some of these existing farm uses in
16 the project lease boundary through its lease payments.

17 Q Let's just take a moment and examine the basis of your
18 view there.

19 I want you to identify, if you will, that your
20 benchmark is the 2006 comprehensive plan where you
21 identified a total of 744,752 acres of GMAAD.

22 Do I have that right?

23 A Yeah.

24 Q Okay.

25 MR. HARPER: Ms. Masengale, can we

1 go to Exhibit 7, please, Page 1. And that would be
2 Benton County -- there we go. Thank you.

3 And go down a little bit.

4 Q (By Mr. Harper) Okay. Ms. McClain, I'll represent to
5 you that this is Page 4-32 of the 2006 Benton County
6 comprehensive plan. You can, I think, pretty well pick
7 that up from what you see on the screen here.

8 If we total the -- the -- the highlighted column
9 of numbers for irrigated agricultural, dryland
10 agricultural, rangeland and undeveloped, I'll just
11 represent to you we get 744,752 acres.

12 Was that your source, Ms. McClain, for your
13 testimony?

14 **A This is current land use versus zoning, right?**

15 Q Right.

16 **A Zoning is a different category.**

17 Q It is, isn't it? Okay. Let's keep going with this,
18 then.

19 Do we agree at least that if we total this, we get
20 744,752, and that's what you quoted on Page 10 of your
21 testimony?

22 **A I was looking at the two thousand si- comprehen -- 2006**
23 **comprehensive plan for total acres in the GMA AD, and**
24 **this table is looking like it's land-use types, so...**

25 Q I'm just asking -- if you just answer my question.

1 If this totals up to 744,752 acres, that's the
2 number you used in your testimony as your benchmark,
3 correct?

4 **A I don't think I did. But...**

5 Q Why don't we go back, then. We can certainly take our
6 time with this.

7 MR. HARPER: Ms. Masengale, if you
8 can go back to Page 10 of Exhibit 1023.

9 Q (By Mr. Harper) Do you see the number there,
10 Ms. McClain, 744,752?

11 **A Yes.**

12 Q Does that look like it's a mistake now?

13 **A I guess I'm not -- I'm kind of confused, because you're**
14 **comparing acres of -- of land uses versus acres of**
15 **zone. And I don't have a calculator right now to add**
16 **up those numbers. But, I mean, it's possible I made a**
17 **mistake. I don't really know what the purpose of this**
18 **question -- questioning is, though.**

19 Q Well, the purpose of the questioning is to make sure
20 that the Council understands the factual basis of your
21 testimony.

22 That's important, isn't it?

23 **A Yes, it is important. And if there is an error here, I**
24 **can -- I can look into it. I can take some time and**
25 **look at the code and double-check my work, and we can**

1 clarify this.

2 I think that the point of my statement here is
3 that there has been a reduction in the GMAAD over time
4 in the Benton County. And that reduction is due to
5 urbanization and not due to wind or solar projects.

6 Q Okay. Well, let's see if that's the case.

7 MR. HARPER: Why don't we take a
8 look, Ms. -- Ms. Masengale, at Exhibit 7. This time,
9 let's go to Page -- let's go to Page 4 of Exhibit 7.

10 Q (By Mr. Harper) So, Ms. McClain, here we actually
11 have, I think, the table that speaks to your point.
12 Here we have the actual table of lands identified as
13 GMA agriculture, and it's 643,000 acres.

14 If we go to Page 3 of the same exhibit --

15 MR. HARPER: Ms. Masengale, you can
16 go there.

17 Q (Continuing by Mr. Harper) -- we'll see this same
18 figure reproduced: 643,476.

19 This is -- this is a measure of acre by land-use
20 designation. That's the 2006 plan.

21 MR. HARPER: And if we could go,
22 Ms. Masengale, to Page 2.

23 Okay. Scroll down just a little bit, or reduce it
24 just a little bit.

25 Q (By Mr. Harper) Now, Ms. McClain, we're in the 2018

1 comprehensive plan.

2 MR. HARPER: If you scroll down just
3 a little bit more, Ms. Masengale, we can all see that
4 reference.

5 There we go.

6 Q (By Mr. Harper) February 2018. And the figure for GMA
7 in Benton County is 649,000 acres.

8 In fact, what Benton County has done is they've
9 been able to identify from 2006 to 2018 additional land
10 qualifying for GMAAD designation. The previous number
11 is 643,000. The current number is 649,000.

12 Do you follow with me, Ms. McClain?

13 A Can you go up just so I can see the -- the headings on
14 that, on that proposed --

15 Q Sure.

16 A -- land use?

17 Okay. So this was the proposed change by the
18 proposed land-use designation changes in the 2018 comp
19 plan?

20 Q That's correct. That's correct.

21 My point is just this, and I'll wrap on this.
22 Your criticism in your testimony is that the County has
23 lost GMAAD land by encouraging the conversion of
24 agricultural land use for sprawling residential
25 development.

1 At a minimum, that appears to be not consistent
2 with the acreage totals that we've seen here. And, in
3 fact, the figures you used to -- to justify that
4 criticism now does not appear to be exactly what you
5 thought it was.

6 Do you agree with that?

7 **A I agree that I need to go back and check my work to be**
8 **able to really respond to this. But I would be willing**
9 **to do that if we -- we want to keep working on this**
10 **topic.**

11 MR. HARPER: All right. With that
12 point of clarification, Ms. McClain, I appreciate your
13 courtesy. I very much appreciate Ms. Masengale with
14 the assist.

15 I have no further questions for you at this time.
16 Thank you.

17 JUDGE TOREM: All right. Thank you,
18 Mr. Harper. You've reduced an hour and a half of
19 predicted time to essentially an hour. I appreciate
20 that very much.

21 So let's give everybody a comfort break until
22 10:20. When we come back, Mr. Aramburu, we'll pick up
23 with your testimony, or cross-examination of
24 Ms. McClain's testimony.

25 All right. So we'll come back at 10:20, and we'll

1 introduce Mr. Aramburu.

2 (Pause in proceedings from
3 10:12 a.m. to 10:20 a.m.)

4
5 JUDGE TOREM: All right. Welcome
6 back, everyone. It looks like we do have Ed Brost
7 joining us.

8 Mr. Brost, I do not know when you came back on.
9 This is Judge Torem. Did you pick up on any of the
10 cross-exam that Mr. Harper was doing? And if you
11 unmute, we'll be able to hear your answer.

12 MS. GRANTHAM: If he's not able to
13 unmute, he did just give me a call saying he might have
14 issues with the microphone, so I let him know to put it
15 in the chat if something comes up.

16 JUDGE TOREM: Okay. Well,
17 Mr. Brost, whatever part of the testimony you missed
18 today, there'll be a transcript and a recording that
19 you'll have access to. The recording might be
20 available sooner, as that's more instantaneous. But
21 we'll ask you to review the adoption of the testimony
22 from the non-cross-examined witnesses this morning --
23 and that would be Ms. Wadsworth and Mr. Wiley -- and
24 then Mr. Harper's cross-examination of our current
25 witness, Leslie McClain.

1 All right. Mr. Aramburu, are you ready --

2 MR. ARAMBURU: I am.

3 JUDGE TOREM: All right. Let's get
4 going on your cross-examination. You've asked for
5 approximately a half an hour of time. We have probably
6 a little bit of wiggle room in that today, given our
7 efficiency so far. Why don't you go ahead, sir.

8 MR. ARAMBURU: Okay. Thank you.

9
10 CROSS-EXAMINATION

11 BY MR. ARAMBURU:

12 Q Ms. McClain, showing up on the screen as "Tim McMahan,"
13 but in any event, I'm Richard Aramburu, Ms. McClain,
14 and I'm the attorney for Tri-Cities C.A.R.E.S., the
15 community organization that is -- is an intervenor in
16 these proceedings. And I have some questions for you
17 regarding your testimony that you provided to the -- to
18 the Council.

19 And you've -- you've submitted two testimonies:
20 One a rebuttal testimony and one a reply testimony; is
21 that correct?

22 A That's correct.

23 Q Okay. Now, I've -- looking at Page 1 of your rebuttal
24 testimony, you indi- -- you've described your
25 professional experience. And you've indicated that you

1 have extensive experience in land use, permitting, and
2 environmental review.

3 And I've looked at your Exhibit 1024, which is
4 your résumé. I don't see any -- anything other than
5 wind projects listed on that, in that material.

6 Is your experience limited to wind projects?

7 **A No. I've worked on solar projects. I thought there**
8 **were some listed there. I'd have to pull it up to**
9 **look. But I do have experience with solar as well and**
10 **transmission, fiber-optic, lots of different**
11 **infrastructure projects.**

12 I've also worked for counties before on -- I'm
13 working on a landfill project on Kauai right now. So
14 I've done permitting on behalf of counties as well, but
15 typically I -- my experience is from a consulting
16 company and not -- I have not worked for a city
17 government or a county government directly.

18 Q So you've never processed a conditional use permit for
19 yourself or any municipality; is that correct?

20 **A A CUP for -- of a county or city, no, I have not.**

21 Q And have -- you indicated you've been involved in
22 renewable energy projects.

23 Have you ever represented or advised opponents of
24 a project as opposed to project applicants?

25 **A No, I have not.**

1 Q Okay. And you've indicated that you have land-use
2 planning experience. I don't see a degree in land-use
3 planning for you.

4 What is your educational background in land-use
5 planning?

6 A Well, I have a liberal arts education, undergraduate,
7 and include public administration.

8 And then I've worked as a land-use planner for 15
9 years. So I think that that speaks to my
10 qualifications.

11 Q I understand it does.

12 But you don't have any -- any educational training
13 in land-use planning, do you?

14 A I don't have a master's in urban planning, a
15 postdoctorate in -- in planning, no.

16 Q And are you a member of any land-use planning
17 professional organizations?

18 A I have had memberships with AICP.

19 Q Now, I want to go back. When did you first get
20 involved with this project?

21 A During the drafting of the application for site
22 certificate.

23 Q Were you involved in the decision to acquire this
24 property and build the wind turbines on it?

25 A No.

1 Q So you came in later; is that correct?

2 A That's correct.

3 Q And have you ever prepared or worked on preparing a
4 Washington GMA comprehensive plan or zoning ordinance?

5 A I have worked -- no, I don't think I have, actually.
6 I've worked on some Oregon long-range planning
7 documents around the metro area of Portland, but not
8 the Washington GMA, no.

9 Q Now, there's discussion in your rebuttal testimony.
10 I'm going to talk about rebuttal testimony and then
11 your reply testimony.

12 First of all, did -- did Scout ever apply to
13 Benton County for a conditional use permit?

14 A I don't know the answer to that, actually. Because
15 I --

16 Q Were you --

17 A -- came in when they decided to go to EFSEC and work on
18 the application for the ASC.

19 Q So you weren't consulted as to whether or not it would
20 be appropriate to go to Benton County first to see if
21 they would issue a conditional use permit and, with it,
22 any -- any conditions?

23 A I believe Scout did communicate with Benton County
24 early in the process and had several meetings. But I
25 don't -- I was n't in those meetings, so I can't really

1 speak to exactly what was discussed and where the
2 decision was made to go to EFSEC.

3 Q Would you agree that, in placing conditions on a
4 conditional use permit under the Benton County Code,
5 that the size of the facility is -- is a factor to be
6 considered?

7 A Placing conditions. I think that the -- the scope of a
8 facility or a proposed use that comes before a hearings
9 examiner or a planning commission or the Council, any
10 decision-making body, they look at the full description
11 of the project and the scope of it as -- in making
12 their decisions.

13 Q But is size an appropriate factor for conditioning
14 under the Benton County conditional use code?

15 A I don't think that size is a specific factor on whether
16 a proposed use does or does not meet the conditional
17 use permit criteria. I think it is a part of the --
18 the description of the project, and it should be taken
19 under account. But I don't think the size is an
20 objective threshold that is met or not. I think it's
21 part of the project description.

22 Q Let's put it this way.

23 Do you think that Benton County, under its code,
24 could condition this conditional use permit application
25 to reduce its size?

1 A Could condition it? I think that if the decision was
2 before Benton County, they could -- they could come up
3 with a condition to reduce the size, if it was. It's
4 not before Benton County, though. It's before the
5 Council. So that would be up to them in this case.

6 Q So if -- if the Council is looking at land-use
7 compatibility under EFSEC regulations, one of the
8 things they could do is reduce the size of it to take
9 account of what the local land-use plans call for; is
10 that correct?

11 A It's -- the Council can decide to do what it wants.
12 It's their decision on whether to approve the project
13 with whatever conditions they deem are necessary to
14 ensure compatibility.

15 Q Including the size of the project, correct?

16 A I'm not going to say what they can and cannot do. It's
17 up to them. And that could be part of their
18 decision-making.

19 Q Okay. And there -- there's a memo that recently went
20 out from Mr. Kobus to some people on EFSEC staff. And
21 I've referred to it as the Moon memo. It's dated
22 August 8.

23 Have you read that memo?

24 A I don't think so.

25 Could you bring it up? Is it an exhibit that you

1 **could share?**

2 Q I don't have it up. But -- but there's been discussion
3 of that.

4 Have you -- have you seen that memo?

5 A **Oh. This is the one that was submitted last week?**

6 **Yes.**

7 Q Yes.

8 A **I didn't know this is the one you were talking about.**

9 **Yes, I have seen this memo.**

10 Q We're going to call it the Moon memo, if you don't
11 mind. It's to Ms. Moon, and that's no reflection on
12 the document, itself.

13 But did you -- did you help draft that?

14 A **No, I didn't. I reviewed it, but I did not help draft**
15 **it.**

16 Q Did you have any editing responsibility for it?

17 A **No. I think I provided a couple questions to Linnea,**
18 **who wrote it. I think she wrote it. But I did not**
19 **edit it, no.**

20 Q Okay. Your Exhibit 1024 talks about the conditional
21 use approval for the Nine Canyon project; is that
22 correct?

23 A **I believe that's correct, yes.**

24 Q And is there a difference in size between the wind
25 turbines proposed for this project and the Nine Canyon

1 project?

2 **A There are more turbines in the Horse Heaven project.**
3 **And I think that the Horse Heaven turbines are taller**
4 **as well. I'd have to pull up the numbers, though, and**
5 **compare the height.**

6 Q Okay.

7 JUDGE TOREM: Mr. Aramburu, I think
8 you referenced 1024, which were her qualifications,
9 where in 1023 is the testimony you're referencing; is
10 that correct?

11 MR. ARAMBURU: I think it's actually
12 1025.

13 Q (By Mr. Aramburu) You put it in the conditional use
14 permit for -- for the Nine Canyon project, didn't you,
15 Ms. McClain?

16 **A The condition -- of the Nine Canyon project were**
17 **included with my testimony. I don't know what the**
18 **exhibit number is.**

19 Q So we can look at that to compare turbine sizes, can we
20 not?

21 **A I would assume so. I don't have those in front of me.**

22 Q Well, let's -- let's not have testimony about that.
23 The -- the Council can -- can go through that, that
24 issue.

25 And you've indicated that the project, on Page 16

1 of your testimony, would involve a minor alteration to
2 aerial application of pesticides or fertilizers.

3 Do you see that? You remember that testimony?

4 **A Page 16, you said?**

5 Q Yes.

6 **A I do recall that, yes.**

7 Q And is it your testimony that -- that the aerial
8 application of pesticides, fertilizers, and other
9 materials will still be possible with 500-foot wind
10 turbines?

11 **A Yes.**

12 Q And what's your source for that information?

13 **A Based on other operating wind farms that I'm familiar**
14 **with in Oregon that have aerial stream.**

15 Q Okay. Are you aware of any other conditional use --
16 uses under the Benton County Code that might consume
17 7500 acres of property?

18 **A Well, when you say "other," this project isn't going to**
19 **utilize that many acres. Its permanent footprint is**
20 **closer to 6,800 acres. So you were referencing the**
21 **lease boundary. But as far as 6,800 acres, I'm**
22 **guessing that there are other uses in Benton County**
23 **that take up that much space, like --**

24 Q I'm not asking you to guess. I'm not asking you to
25 guess, Ms. McClain.

1 Do you know of any other permitted or conditional
2 uses that are in the growth management agricultural
3 zone that would -- would be 6,800 acres?

4 **A Off the top of my head, I don't -- do not -- I have not**
5 **reviewed every CUP approval that's come before Benton**
6 **County, no.**

7 **Q** Okay. And were you involved in the decision to change
8 the fire suppression applications in the Moon memo?

9 **A No, I was not.**

10 **Q** That was not something you were consulted about?

11 **A I -- I was -- the memo was shared with me, and I read**
12 **that section of the memo. And my understanding is that**
13 **the purpose of including that information is to show**
14 **the Council that the BESS -- the BESS design is going**
15 **to continue to be done to be -- to meet the most**
16 **up-to-date electrical code standards.**

17 And so that's my understanding, is that the BESS
18 design is keeping with the most advanced electrical
19 code standards, which is a constantly developing
20 industry and code -- like, part of the code for
21 electrical standards.

22 I am not an expert at BESS, so they wouldn't have
23 consulted me on exactly what needs to happen with BESS
24 design.

25 **Q** But -- but there was a change made to instead of having

1 sprinklers, water sprinklers in the BESS operation, to
2 essentially let it burn out.

3 Is that your understanding of the change?

4 **A My understanding is that the -- the changes to meet the**
5 **most up-to-date electrical standards, which I believe**
6 **is, if there were in the unlikely event of a fire in a**
7 **BESS, that it would have it burn out, which would take,**
8 **I think, approximately -- I think it said two or three**
9 **hours. And that's the safest way to deal with a fire**
10 **in a BESS facility.**

11 **Q You're not an expert on BESS facilities, are you?**

12 **A No, I am not. I just said that. And I'm going off of**
13 **what I read in the mem- -- the Moon memo.**

14 **Q Okay. Now, have you considered the impacts of burning**
15 **out a 10-acre BESS facility on the health, safety, and**
16 **welfare of the community?**

17 **A I believe that those effects are examined in the ASC**
18 **and in the SEPA analysis. But my -- my expertise is**
19 **land-use element and consistency. I know that part of**
20 **that is -- is -- one of the land-use criteria is health**
21 **and safety of the community -- I don't have the exact**
22 **language in front of me, but I think it's the second**
23 **CUP criteria -- and that we have to take into account**
24 **the likelihood of a fire. And that is very low**
25 **likelihood that there would be a BESS fire.**

1 So that's part of the -- the environmental review.
2 And I would point you towards the SEPA analysis to look
3 at the potential effects of a BESS fire.

4 Q And the -- the burnout plan for the lithium ion
5 batteries was not included in the draft environmental
6 impact statement, was it?

7 A I think that the -- whatever the original plan is,
8 whether it included sprinklers or not, I think would
9 still have been an example of what could happen and was
10 evaluated. It's not -- I don't see that the change in
11 how the fire suppression design is -- or the fire alert
12 system design in the BESS facility between the original
13 description of the ASC and the memo is enough of a
14 difference to really change the environmental review.

15 But, that said, the developers in -- is trying to,
16 you know, be as open and transparent as possible, which
17 is why they volunteered the -- the Moon memo to make
18 sure the SEPA analysis is examining the most up-to-date
19 information.

20 Q Okay. I appreciate that.

21 But -- but my question to you is that: Have you
22 considered and examined the consequences to health,
23 safety, and welfare of a 10-acre lithium ion facility
24 being left to burn out?

25 Have you considered those, those factors?

1 **A Personally, have I considered them?**

2 Q Yes.

3 **A Yeah, I have. I've thought about that, yes.**

4 Q So, but, I mean, have you -- have you gone to any
5 examination of how lithium fires burn, what the -- what
6 the products of combustion are, what those -- what
7 those impacts are, as a part of your land-use analysis?

8 MR. McMAHAN: Your Honor, I'm
9 objecting to this. Ms. McClain has stated repeatedly
10 that this is not within her expertise, and Mr. Aramburu
11 is -- is attempting to require Ms. McClain to testify
12 well beyond her expertise in responding to these
13 questions. I think she's been very clear about that.

14 JUDGE TOREM: Mr. McMahan, I think
15 he's asked it in the context of the land use, and that
16 can be a simply "yes" or "no" answer. If there's a
17 better witness, Mr. Aramburu will ask the witness
18 that's on the environmental side. So Ms. McClain can
19 answer within the land-use expertise she's shown to the
20 Council.

21 Ms. McClain, do you want to answer that?

22 **THE WITNESS: Yeah, I considered it**
23 **in terms of the land use, or the conditional use permit**
24 **criteria, yes.**

25 Q (By Mr. Aramburu) And was that based upon your review

1 of lithium ion fires, how they burn, and the -- the
2 toxic fumes that are -- that are let off by those
3 fires?

4 **A My review of the BESS facilities is that they are built**
5 **on a cement base. They're surrounded by noncombustible**
6 **base. The design of the BESS facilities is such that**
7 **if in the low-likelihood event that there were a fire,**
8 **that the fire would be contained to the area of the**
9 **BESS and that it would be short in duration. And I**
10 **think --**

11 **Q That wasn't my question.**

12 My question, Ms. McClain: Have you investigated
13 what happens -- what would happen when 10 acres of
14 lithium ion batteries burn in the locations that are
15 shown on the land-use plan and whether or not that
16 would be consistent with protecting public safety and
17 welfare?

18 **A I believe I have answered your question that I -- that**
19 **that was -- the analysis that I did and understanding**
20 **health and safety, I took into consideration that the**
21 **BESS facility would be contained, that it would be a**
22 **short-duration event, and that it's very low**
23 **likelihood.**

24 And so those are factors that I took into account
25 when I was evaluating whether it met that second

1 **conditional use permit criteria.**

2 JUDGE TOREM: So, Ms. McClain, I
3 think Mr. Aramburu is just driving at the fact: Have
4 you done any analysis on the air emissions that could
5 occur from a fire?

6 **THE WITNESS: Personally, no.**

7 JUDGE TOREM: And have you done any
8 other, what would be the residue of that fire, even if
9 it's contained to the BESS pad?

10 You haven't done any of that analysis, have you?

11 **THE WITNESS: No. And that's**
12 **outside my wheelhouse.**

13 JUDGE TOREM: All right.
14 Mr. Aramburu, I hope that helps dial it in as to what I
15 think you were driving at.

16 Any other follow-up on this area?

17 MR. ARAMBURU: No.

18 Q (By Mr. Aramburu) I do want to address your reply
19 testimony, if I may, that has been submitted.

20 And my understanding is that your fire testimony
21 was -- your reply testimony was addressed to fire
22 prevention and control issues; is that correct?

23 A **That's correct. From the perspective of my experience**
24 **permitting projects and whether typical conditions and**
25 **best management practices that we attach to facilities**

1 **similar to the Horse Heaven Hills one.**

2 Q And in looking at your reply testimony, I see pages of
3 fire conditions that have been put on other projects.

4 And you've kind of done a literature search here.

5 Is that -- is that what I'm seeing?

6 **A That is correct.**

7 Q Okay. Okay. Now, and have you spoken with the Benton
8 County fire marshal or fire chiefs regarding this
9 project?

10 **A I have not.**

11 Q Why not?

12 **A I believe other folks, including Dave, have reached out**
13 **to the fire department and to the fire marshal. That**
14 **wasn't part of my job on the team to talk to them.**

15 Q Well, you've provided extensive testimony here about
16 the -- the apparent efficacy of a fire control plan,
17 have you not?

18 **A I provided testimony that there are many examples of**
19 **other facilities that have been approved by EFSEC in**
20 **Washington State that included conditions similar to**
21 **the -- well, to the ones that I provided in my**
22 **testimony that show that there are conditions that can**
23 **mitigate the concerns for fire safety and fire hazard**
24 **of a facility like this.**

25 Q I understand that.

1 But -- but wouldn't -- wouldn't the best source of
2 information about the feasibility of a fire control
3 plan would be those people responsible in -- in the
4 public area for fire control and suppression in Benton
5 County?

6 **A I a hundred percent agree with you. And that's -- if**
7 **you look at the condition -- example conditions, all of**
8 **those plans would be coordinated with the fire marshal,**
9 **with Benton County, with EFSEC, and any other agency**
10 **that's pertinent to that topic prior to construction.**

11 **Q And have you taken the concept of a 10-acre lithium ion**
12 **battery fire to the fire officials in Benton County for**
13 **their opinions regarding that project?**

14 **A I have not. But as I just noted, that those topics**
15 **would be discussed with the fire marshal, with Benton**
16 **County, with EFSEC prior to construction as part of the**
17 **formulation of the fire management and emergency**
18 **response plan.**

19 **Q But related to the conditional use permit, we're**
20 **looking at whether conditions ought to be placed on**
21 **this project as required by the Benton County Code, are**
22 **we not?**

23 **A We are. And these are good examples of conditions that**
24 **could be placed on an approval to ensure that these**
25 **plans get finalized and coordinated as appropriate.**

1 Q But we need to decide now whether these conditions are
2 appropriate under the Benton County Code, do we not?

3 A And I would recommend that they do include conditions
4 to make sure that these plans get finalized and
5 coordinated with these agencies and experts prior to
6 construction.

7 Q Yes. But -- but can we have that discussion now before
8 the -- before the Council, before they approve a --
9 before they're being asked to approve a 10-acre lithium
10 ion battery array?

11 MR. McMAHAN: Your Honor, Tim
12 McMahan here objecting. This is argumentative
13 testimony. It's been asked and answered.

14 JUDGE TOREM: Mr. Aramburu, any
15 response?

16 MR. ARAMBURU: I'm -- there's --
17 there's a question here about what the applicant is
18 doing, and I -- I want to get to the question of when
19 these conditions and when this issue is going to be
20 taken up according to the applicant.

21 JUDGE TOREM: I'll sustain the
22 objection. I think it's clear for the record that
23 it'll be taken up by the Council before their
24 recommendations to the governor, and this witness can
25 only testify to what she's -- she's experienced, but

1 she's not the one taking this decision up,
2 Mr. Aramburu.

3 MR. ARAMBURU: Okay.

4 Q (By Mr. Aramburu) And in -- in your analysis of fire
5 control / fire protection agreements or conditions,
6 have you considered what would happen in the event of a
7 fire on a wind turbine, itself?

8 A Yeah. And we discussed that in my original testimony
9 as well.

10 Again, wind turbine-caused fires are an extremely
11 rare event. I'm only aware of one occurring in the
12 Northwest, and there are hundreds of turbines operating
13 in the Northwest. So it's a rare event. But if it
14 were to happen, that's what the purpose of the fire
15 management plan and emergency response plans are.
16 And -- and the -- in the case of the -- the one event
17 that happened in Klickitat County, the fire was
18 contained quickly and minimized to basically just
19 agricultural areas. So I think we have taken that into
20 account.

21 Another thing I'd like to note is that the access
22 roads that will be built by the project will actually
23 improve ability for fire response out in these areas
24 where there currently aren't access roads. And so --
25 and a lot of times those access roads can work at fire

1 **breaks as well, which can also assist with fire**
2 **response in the event that there were a fire in these**
3 **wheat fields.**

4 Q Have you investigated the national or international
5 statistics on the frequency of -- of turbine fires
6 within the nacelle and the rotor area?

7 A **Not in the -- in a lot of depth. It's -- I have**
8 **attempted to do some of that research at times. But I**
9 **haven't been able to -- to do a comprehensive study.**
10 **But I -- I am pretty confident that there is only the**
11 **one event in the -- in the Northwest that we know of.**

12 Q One reported event; is that correct?

13 A **Right. Correct.**

14 Q And you're familiar with the -- with the national and
15 international statistics that indicate there's about
16 one fire for a turbine for every 1700 to 2,000 turbines
17 installed?

18 A **I was not familiar with that statistic.**

19 Q But you've not -- you've not investigated those
20 statistics, correct?

21 A **Correct.**

22 Q Now, respecting the -- the fire plan, if there was to
23 be a turbine fire, a turbine nacelle fire, and it was
24 burning, how long would it take for Benton County Fire
25 to come to the site and address the problem?

1 **A** That would take -- I don't personally know. Those
2 details would be considered and evaluated and brought
3 into the fire management plan when it's finalized prior
4 to construction in consultation with the fire marshal
5 and the rural fire district.

6 **Q** Well, but wouldn't it be important to know whether a
7 fire control plan really works if you're going to
8 propose that, how long it would take for fire equipment
9 to arrive at a fire?

10 **A** I think that it's reasonable to assume that there
11 are -- there is a rural fire district in the area that
12 already serves this area and that there would be, you
13 know, a reasonable time frame. I don't think that that
14 question undermines the ability for -- to think that a
15 fire management plan could be finalized prior to
16 construction.

17 **Q** Have you investigated the fire response time for Benton
18 County Fire District No. 1?

19 **A** I have not.

20 **Q** And in your investigation, have you determined the
21 kinds of equipment that Benton County Fire District
22 No. 1 could bring on a turbine fire or a grass fire in
23 this -- in -- within your 244 turbines?

24 **A** Again, these are the details that would be worked out
25 in that fire response plan.

1 Q Have you investigated the amount of water that can be
2 carried by Benton County Fire District equipment to a
3 site to fight a fire?

4 A I have not.

5 Q Do you know how much an average fire department pumper
6 truck carries, how much water is contained within it?

7 A I do not know the -- the details of the fire equipment.
8 But, again, that's not really necessary for me to know
9 these things, because that will be determined in the
10 later exercise with the coordination with these
11 entities for this fire response plan.

12 Q So you just want to kick this can down the road. Isn't
13 that -- isn't that what the applicant wants to do?

14 MR. McMAHAN: Your Honor, I object
15 to that, implying the applicant wants to kick the can
16 down the road, imputing an intent on the applicant.
17 This is -- this is an expert witness trying to provide
18 useful testimony to the Council, and we object to
19 the -- the characterization and the accusation that
20 Mr. Aramburu's just made.

21 JUDGE TOREM: As to the
22 characterization, sustained.

23 Mr. Aramburu, I think you've asked this witness a
24 number of times about this. And the kicking the can
25 down the road, as you've characterized it, is what --

1 it stops when it gets to the deliberations for the
2 Council, and then it gets moved on as a recommendation
3 to the governor one way or the other.

4 So the applicant's not able to kick any cans down
5 the road. This is the adjudication. And when the FEIS
6 comes out, that's the sum of the record. And the
7 Council will then take its action or not.

8 So let's move on to another area.

9 Q (By Mr. Aramburu) With regard to firefighting in the
10 community, if one of your 244 turbines gets on fire,
11 would you expect it to spread to the surrounding
12 grasslands or agricultural crops?

13 A I would expect that it would spread to some, until it
14 can be contained. And, like I said, those additional
15 access roads will really be beneficial with creating
16 fire breaks to help contain a fire if it were to occur.

17 Q And is not the case that the existence of your
18 500-foot-tall wind turbines would essentially prohibit
19 the use of aerial firefighting, such as airborne
20 tankers or helicopters?

21 A That is not the case, to my knowledge. And, actually,
22 there was a fire in Klickitat County earlier this
23 summer where there were aerial firefighting equipment
24 operating in the vicinity of wind turbines
25 successfully. So that's an example.

1 Q Okay. So -- so it's your testimony that large aircraft
2 carrying fire retardant would be permitted to operate
3 in -- in this area over the top of a fire between
4 turbines.

5 Is that your testimony?

6 A My testimony is that, based on my experience and
7 observation and knowledge, that aerial firefighting
8 equipment -- exactly what kind, because I'm not an
9 expert at wildland firefighting -- uh-oh -- would be
10 able to operate in the vicinity of the wind turbines
11 safely.

12 I also know that each one of the locations of the
13 wind turbines has to be shared with the FAA upon
14 finishing of construction, and that information is put
15 on aeronautical charts and that the pilots of those --
16 those aerial firefighting equipment would have those
17 charts available as well as their visual capabilities
18 of seeing where they're going when they're out there.

19 But even with smoke, they have those charts. And
20 I know that this is not uncommon that there are fires
21 that happen in and around wind projects around the
22 country and that aerial firefighting can be deployed.

23 Q Okay. Now, there is questions in the conditions in the
24 Benton County conditional use permit about support of
25 public services and conflicts with existing and

1 anticipated traffic in the neighborhood.

2 Do you see that?

3 **A Yes.**

4 Q Now, it's my understanding that the water -- the
5 construction water necessary for this -- this project
6 is going to come from the Port of Walla Walla.

7 Is that correct?

8 **A I actually don't know if the source of water's been**
9 **finalized. I don't actually know if that's correct or**
10 **not.**

11 Q Okay. Well, that's what the application says.

12 **A Okay.**

13 Q Is that right?

14 **A I can look it up, if you want to give me some time. I**
15 **just don't know off the top of my head.**

16 Q Okay. Well, Appendix J talks about getting water from
17 the Port of Walla Walla down in the Wallula Gap area.

18 Now, and do you know how much water is going to be
19 necessary?

20 **A Not off the top of my head, no.**

21 Q But I understand it's going to be trucked in; is that
22 correct?

23 **A I believe that is the plan, yes.**

24 Q And how many trucks a day will that be?

25 **A Again, I don't have that number off top of my head.**

1 Q But it's -- it's many trucks, is it not?

2 A I would assume that, many trucks, yes.

3 Q Okay. And have you considered the -- the amount of
4 carbon that would be burned by diesel vehicles hauling
5 200,000 gallons or more of water a day from the Wallula
6 area to this site?

7 A I have not -- I mean, I've considered it in general,
8 and the fact that any time we do construction of
9 anything in this country, there's carbon emissions
10 typically. But specific to this project, I haven't
11 analyzed the number of carbon emissions related to
12 truck traffic. But it is a temporary -- a temporary
13 need for -- during construction for all of those truck
14 trips, so it's temporary in its time frame in terms of
15 impacts.

16 Q And how many other conditional uses under the Benton
17 County Code would require 220,000 gallons of water to
18 be trucked to the site each day?

19 A I don't know the answer to that.

20 Q But have you considered it?

21 A Other uses in Benton County that would require this
22 much water? No, I have not considered it.

23 Q Have you investigated the amount of fire flow that
24 would be necessary to fight a fire in and around a wind
25 turbine?

1 **A Did you say fire flow?**

2 Q Fire flow.

3 **A I'm not sure what fire flow is.**

4 Q You're not familiar with the concept of fire flow when
5 it comes to fighting fires; is that right?

6 **A That's correct.**

7 Q So I'll fill you in a bit here.

8 Fire flow is the amount of water that is available
9 in gallons per minute to fight a fire.

10 **A Oh, okay.**

11 Q Okay. Is that fire flow, in your mind?

12 **A I understand that concept, now that you just explained**
13 **it to me, yeah.**

14 Q What's the amount of fire flow that would be necessary
15 to fight a turbine fire?

16 **A I do not know the answer to that.**

17 Q And have you considered the possibility of lightning
18 strikes to any of your 244 turbines?

19 **A I believe that that is considered in the design of the**
20 **turbines and that they are designed to withstand**
21 **lightning strike.**

22 Q I'm sorry, Ms. McClain. I'm just looking at my notes
23 here and see if I have any other questions for you.
24 Thank you.

25 **A Right.**

1 JUDGE TOREM: And, Mr. Aramburu,
2 take your time. I misspoke when I said you had a half
3 an hour. It was actually one hour. I misread the
4 chart.

5 MR. ARAMBURU: Okay. Thank you.

6 Q (By Mr. Aramburu) Am I correct that the current
7 proposal of the applicant is to build a 10-acre lithium
8 ion battery facility on the west side of the site?

9 Is that correct?

10 **A That's correct.**

11 Q Okay. Do you know how many -- how big a 10-acre parcel
12 would be if we -- if we did it in a square, how many
13 feet it would be?

14 **A It's 10 acres. I don't have the conversion in my head**
15 **for square feet. Sorry.**

16 Q Okay. So but something -- I've done -- I've done the
17 math myself, and I'm not a math major from college, as
18 many will testify to, but I get 660 feet on the side.

19 Would that be about right, do you think?

20 **A I'll trust that you did the math right.**

21 Q Okay. Thank you. Thank you.

22 Yeah. Going back to the fire plans that you have
23 in your reply testimony, they all just kind of seem to
24 be the same -- same thing, a condition, coordination,
25 that -- that kind of thing.

1 Do you know if Benton County Fire District No. 1
2 has hazmat capabilities?

3 **A I believe they do. But I'd have to investigate that to**
4 **say for certain.**

5 Q Well, can you tell me what you think the hazmat
6 capabilities of -- of Benton County Fire District No. 1
7 are?

8 **A Again, I'm not an expert at fire response or hazardous**
9 **material response, so I don't know what the specifics**
10 **of their capabilities are. I have not looked into**
11 **that.**

12 Q Well, Benton County Fire District No. 1 is a public
13 agency, is it not?

14 **A I believe, yes, it's a public -- public agency.**

15 Q And their -- their capabilities, their personnel, their
16 equipment is all matter of public record, is it not?

17 **A I assume so, yes.**

18 Q But you haven't investigated the public record to
19 determine what the capabilities of Benton County Fire
20 District No. 1 are?

21 **A I would just again repeat what I've been saying, which**
22 **is that that type of investigation and coordination and**
23 **identification, if Benton County's fire district needs**
24 **additional equipment, additional training, would all be**
25 **part of the fire management/response plan that would be**

1 fleshed out and determined prior to construction. And
2 that's where -- that is described in the example
3 conditions that I provided in my testimony.

4 There's also conditions in that example of where
5 trainings, specific trainings, especially for the BESS
6 facility, would be provided to -- you know, could be a
7 condition of approval, that the -- that the Horse
8 Heaven project would provide those trainings to the
9 Benton County Fire District 1.

10 There's also conditions in there that speak to
11 cost-sharing agreements. There's a lot of different
12 ways that EFSEC condition this project to ensure that
13 Benton County Fire District has the training and
14 materials that they need to be able to respond and
15 stay -- keep their personnel safe in the event that
16 there was a BESS fire.

17 Q So, but you haven't gone to the fire district to ask
18 them whether they'd be agreeable to that?

19 A I personally have not. But that -- this is keeping
20 in -- consistent with what other approvals of other
21 wind and solar projects in Oregon and Washington have
22 been able to come to those agreements with rural fire
23 districts. And ultimately my experience with rural
24 fire districts is that they typically work -- work with
25 stakeholders especially when they are provided the

1 materials and resources that they need to make sure
2 that they can do their job.

3 Q Let me give you a hypothetical here. And that is that
4 after hearing all the testimony and the concerns about
5 fire and wildlife and Indian cultural properties and
6 visual impacts, the Council said you've got to cut your
7 project in half. Got to go from 4 -- 244 turbines to
8 122.

9 Where would you put the turbines?

10 A That's not really up to me. I think that that question
11 isn't really -- I would -- I would ask that question of
12 maybe a different witness or someone else. I don't
13 think that's an appropriate question for my expertise.

14 Q Well, I'm not asking you to talk about mechanical,
15 physical, electrical properties. You say you're a
16 land-use planner. What would your recommendations be
17 from a land-use planning perspective about location of
18 turbines if the Council said cut it in half?

19 A I think we would apply the same siting criteria that we
20 do for the existing layout, which would be to look at,
21 you know, setback requirements, minimizing impacts to
22 adjacent uses, working with the landowners to make sure
23 that things are sited appropriate so that they can
24 continue their ranching and farming out in that area.

25 So I don't really see why it would be any

1 different. But this is also a hypothetical situation
2 that you're describing, so I'm not really sure what the
3 point of the question is.

4 Q Are you familiar with the phasing of this project?

5 A Yes. On a high level, yes.

6 Q Okay. And just briefly describe, if you would, what --
7 what the phasing proposal is.

8 A That the -- at a very high level, the project would be
9 constructed in several phases. I would have to go back
10 and look at the ASC to tell you more specifics. I did
11 not read up on that right before this testimony.
12 Sorry.

13 Q And that's fine, Ms. McClain.

14 But the Phase 2 has got an A and B alternative in
15 it. One of those phases includes all wind, and the
16 other one includes wind and solar.

17 Are you familiar with that distinction in the
18 Phases 2A and B?

19 A I am familiar with it. You're reminding me of it right
20 now.

21 Q Okay. Ms. McClain, from a land-use planning
22 standpoint, from a conditional use standpoint, applying
23 Benton County Codes, which of those two alternatives
24 would be the best from a land-use planning perspective?

25 A I would not judge either one as better or worse. I

1 think they're both consistent with the existing uses in
2 the area and that the consis- -- that the landowners'
3 existing agricultural uses will continue to occur
4 adjacent to both of the solar and the wind turbine
5 infrastructure.

6 Q I understand.

7 But from -- from an impact perspective,
8 Phase 2A -- Phase 2A, Phase 2B: Which is preferable
9 from a compatibility analysis under the Benton County
10 Code?

11 A That -- I think you would need to define what impacts
12 you're talking about. We would have to analyze it
13 from, you know, a better definition of what you're
14 asking. But I think my -- my answer to you on a high
15 level is that both phases, both options would be
16 consistent with the conditional use permit criteria.

17 Q But is it fair to say that you haven't studied it?

18 A A hypothetical -- or the Phase 2 options? I mean,
19 we've studied the project as a whole. And so cutting
20 it into smaller pieces, the same conclusions apply,
21 regardless of how it's phased out.

22 Q Well, but -- but have you seen a map of -- of how
23 Phase 2 -- of where Phase 2 as opposed to Phase 1 would
24 be?

25 A I would have to look it up. It's not fresh in my

1 **memory.**

2 Q Okay. And this can be corrected later, but I have not
3 found a map in the amended ASC that shows a map of
4 Phase 1 versus Phase 2.

5 Have you ever seen one?

6 **A I -- I have not.**

7 Q And there's also Phase 2B, as we talked about, is all
8 wind versus wind and solar.

9 Have you seen a layout or drawing or design for
10 either one of those options on the ground?

11 MR. McMAHAN: Your Honor, I would
12 object. This has been asked and answered.

13 JUDGE TOREM: Mr. Aramburu, what --
14 she's seen the maps or she hasn't.

15 Q (By Mr. Aramburu) Well, and you have not seen such
16 drawings; am I correct?

17 **A That's correct.**

18 JUDGE TOREM: Mr. Aramburu, are they
19 somewhere that you've seen them?

20 MR. ARAMBURU: They don't exist.

21 JUDGE TOREM: Okay. I just wanted
22 to make sure that --

23 MR. ARAMBURU: I will represent
24 that, and if someone tells me wrong, but I have looked,
25 and I'm very familiar with the -- with the ASC, and

1 there are no drawings or maps showing Phase 1 versus
2 Phase 2, and there are no drawings or maps that show
3 Phase 2A versus Phase 2B.

4 JUDGE TOREM: All right. I just
5 didn't want the Council members chasing after something
6 that doesn't exist, so I appreciate the clarification.

7 MR. ARAMBURU: Okay. And if I'm
8 wrong, someone will point that out to me, I'm sure.
9 But that's -- that's -- that's my recollection.

10 MS. VOELCKERS: Your Honor, I'm
11 sorry to interrupt. This is Shona Voelckers. At least
12 on my camera, I can't see the witness very well. Is it
13 possible to zoom out so we can see both her and
14 Mr. McMahan or to center it back on? It's hard to -- a
15 little hard on the screen. Thank you so much.

16 JUDGE TOREM: All right. Thanks,
17 Ms. Voelckers. I think they're -- they're working with
18 a shared camera just to keep the echo down, so they're
19 making adjustments now.

20 Q (By Mr. Aramburu) And in your land-use planning
21 analysis, your consistency with the Benton County Code,
22 did you analyze the impacts on Yakama Nation cultural
23 aspects or other such aspects?

24 A **I would defer questions about the cultural impacts to a**
25 **later witness in the proceedings.**

1 Q Well, I understand there may be people who have more
2 expertise on that. I understand there will be
3 witnesses coming forth. My question to you as a
4 land-use planner for the project:

5 Did you include impacts on Yakama Nation cultural
6 features, practices, and other things in your
7 conditional use analysis?

8 A I did not see those specific topics in the conditional
9 use permit criteria. So I did not look specifically at
10 those elements or resources in my consistency
11 determination. But I also don't think that they're
12 required as part of the CUP criteria.

13 Q Have you read any parts of the final environmental
14 impact statement?

15 A I have read parts of it, yes.

16 Q The one that's being prepared?

17 A Or the draft. The draft EIS.

18 Q Have you -- have you read any parts of the final
19 environmental impact statement?

20 A No.

21 Q Are you consulting with EFSEC staff on the final
22 environmental impact statement?

23 A No.

24 MR. ARAMBURU: I think that's all
25 the questions I have. Thank you, Ms. McClain, for

1 your -- for your testimony.

2 **THE WITNESS: Thank you.**

3 MR. ARAMBURU: Nice to meet you.

4 **THE WITNESS: Nice to meet you.**

5 JUDGE TOREM: All right. Thank you,
6 Mr. Aramburu.

7 Looking at time management, Ms. Voelckers, you
8 would have still an approximate half hour. What I
9 would propose, we take a five-minute stretch break.
10 Come back at, say -- let's say at six minutes, 11:17,
11 and take your cross-exam.

12 We'll probably, Mr. McMahan, target a lunch break
13 before redirect, and a few rounds of recross as
14 necessary and as much as we have time for.

15 So let's take a break for five or six minutes.
16 We'll come back at 11:17, 11:18, and go from there.

17 (Pause in proceedings from
18 11:12 a.m. to 11:18 a.m.)
19

20 **THE VIDEOGRAPHER: All right. Good**
21 morning. We're back on the record, and it's 11:18.

22 We're ready, Ms. Voelckers, for your
23 cross-examination of Ms. McClain.

24 I wanted to clarify for the Council members.
25 We've been referring to this Moon memo. And that came

1 in as correspondence from the applicant last week. And
2 there was a reference to it in a footnote in the
3 prehearing brief. And based on some communications at
4 our prehearing conference with the parties last week,
5 that was stricken.

6 But it's still a document that came in as part of
7 the SEPA review, so I don't -- Council members
8 shouldn't be looking for it in the exhibits to the
9 adjudication, but it will be listed as a response to a
10 data request in the SEPA documents. But for today's
11 purposes, it may be referenced a lot, but it's not an
12 exhibit that's been submitted for the adjudication.

13 I hope that clarifies. If you're looking madly
14 for the Moon memo, it was, again, sent in as a data
15 request addressed to Amy Moon, who's handling all the
16 SEPA things for EFSEC staff.

17 All right. Let's go on to Ms. Voelckers. And,
18 Ms. McClain, thank you for your ongoing stamina in
19 responding to questions. We'll get this
20 cross-examination in, then hopefully have a lunch break
21 before your redirect.

22 MS. VOELCKERS: Thank you, Your
23 Honor.

24 ////

25 ////

CROSS-EXAMINATION

BY MS. VOELCKERS:

Q And good morning, Ms. McClain. My name is Shona Voelckers, and I -- I represent the Confederated Tribes and Bands of the Yakama Nation in this proceeding.

A number of my questions have already been covered, so I don't think we'll need the half hour that I had previously requested. We are going to jump around, though, and there's been a number of topics, so I appreciate if you answer the question that's asked of you, and then if we need a clarification, we can do that.

So going back to earlier this morning, you talked with Mr. Harper about the way that EFSEC sits in the seat of the county hearing examiner, decides whether or not to recommend that the governor issue a conditional use permit for the project.

Do -- can we agree that EFSEC is still required to apply Benton County's land-use regulations when they fulfill that role unless the applicant specifically requests preemption?

Do we agree on that point?

A That -- I agree that the Council -- well, first of all, I would direct you to Council's Order 883, which is the order that establishes the Council's determined

1 consistency of the land -- of the project with the
2 land-use ordinance and the comprehensive plan. And so
3 to that extent, that -- that decision's already been
4 made.

5 And so what is before Council is the determination
6 of whether the -- the use meets the conditional use
7 permit criteria and what conditions would need to be
8 attached to an approval to ensure that -- the
9 consistency with the -- the criteria for the CUP.

10 Q Okay. If you could try to focus on answering the
11 question I'm asking.

12 The question I'm asking is whether or not you and
13 I agree with the statement that I'm making that, when
14 EFSEC sits in that role of the hearing examiner, EFSEC
15 is still required to apply Benton County's land-use
16 regulations unless there's specific preemption requests
17 from the applicant.

18 Do we agree or disagree on that statement?

19 MR. McMAHAN: Your Honor, I object
20 to that. That calls for a legal conclusion. And,
21 frankly, it is -- it calls for a legal conclusion.

22 JUDGE TOREM: I'd agree,
23 Mr. McMahan.

24 I think, Ms. Voelckers -- so I'm going to sustain
25 the objection. I think it's acknowledged, as the

1 witness pointed out in the Council's land-use order,
2 that what you're saying is correct legally. There's no
3 formal preemption request under the law, under I think
4 it's 80.50.110. Simply the land-use consistency is
5 there. And you're correct. This Council will sit and
6 apply the same criteria that were in the land-use code
7 and zoning requirements that were in effect at the time
8 of the application.

9 MS. VOELCKERS: Thank you, Your
10 Honor.

11 And so then just to be clear in terms of
12 Ms. McClain's understanding for her, the basis of her
13 analysis that she was unaware of any preemption
14 requests by the applicant as she formed her opinions
15 about the project's suitability for a conditional use
16 permit.

17 MR. McMAHAN: Again, Your Honor --
18 I'm sorry, Ms. Voelckers.

19 And, Your Honor, again, I object to that. There
20 is no need for a request for preemption, per se.

21 JUDGE TOREM: Well, let me just,
22 Ms. Voelckers, have you direct that question briefly to
23 the witness. Was she aware, or was she not? And --
24 and we'll see what she says.

25 MS. VOELCKERS: Okay.

1 Q (By Ms. Voelckers) Ms. McClain, are you aware of any
2 requests by the applicant that EFSEC preempt any of
3 Benton County's land-use regulations?

4 **A I am not aware, no.**

5 Q Okay. Thank you.

6 Now, you testified earlier -- I believe you
7 brought it up first in your testimony in response to
8 Benton County, and then it was also brought up by
9 Mr. Aramburu -- regarding the, what's now being
10 referred to as the Moon memo. And I believe that you
11 said that the project design modifications contained in
12 that memo result in a net reduction of the project's
13 impacts.

14 Did I accurately summarize your testimony from
15 earlier?

16 **A Yes. It's a net reduction of the footprint and**
17 **associated impacts to the footprint.**

18 Q Okay. But to be clear for the Council, the
19 environmental analysis of the recently introduced
20 project redesign is outside the scope of your
21 expertise, correct?

22 **A The SEPA analysis is being conducted by EFSEC staff, to**
23 **my knowledge.**

24 Q Any environmental analysis, though, would that be
25 within the scope of your expertise?

1 A Well, I have experience doing environmental analysis,
2 if that's what you're asking. And I looked at
3 considerations of environmental impacts in my land-use
4 review.

5 Q So your statement from earlier today about, I believe
6 what the term you used was net reduction of the
7 project's impacts.

8 Are you testifying today that it's your opinion
9 that there is a net reduction of the project's
10 environmental impacts?

11 A Because the footprint is reducing, I guess that is my
12 assumption.

13 I will also note that the SEPA process is going --
14 ongoing at the same time as this adjudication. So that
15 process is -- you know, these -- the information in the
16 memo is in EFSEC's staff's hands. They'll be able to
17 evaluate it in their SEPA analysis. And, you know, and
18 the -- the work that we do as part of looking at, like,
19 land-use con- -- con- -- or the consistency with the
20 CUP criteria is happening at the same time in this
21 adjudication.

22 Q Okay. So I'm still just trying to make sure that we're
23 clear on what your opinion is today, though, as
24 yourself, not -- not the analysis that anyone else may
25 be doing. I'm just asking if you're testifying today

1 on the environmental impacts of the project as it has
2 been redesigned in the Moon memo.

3 **A I think it's factual that the -- that the Moon memo**
4 **represents a reduced footprint and that the --**
5 **ultimately it will be up to EFSEC to determine what**
6 **that means from an environment analysis perspective.**

7 MR. McMAHAN: And, Your Honor, if I
8 could just object here quickly, briefly. We disagree
9 with the contention that the project is being, quote,
10 redesigned, end quote. Just for the record, I want
11 that to be clear.

12 JUDGE TOREM: Noted. Thank you.

13 MS. VOELCKERS: And, Your Honor, if
14 I could just -- I'm looking for a "yes" or "no" on
15 whether or not Ms. McClain's testimony, her opinion is
16 being made about -- if she's offering an opinion today
17 about the environmental impacts of any of the design
18 modifications in that Moon memo.

19 JUDGE TOREM: Ms. McClain, if you
20 can answer that, go ahead.

21 **THE WITNESS: I would say that I**
22 **suppose anything that I'm saying here to some extent is**
23 **from my professional background and my experience. So**
24 **to that extent, it is my opinion.**

25 **With regards to environmental impacts, that's a**

1 very broad topic, so there's a lot of different
2 elements that would need to be evaluated. From --
3 specifically from a land-use perspective, I know that
4 the reduction of the footprint would have less of an
5 impact or displace less of the dryland wheat farm
6 acreage. And then also based on the maps that were
7 included in the Moon memo, it would be less of a
8 footprint in the shrub-steppe habitat as well.

9 JUDGE TOREM: I think what
10 Ms. Voelckers is asking --

11 MS. VOELCKERS: Okay.

12 JUDGE TOREM: Hang on. Get the mike
13 real quick.

14 Sorry. We were on mute.

15 I think the question Ms. Voelckers is trying to
16 ask, Ms. McClain, honestly is: Today's testimony, is
17 it based on your review of that response from the
18 applicant to Data Request No. 9, otherwise known as the
19 Moon memo? Are you incorporating anything you learned
20 last week looking at that in today's testimony, or is
21 it based on everything before?

22 Ms. Voelckers, is that a fair question? Is that
23 what you're driving at?

24 MS. VOELCKERS: Not necessarily, but
25 I think that's a fair question as well. And that might

1 help clarify my -- my follow-up questions.

2 Q (By Ms. Voelckers) So I think the -- I would ask the
3 judge's question on whether or not your analysis is --
4 includes the information contained in that memo or if
5 it's based upon the previous project design.

6 A I would say that it's based on both. I think that my
7 written testimony is based on the previous design. And
8 then since I read the Moon memo and I saw the
9 adjustments in the project footprint and the reduction
10 of some of the solar array areas and reduction in some
11 of the turbines, that I thought about that in terms of
12 the consistency with the land-use code and the -- and
13 the CUP criteria. And so I would just say that even
14 because the -- the changes in the Moon memo are
15 reduction of footprint, that my conclusions and my
16 analysis of the original layout and the original design
17 are the same, are unchanged. Those conclusions are the
18 same even with the Moon memo, because the original
19 design --

20 Q Okay. So then is it fair to say that you're not
21 testifying today that the -- the Moon memo represents a
22 reduction of habitat impacts specifically?

23 A Can you repeat your question?

24 Q Is it fair to say that you're not testifying today that
25 the Moon memo represents a reduction of habitat

1 impacts?

2 Is that fair to say?

3 UNIDENTIFIED SPEAKER: Did she say
4 "wildlife impacts."

5 THE WITNESS: I think she said
6 wildlife.

7 We're getting a little bit of a lag in the video.
8 Sorry.

9 MS. VOELCKERS: I said habitat.
10 Habitat impacts.

11 UNIDENTIFIED SPEAKER: Habitat.

12 THE WITNESS: I'm testifying --
13 my -- I'm testifying that my read of the Moon memo is
14 that there is a reduction in habitat impacts.

15 Q (By Ms. Voelckers) And what is the basis of your
16 testimony?

17 A The Moon memo.

18 Q Okay. And are you testifying today that the Moon memo,
19 the design modifications within that represent a
20 reduction of wildlife impacts?

21 A I would -- I would actually recommend that you ask more
22 of those type of questions for a later witness who has
23 the habitat and biology background.

24 Q So is that a "yes" or a "no"?

25 A I guess I'm not testifying to that point, 'cause it's

1 **not in --**

2 Q Okay.

3 **A -- my wheelhouse.**

4 Q Okay. And you're not testifying today about the -- the
5 potential reduction of impacts on water resources?

6 **A No, I'm not testifying --**

7 Q Okay.

8 **A -- on that.**

9 Q And you're -- you're not testifying today about any
10 reduction that might -- there might be reduction in
11 cultural resource impacts from the Moon memo.

12 You're not testifying today about potential --

13 **A No.**

14 Q -- reductions? Okay.

15 So when you talked about a net reduction of the
16 project's impacts, you weren't talking about
17 specifically reductions to wildlife, water resources,
18 or cultural resources.

19 Is that fair to say?

20 **A That's fair to say. It was more from the perspective**
21 **of land use.**

22 Q Okay. And you talk at length in your written testimony
23 as well as your verbal testimony today you discuss with
24 the attorneys before me, the project's ability to be
25 permitted under Benton County Code as a conditional

1 use.

2 Are you aware of any provision in the Benton
3 County Code that allows for conditional use permits to
4 be issued for a development that does not have a viable
5 water source?

6 **A I am not aware of any provisions that specifically**
7 **require a water source for use.**

8 Q And are you aware of any provisions that allow a
9 conditional use permit to be issued for a development
10 that does not have a viable water source?

11 **A My understanding of the conditional use permit criteria**
12 **is that viable water source is not part of the**
13 **criteria.**

14 MS. VOELCKERS: Okay. Thank you.

15 I will reserve the ability to ask redirect
16 questions -- or excuse me -- after the redirect.

17 JUDGE TOREM: Okay. Thank you very
18 much.

19 I think that exhausts the cross-examination we had
20 scheduled for this witness.

21 Council members, as will be the case with each and
22 every witness called, there's an opportunity after the
23 attorneys have asked their questions to see what
24 questions you might have, and that will then form -- in
25 this case, the applicant, but the sponsoring party to

1 know what else they need to respond to in redirect. So
2 you might have questions, or you might not. Going
3 forward, maybe it will be helpful to put something in
4 the chat so I know to call on you directly.

5 But at this time, Chair Drew, do you have any
6 questions that you want to pose to Ms. McClain?

7 COUNCIL CHAIR DREW: Not at this
8 time.

9 JUDGE TOREM: All right. Does any
10 other Council member have any questions they want to
11 pose at this time? And I'll ask again at the end of
12 redirect and recross.

13 All right. Not hearing any.

14 We're at 11:30. Mr. McMahan, do you want to give
15 me an estimate on what you think your redirect will
16 take? Less than an hour or more than an hour?

17 MR. McMAHAN: Less than an hour.
18 Less than an hour, Your Honor.

19 JUDGE TOREM: All right. Well,
20 parties, unless there's an objection, I think I'll have
21 Mr. McMahan do his redirect. We'll take that lunch
22 break, and we'll come back after any recross, and
23 hopefully we'll be a bit ahead of schedule.

24 MR. McMAHAN: Your Honor, if I may,
25 can we have, oh, maybe five or as many as ten minutes

1 to collect our collective knowledge from the team here
2 before the redirect?

3 JUDGE TOREM: You just want a little
4 bit of a chat session to make sure what you-all want to
5 cover?

6 MR. McMAHAN: That's right.

7 JUDGE TOREM: Okay. I think that's
8 fair. So we'll take a break until 11:45 and come back,
9 hopefully get at least 45 minutes of redirect, and
10 target of lunch break at 12:30.

11 All right. We'll --

12 MR. McMAHAN: Thank you, Your Honor.

13 JUDGE TOREM: -- recess the hearing
14 till 11:45.

15 (Pause in proceedings from
16 11:34 a.m. to 11:45 a.m.)
17

18 JUDGE TOREM: All right. Good
19 morning again, everybody. It's 11:45.

20 Mr. McMahan, do we have your readiness to go
21 forward with redirect?

22 MR. McMAHAN: Thank you, Your Honor.
23 Just -- really just a few questions here.

24 ////

25 ////

REDIRECT EXAMINATION

BY MR. McMAHAN:

Q Ms. McClain, you were asked by one of the attorneys what land-use mitigation measures have been proposed and actually a question of why the applicant has not proposed land-use mitigation measures.

Can you respond to that question?

A Sure.

So the reason that there aren't specific land-use mitigation measures is because the project, itself, is designed to minimize impacts to surrounding land uses. As I said many times, the project is consistent with the GMAAD. Because it works -- it will work with the landowners to continue the existing land-use operations that are out there, which is primarily dryland wheat. And so by that purpose, there is no need for specific land-use mitigation measures.

Q Thank you.

And did -- did the applicant receive any input from the County concerning mitigation measures, land-use mitigation measures?

A No.

Q Can you elaborate on that?

A Yeah. The County did not provide any land-use mitigation measures or any other conditions, example

1 conditions of approval that they would offer up to the
2 Council to consider in their decision-making, in their
3 written testimonies.

4 Q Are you aware of whether the applicant received any
5 feedback from the -- a fire district?

6 A I am aware that Dave Kobus did reach out to the fire
7 marshal, but to my knowledge, he has not received any
8 feedback so far.

9 Q And wouldn't it be typical that a fire agency would
10 want to have feedback prior to development of a fire
11 management plan?

12 A Yes.

13 Q And can you talk about when it is typical that those
14 plans would be formulated in the permitting process?

15 A Yeah. The typical timing for working out the specifics
16 of a fire management plan is prior to construction. I
17 believe the typical conditions from EFSEC are usually
18 90 days prior to construction that the plan is
19 finalized.

20 And the critical piece to being able to work out
21 those details is that you need the design further
22 along, closer to final, and also having the EPC
23 contractor on board, which comes later in the
24 development process as you get closer to construction,
25 because the EPC contractor will be the one to really

1 understand the process of construction, and they'll
2 have the feedback necessary to have those discussions
3 with the fire marshal and the rural fire district, the
4 County, and with EFSEC.

5 Q And actually for everyone else here that maybe isn't as
6 clever as you, can you talk about what an EPC is?

7 A I wish I actually knew what that acronym stands for off
8 the top of my head, but it is the -- I guess it's
9 engineering, building, design. It's -- it's the
10 contractor that's brought in to do the final design and
11 construction of the project.

12 Q All right. And that contractor would typically be
13 involved how in the -- in the final planning?

14 A They would take quite a bit of ownership over these
15 final preconstruction plans, such as the emergency
16 management plan and the fire management plan as well as
17 the -- the stormwater, the SWPPP plan, the
18 erosion/sediment control plan, because they're doing
19 the final design, and they would be rolling out the
20 actual construction.

21 MR. McMAHAN: Okay. So unless any
22 Council members or others need to have acronyms defined
23 or described, that will be the end of our redirect
24 questions.

25 JUDGE TOREM: Thank you. You

1 anticipated that I was going to ask that same acronym
2 question.

3 Council members, as far as the land-use mitigation
4 measures just discussed or the fire planning and
5 mitigation, any questions from Council members that
6 that raises?

7 All right. Seeing and hearing none.

8 Mr. McMahan, I think you've clarified again as to
9 when and how that fire management plan would be
10 developed as far as timing.

11 We have a little bit of time. Let me come back to
12 Mr. Harper and see what recross you think your time
13 estimate is, if we can get that in before lunch, or do
14 you need time to reformulate?

15 MR. HARPER: I can recross before
16 lunch.

17 JUDGE TOREM: All right. Go ahead,
18 sir.

19
20 RECROSS-EXAMINATION

21 BY MR. HARPER:

22 Q Ms. McClain, just a couple questions. And I really
23 mean just a couple of questions.

24 First thing is this. You just testified that the
25 County didn't provide any conditions of approval. And

1 I think that's correct.

2 MR. HARPER: If I could ask
3 Ms. Masengale to go back to Exhibit 2. We've seen this
4 before.

5 And, Ms. Masengale, if you would, go to Page 5.
6 That's the last page of the document.

7 Q (By Mr. Harper) Ms. McClain, this is the Benton County
8 Code Chapter 11.50 regarding variance and conditional
9 use processing.

10 We agree that this code did not change during
11 the -- the course of the -- the operative application
12 process here. So --

13 MS. MASENGALE: I apologize. Could
14 you -- could you -- I apologize. Could you redirect me
15 to which exhibit you wanted open and on --

16 MR. HARPER: Absolutely.

17 MS. MASENGALE: -- which page?

18 MR. HARPER: It's Exhibit 2. Let me
19 be more specific so everybody's on the same page.
20 Benton County Exhibit 2006.

21 And I would like Ms. McClain and Council members
22 to look at Page 5 of 5, the last page.

23 JUDGE TOREM: Mr. Harper, while
24 Ms. Masengale is getting that up on the screen, Council
25 members, a lot of the prefiled testimony -- sorry. I

1 think we were just getting off "mute" here.

2 For the Council members looking for some of these
3 exhibits, these are cross-exam exhibits that were
4 submitted in more recent days than the prefiled
5 testimony you got in June and July.

6 So Mr. Harper is referring to an exhibit that's
7 only now probably being uploaded, as staff received
8 them over the weekend. So they're displaying these
9 cross-exam exhibits.

10 And if you went back and looked, Mr. Harper, 2006,
11 that exhibit really did just come in Friday, Saturday,
12 Sunday; is that correct?

13 MR. HARPER: That is fair, Your
14 Honor.

15 JUDGE TOREM: Okay. I just want to
16 make sure that, again, Council members, as we navigate
17 this first day and our hearing about cross-exam
18 exhibits, they may not be included with prefiled
19 testimony, but they'll make their way into the
20 SharePoint folder and make their way onto the EFSEC
21 public website as well, as staff can keep up with the
22 onslaught of documents that we're all having.

23 All right. Mr. Harper, go ahead on this. We've
24 got it on the screen.

25 MR. HARPER: Okay. Thank you, Your

1 Honor.

2 And, Ms. Masengale, if you can just scroll down to
3 the -- the -- so that the fully -- the highlighted
4 portion is fully visible.

5 There we go. Thank you.

6 Q (By Mr. Harper) So, Ms. McClain, the question that I
7 asked a moment ago related to your testimony that the
8 County didn't provide any conditions of approval, can
9 we agree that based on this Code Provision 11.50.040,
10 final paragraph, it's the applicant's burden to present
11 sufficient evidence to allow the various conclusions to
12 be made, and consequently, if there is not evidence of
13 all necessary reasonable conditions identified by the
14 applicant, then the conditional use application is to
15 be denied?

16 Can we agree that's what this says?

17 A Yeah, I'm reading the same text as you. I agree.

18 MR. HARPER: Now, Ms. Masengale, can
19 we go to Exhibit 5, Benton County Cross-Exam Exhibit
20 2009.

21 Q (By Mr. Harper) Ms. McClain, this is the prefilled
22 written testimony of Greg Wendt, the Benton County
23 planner, planning director, actually community
24 development director, who you'll be hearing from in a
25 moment, actually after lunch.

1 Mr. Wendt's testimony, as you can see here, is
2 that there are no mitigation measures to accommodate
3 the permanent loss of agricultural land.

4 Now, when we talked earlier, Ms. McClain, I was a
5 little bit shaky on whether the 72,428 acres was the
6 lease boundary or some other polygon.

7 I can represent to you now I double-checked. The
8 72,428 is the lease boundary identified in the amended
9 ASC. Comes out to 113 square miles.

10 I'm going to ask you this question. I think I
11 know what your answer is going to be.

12 Do you agree or disagree with Mr. Wendt that --
13 that, in fact, there are no mitigation measures that
14 deal with the 113-square-mile replacement on the
15 landscape of this agricultural land with the Horse
16 Heaven wind facility?

17 **A I disagree with the statement that the entire facility**
18 **lease boundary, the 72,000 acres and some, would be**
19 **permanently displacing, you know, agricultural uses.**

20 As I said, that the key is to look more at the
21 permanent impact footprint, which is a much, much
22 smaller acreage, and that -- and I would disagree. I
23 think there are mitigation measures to ensure that --
24 that the land use is -- that the -- that the project's
25 use is consistent with the other uses in the zone,

1 **which is the dryland wheat uses that are currently**
2 **happening out there, and those mitigation measures are**
3 **captured in the project's design.**

4 Q Fair enough.

5 But when I asked you questions earlier this
6 morning and again in response to the questioning of
7 Scout's own attorney, Mr. McMahan, you acknowledge
8 there are no specific land-use mitigation measures as
9 part of this ASC, correct?

10 A **They're -- they are -- the mitigation measures related**
11 **to land use are part of the project design. So they**
12 **are -- they are the ASC essentially.**

13 MR. HARPER: Okay. I have no
14 further questions. Thank you.

15 JUDGE TOREM: All right.
16 Mr. Aramburu, let's come to you for any recross that
17 TCC might have.

18 MR. ARAMBURU: Okay. Thank you.

19
20 RE CROSS-EXAMINATION

21 BY MR. ARAMBURU:

22 Q Ms. McClain, we've talked about the Moon memo and the
23 reduction in the number of turbines.

24 Isn't it true that the FAA has only permitted a
25 certain number of wind turbines on this project?

1 A I don't know if that's true or not. I think that --
2 I'm assuming you're referring to a preliminary filing
3 with the FAA where we provide preliminary locations for
4 turbines and to see if there's any foreseen hazards
5 from an aeronautical perspective.

6 But like with any wind project in the nation, the
7 final location of wind turbines have to be submitted to
8 the FAA for a final hazard analysis.

9 Q I understand.

10 But -- but do you understand that the FAA has --
11 had required that only a certain number of turbines be
12 permitted on this site and that is less than the 244?

13 A I don't agree with that statement. I don't know if
14 that's true. I don't think it's true, actually.

15 Q Okay. Okay. You talked about the reaching out to the
16 fire -- Benton County Fire No. 1.

17 You haven't tried to reach out for them yourself,
18 have you?

19 A We talked about this earlier. No, I haven't. But my
20 understanding is that Dave Kobus has reached out to the
21 fire district, or the fire marshal for Benton County.

22 Q And have you seen any e-mails that have been sent or
23 any correspondence been sent at all to the fire marshal
24 requesting coordination?

25 A I personally have not seen those. I've just been told

1 that that occurred by my -- by my team.

2 Q You've talked a great deal about fire control plans.
3 And you've indicated that those are part of the final
4 review process by EFSEC.

5 Does the public get notice of those fire control
6 plans when they're submitted for review just prior to
7 construction?

8 A I don't believe that there's a public notice that goes
9 out, but I -- I know that all of these materials would
10 be made available to the public, if requested. But the
11 mechanics of what's noticed by EFSEC, I would direct
12 that question to maybe one of the EFSEC staff.

13 Q And can you tell me what the public involvement is in
14 the approval of the fire control plans?

15 A I think at that point the -- the Council has made a
16 decision about the project, and so there isn't really a
17 public comment period on those plans. It's more
18 discussion with the stakeholders and the experts of the
19 field to make sure that these fire control plans and
20 emergency response plans are adequate to ensure the
21 public's safety.

22 Q But not -- but neither public notice or public
23 involvement in that decision-making, correct?

24 A Like I said, I would direct that question to an EFSEC
25 staff member in terms of what the public notice

1 **requirements are.**

2 Q Okay. And -- and thank you.

3 And if -- let's suppose that Benton County Fire
4 District says, "We don't agree with your fire control
5 plan that you've submitted to us." What's going to
6 happen then?

7 A **Can you repeat the first part? Kind of glitched out a**
8 **little bit.**

9 Who -- who at Benton County did you say?

10 Q Let's suppose that the applicant -- you've talked about
11 all sorts of fire control plans in your reply
12 testimony, and I've read that. I'm aware of those.

13 And I presume that the plan is for the applicant
14 to submit a fire control plan to the fire district; is
15 that correct?

16 A **That's correct. Yes.**

17 Q And what if the fire district says, "We can't agree
18 with that. We're not going to agree with that. We
19 don't -- we don't think that's appropriate given --
20 given the circumstances at this project"?

21 What's going to happen then?

22 A **I think that they will -- if they have concerns with**
23 **the fire plan, then it will go back to the applicant,**
24 **and they'll discuss, try to reach an agreement.**

25 But ultimately, I don't think that the decision of

1 whether or not to approve a -- it's not an approval
2 decision, because the approval decision of the project
3 is made by EFSEC, or by the Council. And so the fire
4 district will be compelled to come to the table and
5 negotiate this agreement with the Council -- or with the
6 applicant.

7 Q The plan is to have EFSEC tell the fire district what
8 the fire control plan's going to be, correct?

9 A I wouldn't characterize it that way. I think that
10 EFSEC will be very interested to know what the fire
11 district's concerns are and what their input is,
12 because that's how the plan will be functional. But it
13 won't be up to them to decide to try to stop the
14 project by not approving the fire plan.

15 MR. ARAMBURU: Good. Thank you.
16 That's all the questions I have. Thank you,
17 Ms. McClain.

18 THE WITNESS: Thank you.

19 JUDGE TOREM: All right. Thank you,
20 Mr. Aramburu, particularly for clarifying that at the
21 very end there.

22 Ms. Voelckers, any other recross?

23 MS. VOELCKERS: Nothing further from
24 the Yakama Nation. Thank you, Your Honor.

25 JUDGE TOREM: All right.

1 Mr. McMahan, any further redirect or clarifications the
2 applicant needs to make?

3 MR. McMAHAN: No, Your Honor. Thank
4 you.

5 JUDGE TOREM: All right, then.

6 Council members, for Ms. McClain. Because
7 otherwise we'll release her and won't have her back
8 after lunch, at least as to this land-use testimony.

9 All right. Hearing no questions from Council
10 members.

11 We're a little bit ahead of schedule, and we also
12 probably can get Mr. Wendt, I think, on at maybe 1:30.

13 Mr. Harper, that's going to be your witness. Do
14 you think he'd be available at 1:30 instead of 2:30
15 today?

16 MR. HARPER: I do.

17 JUDGE TOREM: Okay. So, Chair Drew,
18 what I'd like to do is recess for lunch, have everybody
19 come back at 1:30, and we'll resume with the adoption
20 of Mr. Wendt's testimony. And then cross-exam is
21 scheduled to be a half an hour from the applicant,
22 another half an hour from Mr. Aramburu on behalf of
23 TCC, and then another half hour perhaps from
24 Ms. Voelckers for the Yakama Nation.

25 And we'll go around again for any redirect as

1 needed. And I know Ms. Reyneveld hasn't listed any
2 questions for cross-exam she's prescheduled, but I'm
3 taking it that Ms. Reyneveld will let us know if she
4 wants to interject and ask any questions as we go.

5 All right. Thank you, all.

6 MS. VOELCKERS: Your Honor.

7 JUDGE TOREM: We'll be -- yes,
8 Ms. Voelckers.

9 MS. VOELCKERS: Oh. Your Honor, if
10 I may, there was a discussion during this morning's
11 conference with counsel about returning to the
12 conversation on scheduling at lunch. So should the
13 parties, themselves, plan to be back before 1:30, or
14 are we no longer discussing the rearrangement of the
15 wildlife testimony?

16 JUDGE TOREM: Let's come back at
17 1:20 and have a brief housekeeping session so we can
18 talk about what the impacts on Ms. Perlmutter's
19 availability or unavailability might be. So counsel
20 will come back at 1:20, Council members at 1:30.

21 Thank you, Ms. Voelckers, for that.

22 MS. VOELCKERS: Thank you, Your
23 Honor.

24 JUDGE TOREM: All right. We're at
25 recess until 1:20 for the -- for the counsel and 1:30

1 for the Council members.

2 (Pause in proceedings from
3 12:03 p.m. to 1:20 p.m.)
4

5 JUDGE TOREM: All right. We're back
6 for a housekeeping session before we get to Mr. Wendt's
7 testimony.

8 Is the applicant back?

9 MR. McMAHAN: Yes, Your Honor, we're
10 here.

11 JUDGE TOREM: Great.

12 Mr. Harper, you there, for the County?

13 MR. HARPER: I am.

14 JUDGE TOREM: Great.

15 Ms. Reyneveld?

16 MS. REYNEVELD: I'm here.

17 JUDGE TOREM: Great.

18 MS. REYNEVELD: Thank you.

19 JUDGE TOREM: Ms. Voelckers?

20 We're waiting for Ms. Voelckers.

21 Mr. Aramburu, you out there too?

22 MR. ARAMBURU: Present. Yes.

23 JUDGE TOREM: Okay.

24 MS. VOELCKERS: Your Honor, this is
25 Ms. Voelckers. Shona Voelckers on behalf of Yakama

1 Nation. I'm having a little bit of a connection lag
2 here. So I think you asked for me. It didn't come
3 through. Are you able to hear me?

4 JUDGE TOREM: Yes. We can hear you
5 now.

6 MS. VOELCKERS: Thank you.

7 JUDGE TOREM: So, parties, before we
8 take up Ms. Perlmutter's health and the question for
9 tomorrow, I wanted to just go over something very
10 quickly on exhibits.

11 Those that were adopted today by testimony, I'm
12 marking them as admitted based on their being prefiled
13 testimony and cross-examined.

14 Mr. Harper, on your cross-exam exhibits, I know a
15 lot of them were excerpts of other prefiled testimony.
16 But we didn't have a formal motion to have them
17 admitted. And that was an oversight on my part to not
18 ask you that.

19 Were there any that you thought you wanted marked
20 for admission and to make that motion?

21 MR. HARPER: Yeah, well, Your Honor,
22 yeah, I was working on this -- I'm getting a terrible
23 echo right now. Anybody else?

24 JUDGE TOREM: I'm hearing you okay.

25 MR. HARPER: Okay. I'll --

1 JUDGE TOREM: Why don't we mute our
2 end real quick.

3 MR. HARPER: -- try to answer your
4 question, and then I may log off and then back on.

5 But the answer to your question is, I believe that
6 by filing them, they would be presumptively admitted,
7 and when the witness acknowledged their authenticity,
8 that would finish it.

9 But to respond to your point, the County would
10 move admission of our cross-examination witnesses as
11 previously identified.

12 JUDGE TOREM: That works for me.
13 But I want to make sure, in the normal course of an
14 evidentiary hearing, I'd ask if other parties have an
15 objection. And it will probably be easier going
16 forward on the exhibits, especially because they're
17 coming in a little late, for parties doing cross-exam
18 exhibits to make sure that we're formally moving them.
19 That will help me to hear if there's an objection.

20 On the prefiled, I'm much less worried about that
21 because everybody's had a chance, we're adopting the
22 testimony, and then there's an opportunity for cross.
23 It's essentially direct exam that we're not dealing
24 with.

25 On the cross, I do want to make sure everybody has

1 a chance to object. You may have objections,
2 Mr. Harper, to some of the cross-exam exhibits the
3 applicant puts up, and I don't want it to be an issue
4 for anybody.

5 So when we go back into the hearing record,
6 Mr. McMahan, are you going to have any concerns or
7 objections to the cross-exam exhibits used by the
8 County today?

9 MR. MCMAHAN: Your Honor, no, we
10 don't.

11 Go ahead, Ariel.

12 MS. STAVITSKY: We're tag-teaming
13 today, Judge Torem.

14 We don't have any objections to those. But we
15 would like to request for Exhibit 7 of the County, for
16 those excerpts, if we could have the whole documents
17 for each of those plans, that would be ideal for us.
18 So no objection, assuming that we can obtain the whole
19 documents for that one exhibit.

20 JUDGE TOREM: All right. And
21 Mr. Harper will arrange to get that to everybody later.

22 All right. Let's go back to Ms. Perlmutter's
23 health and what we might want to do for tomorrow.

24 Mr. McMahan, Ms. Stavitsky, what's the plan there,
25 or thoughts?

1 MS. STAVITSKY: Yeah, thank you. We
2 were able to check in with Ms. Perlmutter. She is not
3 doing well. But she's been to the doctor and has -- is
4 getting past COVID. So we hope that she'll recover
5 soon.

6 We are requesting that Mr. Rahmig and Mr. Jansen's
7 cross-examination and redirect sessions be moved. We
8 understand that this is likely going to cause a
9 disruption to the existing schedule, and so we went
10 through the current proposed schedule and tried to
11 figure out a way that we could all make this work.

12 Our proposal is based on the fact that we are
13 already running ahead of schedule. And it's also based
14 on the fact that there are -- a lot of these time
15 estimates are already fairly conservative. And
16 including the fact that, if and when we receive Your
17 Honor's ruling on the pending motions to strike, it may
18 further reduce the need for some of his testimony.

19 So the proposal is that we would call -- we would
20 fit in Greg Poulos's testimony, which is currently
21 scheduled for the afternoon of Thursday, the 24th. We
22 could fit all of Mr. Poulos's testimony on that day to
23 be done on Thursday, and then which would leave Friday
24 completely open except for Mr. Simon's testimony in the
25 middle of the day when he's available at noon.

1 And so we believe, based on the time estimates
2 that the parties provided, that Mr. Rahmig and
3 Mr. Jansen could both fit on Friday in their entirety.

4 We make this request based on the fact that, as
5 Your Honor's mentioned, we have a four-attorney team,
6 but applicant is the only party that is providing
7 witnesses on every single topic. And so we have
8 prepared our respective topics, and Ms. Perlmutter has
9 been solely responsible for the wildlife and habitat
10 content. And so none of us at this point, you know,
11 assuming we go for the rest of the day, are not going
12 to have a chance to be apprised on those issues.

13 JUDGE TOREM: And I understand that.

14 MS. STAVITSKY: So I'll leave it at
15 that.

16 JUDGE TOREM: Yeah, I don't think --

17 MS. STAVITSKY: Yeah.

18 JUDGE TOREM: -- you need to give me
19 any further justification. I think if any party that
20 didn't have four attorneys around the table had any one
21 of them go down with COVID -- or, frankly, the headache
22 I had last night, I thought, Ooh, this is not the time.
23 So health issues are -- we catch them as we can, and we
24 have to accommodate.

25 If -- if we're correct, then, let me just

1 summarize. You're asking for two of the witnesses we
2 have scheduled for tomorrow and into Wednesday, Jansen
3 and Rahmig, to essentially be pushed over to Friday,
4 the 25th, and we could further adopt that by having
5 Mr. Poulos's testimony all on Thursday, the 24th.

6 That's the proposal?

7 MS. STAVITSKY: Correct.

8 And apologies. I forgot to mention that we also
9 are proposing that Mr. McIvor, CFE's witness, would
10 also go on Friday. He also has wildlife and habitat
11 testimony. And I believe, based on the correspondence
12 that's gone around, none of the parties objected to
13 Mr. McIvor going on Friday anyway, even before we got
14 this news about Ms. Perlmutter.

15 JUDGE TOREM: Okay. And so these
16 are your witnesses, Jansen and Rahmig, and you're
17 providing they will be available Friday, the 25th?

18 MS. STAVITSKY: Correct.

19 JUDGE TOREM: And I think we also
20 had confirmation from Mr. Aramburu that he had another
21 witness that would be on that Friday, the 25th.

22 Mr. Aramburu, remind me which witness that was.

23 MR. ARAMBURU: Well, I don't -- we
24 have Mr. Simon. I think that was really the only
25 witness that we were talking about at this point. And

1 with this change in schedule, I would appreciate the
2 accommodation for Mr. Simon to be on after these
3 wildlife witnesses so we can get settled after six
4 hours of plane ride from -- from Anchorage. So that
5 would be more comfortable for him, and we would
6 appreciate the parties' accommodation to him.

7 JUDGE TOREM: I think that probably
8 works better for the plane schedule we talked about
9 last week.

10 Mr. Harper, any concerns with the discussion about
11 pushing witnesses over so Ms. Perlmutter can be
12 available?

13 MR. HARPER: No. I'm happy to
14 accommodate.

15 JUDGE TOREM: And, Ms. Reyneveld,
16 for Mr. McIvor, would he be available on Friday, the
17 25th?

18 MS. REYNEVELD: Mr. McIvor is
19 available on Friday, the 25th.

20 I -- I have no objection to the proposal from the
21 applicant. I do have some concern that fitting all of
22 our wildlife witnesses in on Friday might be too tight,
23 just looking at the parties' cross-examinations. I
24 don't know if it'd be possible to fit some of those in
25 the afternoon of, I guess it would be Wednesday, the

1 23rd.

2 I'm just throwing this out there because, looking
3 at the length of the cross-examination that I may have
4 and then the other parties, I just -- and Your Honor's
5 ruling about not having additional days of testimony, I
6 just wanted to look and see if there was some more
7 flexibility next week. That's my only concern.

8 JUDGE TOREM: I think there very
9 well may be. Because tomorrow will turn into a much
10 shorter day. And we have the -- we have the public
11 comment hearing on Wednesday at 5:30, but maybe we can,
12 depending on where we are health-wise early next week
13 on Monday, reengage on that, Ms. Reyneveld, as to where
14 we're going on time and see if those witnesses can be
15 available, accommodate them on Wednesday to have a
16 little buffer on Friday, the 25th. All right.

17 MS. REYNEVELD: Yeah, it's my
18 understanding Mr. McIvor is flexible.

19 JUDGE TOREM: All right.
20 Ms. Voelckers, any other concerns on kind of
21 rescheduling for those witnesses?

22 MS. VOELCKERS: Thank you, Your
23 Honor. We do have concerns. And I guess I -- I would
24 not agree that with applicant that we don't object to
25 the moving of testimony. For Mr. McIvor, I would like

1 an opportunity to have a little more nuanced
2 conversation about the exact timing before we are, you
3 know, pinned to a position.

4 But my concern is -- is a couple things here. We
5 don't have a ruling from Your Honor on the admission of
6 Mr. Kobus's testimony, nor do we have an agreed time
7 for his cross-examination. So that was previously
8 proposed as potentially happening on that Friday at the
9 end of the hearing.

10 We also have, I mean, really a day and a half now
11 that's being proposed on that Friday for wildlife
12 testimony. And so understanding that health issues
13 come up, but also understanding that this is a pretty
14 significant shift in the schedule.

15 I propose that we try to workshop some sort of
16 option that provides applicant's counsel some time,
17 such as having a witness -- at least one of their
18 witnesses go on Wednesday, the 16th, which would give
19 them almost all of tomorrow to prepare and would lessen
20 some of the pressure of having -- you know, these are
21 pretty significant witnesses that go to a very
22 significant piece of the Nation's piece but also
23 counsel for the environment.

24 And -- and, again, I don't want to speak for any
25 other parties, but I'm concerned that we're putting a

1 lot on the final day of the hearing. And I think
2 there's a middle ground here that's more reasonable and
3 still allows applicant's legal counsel most of tomorrow
4 to prepare for, you know, if we were to put one of
5 their witnesses on Wednesday morning.

6 JUDGE TOREM: All right. I hear
7 what your concerns are, and I want to be flexible. I
8 think what I'm looking for is, tomorrow it sounds like
9 there's not an objection to taking Jansen and Rahmig
10 off the list because Ms. Perlmutter's, unless there's a
11 miraculous recovery in the next 12 hours, just not
12 going to be able to go forward. We can talk each day
13 about where we're at, and I know that the applicant has
14 got to be thinking, if Ms. Perlmutter's got longer
15 implications of this COVID illness and is not able to
16 participate at all in the dates we have, they'd be
17 covering at some point, but obviously while we're
18 working today, they can't. They'll have more time
19 tomorrow.

20 So, Mr. Aramburu, did you want to be heard on this
21 as well?

22 MR. ARAMBURU: No. I had some
23 concerns about Mr. Simon's testimony. But those have
24 been resolved. For some reason, I see on Tuesday, the
25 23rd, that we have McClain cross for what looks like 40

1 minutes. I thought we had -- maybe I've got the wrong
2 list here. But...

3 JUDGE TOREM: No. I think that
4 there were some -- there was some piece of calling
5 Ms. McClain back on Wednesday, August 23rd, for some
6 short on the overall scope and scale and on the
7 decommissioning site restoration, I think. Part of
8 those questions were asked today, so it may be very
9 short time that she's available again next Wednesday.
10 But that's what that's about from my recollection of
11 last week.

12 MR. ARAMBURU: Okay. Okay.

13 JUDGE TOREM: Okay. So I know we're
14 getting ready to go back into the formal hearing.

15 Mr. Harper has another question?

16 MR. HARPER: I do. Not to be
17 pedantic, but I think you asked me to move to admit the
18 exhibits. Mr. McMahan indicated he had no objection.
19 I'm not sure you ruled, Your Honor.

20 JUDGE TOREM: No. And I figured
21 once we got out of housekeeping, I would do that on the
22 formal hearing record. But I appreciate --

23 MR. HARPER: Very good.

24 JUDGE TOREM: I appreciate the
25 attention to detail, because it will keep me on track.

1 All right. So the --

2 MR. HARPER: Thank you.

3 JUDGE TOREM: -- decision -- and I'm
4 saying this more for Ms. Masengale, who's putting
5 together the daily list and helping the Council know
6 what they need to read for the next day. We'll have
7 the Cooke testimony tomorrow, and then we may not have
8 any other witnesses unless the parties are able to say,
9 We've pulled another witness together.

10 So we may have a fairly short adjudicative hearing
11 tomorrow unless the parties identify in the morning
12 that they've got another witness.

13 Does that, Mr. McMahan, sound about right?

14 MS. STAVITSKY: Your Honor, we have
15 two points. One is we actually were going to propose
16 if -- we would be prepared to question Ms. Cooke today,
17 if that works for other parties. We certainly can
18 proceed with that tomorrow morning, but if it helps the
19 schedule to move it forward, we can do that.

20 The other thing, I wanted to address
21 Ms. Voelckers' point about Dave Kobus's testimony.
22 Because that's a great point that we had discussed: If
23 there is a need for Mr. Kobus to provide live
24 testimony, that that would have happened on Friday.

25 And so if that is the case, we do have flexibility

1 there, and we could move Dave Kobus's testimony up to
2 accommodate. Because Ms. Perlmutter will not be in
3 charge of that examination. So that's another option.

4 MR. ARAMBURU: Mr. Examiner, I don't
5 have questions of Mr. Kobus, so I don't know that --
6 his dep- -- his deposition, I think, will be in the
7 record. We don't have any further questions for him at
8 this point.

9 JUDGE TOREM: Right. And that might
10 change subject to a ruling on the supplemental
11 testimony that's been provided. So I will get back to
12 all of you on that question maybe tomorrow morning.

13 And I'd like to keep the Cooke testimony on for
14 tomorrow morning, Ms. Stavitsky, just so that we have
15 the chance to have a housekeeping session, have that
16 testimony, and then know where we're going. Because if
17 we struck the Cooke testimony to today, there might be
18 nothing tomorrow, and I think we all need to reengage
19 on some procedural matters even if it's a short hearing
20 day for the Council members.

21 All right. Council members, we're now going to
22 move back into the formal hearing session. We've been
23 talking since about 1:20 about some developments. And
24 in sum, for this formal part of the adjudication, I
25 talked to the parties about formal admission of

1 exhibits.

2 The prefiled testimony, once it's adopted, is
3 going to be considered admitted. And Ms. Masengale is
4 going to be keeping track on a master exhibit list of
5 which exhibits have been discussed and admitted.

6 The cross-examination exhibits in a normal hearing
7 would come up and be offered individually by counsel.
8 And this time, Mr. Harper had indicated, yes, he would
9 have liked to have formally moved to admit all of the
10 County's cross-exam exhibits. Those were submitted to
11 the Council over the course of the weekend and even
12 this morning. Ms. Masengale will get those uploaded
13 into the Council SharePoint. And I asked Mr. McMahan
14 whether he had any objections to those exhibits. He
15 did not. And given that it was his witness, he's the
16 only one that really had a right to object to those
17 cross-exam exhibits.

18 So all of the Benton County cross-exam exhibits
19 are now admitted and part of the record.

20 (Exhibit Nos. 2005_X, 2006_X,
21 2007_X, 2008_X, 2009_X,
22 2010_X, 2011_X, 2011_X_Full,
23 and 2012_X admitted.)

24
25 JUDGE TOREM: Ms. Willa Perlmutter

1 is one of the applicant's attorneys, and she had
2 prepared for some of the witness, Jansen and Rahmig,
3 that will be scheduled for tomorrow. She tested
4 positive for COVID and is not feeling particularly well
5 today, as you might expect, and is doing what she can
6 to get better and come back.

7 What you probably came in on as you came back at
8 1:30 is a change in the schedule for tomorrow. If --
9 we'll talk about this again in the morning, but it
10 looks like Jansen and Rahmig will be rescheduled
11 possibly as late as next Friday. But it's a moving,
12 flexible target now so we can accommodate everything
13 and get it done in the time we've allocated.

14 So today we're going to take the Wendt testimony
15 sponsored by the County. And when that's done, we'll
16 adjourn for the day. We may have a little Council
17 roundtable for procedural discussion afterward, and so
18 we'll have a little bit of extra time today to kind of
19 address your "How do I find this document?" question
20 and make sure you're navigating SharePoint correctly.

21 And, again, we won't be deliberating anything
22 today. We'll just be talking about procedural, make
23 sure everybody's comfortable being ready each day.

24 As for the other reschedules, we'll try to make
25 sure at the end of each day that we know where we're

1 going and make sure the Council members are adequately
2 warned -- adequately warned about what they need to be
3 done for the next day. So we can talk about those
4 procedural matters as well at the end of today's
5 hearing when we have our little Council "What's going
6 on?" session.

7 (Witness Greg Wendt appearing
8 remotely.)
9

10 JUDGE TOREM: All right. Mr. Wendt,
11 are you on the line?

12 **THE WITNESS: Good afternoon. Yes.**

13 JUDGE TOREM: All right. Good
14 afternoon. I'm going to have you adopt your testimony
15 after I swear you in and have Mr. Harper go over
16 whether or not there's any changes to it. And then
17 we'll have cross-examination scheduled by the
18 applicant's attorneys. They estimate it should be a
19 half hour or so. And then Mr. Aramburu from Tri-City
20 C.A.R.E.S. and then the Yakama Nation has also asked.
21 Shona Voelckers or one of her colleagues will be doing
22 the cross-examination as well. So hopefully in the
23 next hour and a half, we've heard everything that
24 you've got to offer as well in cross-exam, and then
25 Mr. Harper will come back with any redirect items that

1 need to be recovered.

2 Any questions?

3 **THE WITNESS: No, sir.**

4 JUDGE TOREM: All right. I'm going
5 to have you raise your right hand.

6
7 GREG WENDT, appearing remotely, was duly
8 sworn by the Administrative
9 Law Judge as follows:

10
11 JUDGE TOREM: Do you, Greg Wendt,
12 solemnly swear or affirm that all testimony you'll
13 provide today via your prefiled testimony and any other
14 answers you give will be the truth, the whole truth,
15 and nothing but the truth?

16 **THE WITNESS: I do. Yes.**

17 JUDGE TOREM: All right. Thank you.

18 Mr. Harper, if you'd please identify the exhibits
19 that Mr. Wendt is sponsoring and adopting, that will
20 help those of us keeping score at home to make sure
21 we've got all of that, and Ms. Masengale will be able
22 to mark the exhibit list accordingly.

23 MR. HARPER: Okay. Well, good
24 afternoon, Your Honor and Council members.

25 ////

DIRECT EXAMINATION

BY MR. HARPER:

Q Mr. Wendt, you are here to sponsor your prefiled testimony, Exhibit 2001; Exhibit A, your prefiled testimony, Exhibit 2002; and your prefiled reply testimony, Exhibit 2004_R.

Is that consistent with your understanding, Mr. Wendt?

A That is correct.

MR. HARPER: Thank you.

Your Honor, I think that's it from me for now.

JUDGE TOREM: All right. And, Mr. Wendt, did you have any updates or changes to any of those exhibits that Mr. Harper listed?

THE WITNESS: I do not.

JUDGE TOREM: All right. So we'll consider those admitted to the record as your prefiled testimony.

(Exhibit Nos. 2001_T, 2002, and 2004_R admitted.)

JUDGE TOREM: Mr. McMahan, I'm going to turn him over to you for cross-examination.

MR. McMAHAN: Thank you, Your Honor.

And for Ms. Masengale, we are going to cite

1 Exhibits 1055_X and 1057_X, and those are the only ones
2 that we'll be using for cross-examination.

3 JUDGE TOREM: And, Mr. McMahan, were
4 you asking her to put those up on the screen in any
5 order right now?

6 MS. SHILEY: You were muted for half
7 of that.

8 JUDGE TOREM: Sorry.
9 Mr. McMahan, were you asking Ms. Masengale to put
10 any of those up on the screen right now?

11 MR. McMAHAN: No. I know that we
12 sent Mr. Wendt, through his attorney, these exhibits.
13 I don't think they need to be up on the screen, but if
14 it's helpful to anybody to have them on the screen,
15 that can certainly happen. Excuse me.

16 JUDGE TOREM: Okay. You can go
17 ahead and commence with your questions, and we'll go
18 from there.

19 MR. McMAHAN: All right. Thank you,
20 Your Honor.

21
22 CROSS-EXAMINATION

23 BY MR. McMAHAN:

24 Q Good afternoon, Mr. Wendt. Tim McMahan. We've seen
25 each other before.

1 **A We have.**

2 Q Thank you for being here.

3 **A Absolutely.**

4 Q Appreciate your -- appreciate your engagement here. I
5 know it's -- it's all -- it's all size of fun for you.
6 So anyway, happy to have you here.

7 To start out, you have reviewed Council Order 883;
8 is that correct?

9 **A I did. And I have it in my hands right now.**

10 Q That's very convenient.

11 And just quoting several things from -- from that
12 testimony on the Page 7 through 8, the Council stated
13 that under established precedent for -- sorry. I think
14 there's some disturbance on the line.

15 Okay. Let's try again.

16 So you're -- you're aware of Order 883. And to
17 quote from the order, the Council found that under the
18 established precedent for minimal threshold for
19 determining land-use consistency, the facility is
20 consistent and in compliance with Benton County's
21 land-use provisions.

22 Do you dispute that determination from the
23 Council?

24 **A Not from the Council, no.**

25 Q All right. The Council goes on in this order and

1 states at Section 6, Page 9, the applicant has met its
2 burden of proof of demonstrating that the site is
3 consistent and in compliance with Benton County's
4 comprehensive plan and applicable zoning ordinances in
5 effect at the time the application was filed, as
6 required by RCW 80.50.090, Sub 2.

7 Are you aware of that finding?

8 **A Yes.**

9 Q And do you dispute that finding?

10 **A No.**

11 Q And then, finally, on Page -- on Page 9, the matter
12 shall be set for adjudication to consider any
13 conditions which might be required for the
14 construction, operation, and maintenance of the
15 facility in the GMAAD, consistent with Benton County's
16 conditional use criteria in effect at the time the
17 application for site certification was filed with
18 EFSEC.

19 And, again, you are aware, I assume, of that
20 determination?

21 **A I am. I do understand it needs to be consistent with**
22 **the CUP criteria, yes.**

23 Q As defined by the Siting Council, right?

24 **A Yes.**

25 Q By the way, just -- I'm experiencing a little bit of

1 whatever allergy kind of dreary weather in Portland
2 brings on, so if my voice is a little scratchy and it
3 is, I apologize for that.

4 I also have a tendency to talk fast, so -- and I'm
5 cognizant of that, so you can ask me to slow down if
6 that gets in your way.

7 **A It's all fine, so -- it's fine, so I'll let you know.**

8 Q All right. Thank you.

9 So as the County has considered that order, isn't
10 it true that the County has not -- in fact, had
11 declined to offer any conditions or suggest any
12 conditions for the permitting of the facility by EFSEC?

13 **A Well, the -- the burden for conditions is upon the**
14 **applicant, but certainly the County reviewed this**
15 **application. And, you know, a conditional use permit**
16 **application needs to -- it's not a permitted -- excuse**
17 **me. It's not a permitted use. It's a conditional use.**

18 Q Yes.

19 **A So there are requirements that need to be developed and**
20 **criteria --**

21 Q Yes, and I understand that.

22 **A -- that has to be met.**

23 Q My question was: The County, in fact, has not offered
24 any suggested conditions to the Siting Council, has it?

25 **A No.**

1 Q All right. When we first met you -- and I don't know
2 if you remember in July, June/July of 2020. We met you
3 in the halcyon days when we thought that we could file
4 this application locally and move along.

5 But when we first met you, Scout had -- had --
6 excuse me. The Nine Canyon project had been permitted.
7 And in Order 883, I assume that you noted that the
8 Council also referred to that -- Siting Council
9 referred to that as a permitted Benton County wind
10 project, right?

11 **A Benton County did approve a wind project for Nine**
12 **Canyon back in 2008. Correct.**

13 Q Okay. And isn't it true that the Nine Canyon site is
14 on the same landscape -- essentially the same landscape
15 as Horse Heaven?

16 **A It is adjoining it. Correct.**

17 Q Yeah.

18 And it is also, like Horse Heaven, an unirrigated
19 dryland wheat property, right?

20 **A Generally.**

21 Q And -- and it is immediately adjacent to urban or
22 urbanizing landscape, Nine Canyon?

23 **A I -- I wouldn't call it urbanizing. It's next to our**
24 **rural land designations.**

25 Q But adjacent to an urban area, correct?

1 **A No.**

2 **Q How close is the nearest home to Nine Canyon?**

3 **A Well, a single-family home is not urbanizing.**

4 **Q Yeah, how close --**

5 **A An urban -- an urban growth area is about -- I don't**
6 **know -- three, three and a half miles away. We have a**
7 **lot of rural land designated lands between an urban**
8 **growth area and our GMA ag zone, and that's -- that's**
9 **typically where you see a lot of the residential**
10 **development occurring, is in a lot of those lots are**
11 **pre-GMA. A lot of them are -- were done in the early**
12 **stages of growth management, and they're infilling over**
13 **time. So a lot of what you see out there is -- is**
14 **rural development that allows a mixture of hobby farms**
15 **and agricultural and things like that.**

16 **Q Well, you actually led me to a different question, so**
17 **we'll go ahead and go there.**

18 **A Okay.**

19 **Q So it is true, then, that the County has authorized**
20 **many, many homes, residences in the rural area, not**
21 **within the urban growth boundary?**

22 **A If it's designated rural land, rural development under**
23 **the state law, absolutely. Within the state law, we**
24 **have. We have rural lands 5 zoning. We have rural**
25 **lands 20 zoning.**

1 Q Yeah.

2 A And those areas are -- don't have to be de-designated
3 out of GMA ag for incompatible uses. They -- that was
4 done back when GMA was first established, and we had a
5 lot of rural land development in those designations in
6 our comp plan.

7 Q And the County still has a lot of rural land
8 development, right?

9 A Absolutely. Yeah, there's -- there's -- I mean,
10 those -- those areas are fairly large. But the minimum
11 lot sizes are large as well. They keep the rural
12 character out in those areas.

13 Q So the development of a lot of rural residential lands
14 maintains the rural character?

15 A Yeah. Absolutely. In the rural lands. Absolutely.

16 Q Okay.

17 A In rural development.

18 Q Sorry, Mr. Wendt. Did you want to finish something?

19 Okay. I don't mean to talk over you, so --

20 A It's all good.

21 Q -- I'll be --

22 A I apologize.

23 Q I'll try to be respectful.

24 A Sorry.

25 Q All right. So the zoning between -- the zoning for

1 Nine Canyon and the zoning at the time Horse Heaven
2 originally -- we originally came to talk to you was the
3 same zoning, right?

4 **A There was some differences. While it was the GMA ag**
5 **zone, there were some changes to our zoning.**

6 Specifically in 2012, the comprehens- -- excuse me --
7 the -- the conditional use permit criteria changed.

8 The criteria that -- that Nine Canyon was approved
9 under and the criteria that this is being tested under
10 are different. And the burden is on the applicant, as
11 stated in the CUP criteria, and that is a significant
12 difference.

13 We've also had the ag land study done for our GMA
14 ag lands to preserve and protect from incompatible uses
15 and designate those areas. And so that's been done.
16 As well as our 2006 comprehensive plan was completely
17 rewritten in -- in 2018 and has all new goals and
18 policies and directives as relates to our ag lands.

19 So the GMA ag zone continues to implement our --
20 our -- our comprehensive plan and our applicable
21 land-use laws and protect it from incompatible uses.

22 **Q I understand that.**

23 So are you aware of the closest distance from the
24 Nine Canyon to homes?

25 **A I do not know that off the top of my head.**

1 Q All right. And when the County approved Nine Canyon,
2 which -- and there were three -- there were three
3 projects that were consecutively approved; is that
4 correct?

5 A **That's my understanding. I don't know a whole lot**
6 **about those projects.**

7 Q And isn't it true that those projects were all approved
8 subject to a State Environmental Policy Act
9 determination of mitigated nonsignificance, or MDNS; is
10 that correct?

11 A **Somebody told me that, but I -- I haven't reviewed**
12 **them.**

13 Q Well, would you -- so you have no reason to suspect
14 that I'm incorrect in saying that no environmental
15 impact statement was required for those projects and
16 they were approved through an MDNS?

17 A **I can't -- under the court of law, I can't answer the**
18 **question I don't know.**

19 Q That's fair. I'm not making you. I'm not a court of
20 law here. I'm just trying -- trying to understand what
21 you know.

22 A **I -- I know very little about those projects. I'll put**
23 **it that way.**

24 Q Fair enough. All right.

25 Well, I think you do know about the conversations

1 that we had in 2020. And we have two record -- two
2 exhibits in the record. One is a letter dated July 1,
3 2020, from Dave Kobus, or from you -- excuse me -- to
4 Dave Kobus.

5 And in that letter -- do you need to have it
6 pulled up, or do you have it in your hand, Mr. Wendt?

7 **A What's the date of it?**

8 Q Yeah, July 1, 2020.

9 **A Yes. A zoning determination interpretation?**

10 Q Right.

11 **A Got it.**

12 Q All right. And in issuing that determination, you
13 recall that we -- sorry.

14 UNIDENTIFIED SPEAKER: Can you say
15 the exhibit number?

16 MR. McMAHAN: Oh. I'm sorry. Yes.
17 Yeah. Exhibit 1055_X.

18 UNIDENTIFIED SPEAKER: Give Lisa a
19 moment to put it up on the screen for Council members.

20 MR. McMAHAN: All right. Sorry,
21 Lisa.

22 Do we have it, Lisa? All right.

23 Q (By Mr. McMahan) Mr. Wendt, you and I of course have
24 this letter in front of us, and the others can see it
25 on the screen. And we can scroll if any party wants.

1 But my only purpose in asking the question is --
2 is: I assume you acknowledge that on July 20 -- or
3 excuse me -- July 1, 2020, we were working in tandem or
4 in cooperation with the County to come to the bottom to
5 determine the correct zoning designations for wind
6 facilities and solar facilities and the like; is that
7 correct?

8 **A I do remember that, yes.**

9 Q Yeah.

10 And, in fact, on Page 2, we also asked and the
11 County provided confirmation that the battery energy
12 storage facility, itself, was considered, your
13 interpretation was, part of a solar power generator; is
14 that correct?

15 **A I don't remember the conversation necessarily, but**
16 **that's -- that is what this reads.**

17 Q Right.

18 And it states in the letter, second page, With
19 this -- excuse me -- with this, a conditional use
20 permit is required for a wind turbine facility -- cites
21 the code -- and a conditional use is required for solar
22 power gener- -- general -- I think you meant generation
23 facility, major. Cites the code.

24 Do you remember that, or do you see that?

25 **A Yes.**

1 Q All right. And then on a series of e-mails that we
2 exchange on January 11, 2021, so a bit after that, do
3 you recall that we asked the planning department, you,
4 for confirmation of a number of things, including
5 compatibility, whether the use was an allowable use, et
6 cetera?

7 Do you recall those discussions that we had?

8 A I can remember -- after looking at this when I saw
9 this, this weekend, I remember -- I remember writing
10 the e-mail. I don't remember what I reviewed. This
11 was a pretty busy time for us. I don't -- I don't
12 specifically remember what you guys had submitted to me
13 to look at. I can't recall what that information was.

14 Q But you do, of course, acknowledge that you wrote this
15 e-mail?

16 A Oh, yeah. Absolutely. I wrote the e-mail. I just --
17 I just don't remember what --

18 Q And you have no reason to --

19 A -- I reviewed.

20 Q -- change or modify the content of that e-mail and the
21 confirmations that are in that e-mail?

22 A I don't feel I need to.

23 MR. HARPER: I'm going to object
24 too. Wait a minute. I'm going to object.

25 If Mr. McMahan is stating that there are

1 confirmations contained in that e-mail that somehow
2 relate to conditions of compatibility or position of
3 compatibility, I think he needs to identify what
4 portion of the e-mail he's talking about.

5 JUDGE TOREM: Yeah. And, Mr. --
6 Mr. McMahan, this is Judge Torem. There's a little bit
7 more speaking over each other than the court reporter
8 can keep up with. So I'm going to just ask everybody
9 to speak a little bit more slowly, a little bit more
10 deliberately. And I'll put the burden, Mr. McMahan,
11 actually on you. If the witness is talking, let him
12 finish his statement, and then we'll come back. But
13 I'm sure Mr. Wendt will work with you on that.

14 Ms. Masengale's anticipated that you're talking
15 about the e-mails between January 8th and 11th of 2021.
16 They're in Exhibit 1057_X as she identified. That's up
17 on the screen.

18 Mr. McMahan, can you confirm that's the e-mail
19 exchange you and Mr. Wendt are discussing?

20 MR. McMAHAN: Yes, it is.

21 And apologies for talking over Mr. Wendt.

22 JUDGE TOREM: All right. So as to
23 the objection, Mr. Harper, I'm sustaining that and
24 directing Mr. McMahan to dial us in a little bit more
25 as to what Mr. Wendt said in the e-mail.

1 And also I think I wanted to clarify on your point
2 whether Mr. Wendt could speak to what conditions he
3 would impose or -- for a conditional use permit or how
4 that process might work, if he's the decision authority
5 had this come to the County, or is there some other
6 governmental body, so that the Council members for
7 EFSEC can understand a little bit more of the context
8 of this e-mail and the discussions before the
9 application was filed with EFSEC.

10 Mr. McMahan, if you can address that, then I think
11 that will help set the scene a little better for what
12 we're talking about.

13 MR. McMAHAN: All right. Thank you,
14 Your Honor.

15 Q (By Mr. McMahan) Mr. Wendt, as I recall our
16 circumstance in -- on January 11, 2021, we were talking
17 with you and your department about -- we were at the
18 time considering and seeking your input on how to draft
19 portions of the application for site certification.

20 Do you recall that?

21 A **I -- not specifically, no.**

22 Q Okay. So you don't recall having those discussions
23 that we -- where we were seeking your input on how to
24 describe particular --

25 A **I remember having conversations, but I don't --**

1 Q We're not going to talk over each other right now, I
2 think.

3 So we had conversations involving you on getting
4 concurrence on how we would describe land use in the
5 application for site certification.

6 Do you recall that?

7 A I remember being on Webex calls. I do not remember
8 what specifically we discussed, no.

9 Q Okay.

10 A It was three years ago. I've had lots and lots of
11 meetings between now and since then. I don't...

12 Q And probably just a few e-mail exchanges too, I
13 suppose.

14 Do you recall, though, in 2020 and 2021, ever
15 telling the applicant that this project would be
16 incompatible with local land use?

17 A I told -- when -- when he finally decided to move
18 forward to -- I can remember having a meeting with him
19 in the meeting room, with him and a gentleman from out
20 of state, that the County -- it would be a very
21 difficult application for the County to support, and
22 due to --

23 Q Excuse me for interrupting. But is "him" --

24 A -- due to incompatibility.

25 Q Sorry.

1 Is "him" Mr. Kobus?

2 **A That would be Mr. Kobus. Correct.**

3 Q Okay. But this communication, sir, does not state that
4 the project would be incompatible with all the land
5 use, does it?

6 **A I don't remember seeing that, other than in the last**
7 **paragraph, it talks about how the burden is on the**
8 **applicant to provide that information and provide the**
9 **compatibility to us. That was -- that's -- that was a**
10 **burden on the applicant to provide that, and we -- and**
11 **still to this day we have yet to see that.**

12 Q And when we had the discussions, you never
13 characterized the project as an industrial development,
14 did you, in writing, in -- in this information?

15 **A Not in writing. But that's -- again, that's -- that's**
16 **part of the burden of the applicant to go through the**
17 **process. We didn't even have an application.**

18 Q Well, except, if I may, we were asking you, the County,
19 for confirmation on how to describe this use and how to
20 write this narrative for EFSEC, and you never, in fact,
21 characterized this as an industrial land use in those
22 conversations, did you?

23 **A I don't know. It's not written here.**

24 Q All right. So it's not written there. You didn't say
25 it in here that that's what it was. And now you don't

1 remember.

2 Is that what you're saying?

3 **A Do I remember the conversation that we had? No. I've**
4 **already repeated that. I've said it twice.**

5 Q Okay. That's fine.

6 So moving -- moving along here. I -- from
7 reviewing -- from reviewing the comprehensive plan, I
8 noted that the County considers shrub-steppe to be a
9 highly valuable -- highly valuable land for native --
10 native species; is that correct?

11 **A Yes. And it's also designated in Title 15 of our**
12 **critical area ordinance as a -- as species of local**
13 **importance, I do believe.**

14 Q Yes.

15 **A In our Fish and Wildlife chapter.**

16 Q Let me ask you: Does the Washington State Department
17 of Fish and Wildlife testify at hearings where
18 conversion of lands -- of habitat lands to residential
19 development has been approved?

20 Do they ever testify?

21 **A They provided us with written comments and mitigation.**
22 **We were just on the phone with them two weeks ago**
23 **having that conversation, trying to place a project,**
24 **and we're working through mitigation through our**
25 **critical area ordinance, and Fish and Wildlife was very**

1 **helpful to do that.**

2 Q That's great.

3 But as to -- as to the proposal for residential
4 subdivisions, for example, does the Washington
5 Department of Fish and Wildlife show up at hearings for
6 residential subdivisions and comment on those requests?

7 A **In person?**

8 Q Sure.

9 A **I haven't seen them in person. But we certainly have a**
10 **lot of discussions with them. They make written --**
11 **they make written comments through the --**

12 Q So --

13 A **-- SEPA process.**

14 Q So for a subdivision, you would -- would you typically
15 see the Washington State Department of Fish and
16 Wildlife make comments of subdivision proposals?

17 A **Some. We've sat down with them on a large subdivision**
18 **out in Badger Canyon where they were doing a redesign,**
19 **and we worked with them to redesign where the road was**
20 **going to go and have set-aside areas for priority**
21 **habitats and so we could move the houses around to try**
22 **to preserve and protect the different locations.**

23 And so, yeah, we've -- we've worked with them many
24 times to come up with critical -- we always send
25 applicants to them to help develop the critical area

1 **reports. So certainly they're an integral part of our**
2 **process, and we appreciate them.**

3 Q But do they show up in residential subdivision
4 applications or other major permit applications and
5 take a position?

6 Do they ever say, This shouldn't be approved
7 because this is on shrub-steppe land?

8 Do they ever do that?

9 MR. HARPER: Your Honor, I'm going
10 to object. I don't understand what the purpose of
11 asking Mr. Wendt the position of Washington Department
12 of Fish and Wildlife on subdivision application.
13 There's been no foundation laid for this. It's become
14 argumentative as well.

15 So, Your Honor, those are my --

16 JUDGE TOREM: Thank you, Mr. Harper.
17 I think you unmuted just about the time I was going to
18 ask Mr. McMahan where this examination was going.

19 Mr. McMahan, if you could respond to the relevance
20 question that Mr. Harper raised, that will help me and
21 the County -- or the Council members here for EFSEC
22 understand why we're asking about another State agency
23 commenting in Benton County.

24 MR. McMAHAN: Yes, Your Honor. It's
25 really about -- about whether the County and whether

1 the Washington State Department of Fish and Wildlife
2 restricts, controls the development of land that is
3 habitat land.

4 Are -- many comments from agencies, including the
5 County, talk about impacts of the -- of the Horse
6 Heaven project with respect to both habitat and
7 agricultural land. So I'm just trying to find out if
8 that's information and positions taken unique to this
9 project or if these agencies, in fact, show this great
10 concern beyond what is proposed for the -- for the
11 Horse Heaven project.

12 MR. HARPER: And, Your Honor, that
13 has no tendency to demonstrate anything of relevance to
14 the conditional use permit criteria before this
15 Council.

16 JUDGE TOREM: Yeah, I would sustain
17 the objection, Mr. Harper, but I think I'm going to
18 redirect a question to Mr. Wendt that is within the
19 bounds, I think, of your objection.

20 And, again, if you find my question is similarly
21 objectionable to that of Mr. McMahan, please let me
22 know. I'm trying to help the Council see what's
23 relevant here.

24 Mr. Wendt, I think what's being asked -- and,
25 again, subject to being wrong -- is: Do you have State

1 agencies like Fish and Wildlife ever testify in comment
2 hearings, show up in person regarding any conditional
3 use permits in the county?

4 We'll start broadly.

5 **THE WITNESS:** Yes. I can -- within
6 the last year, year and a half, we did have a Webex
7 planning commission meeting where there was a staff
8 member from Fish and Wildlife out of the Ellensburg
9 office who did attend and did comment on a subdivision.

10 **JUDGE TOREM:** And does any of the
11 comments coming from Fish and Wildlife hold a greater
12 sway with you as a State government agency than other
13 comments that are coming in?

14 **THE WITNESS:** No. We value Fish and
15 Wildlife similar to we value DNR or we value Ecology.
16 They're all reviewing agencies that we deal with all
17 the time on all of our projects. They all get copies
18 of the SEPA applications, and they all submit comments,
19 and those are just agencies and staff that we're used
20 to working with.

21 **JUDGE TOREM:** And I think part of
22 the nuance of Mr. McMahan's intended scope here or
23 intended inquiry was whether those comments are
24 controlling versus just considered.

25 **THE WITNESS:** Okay. Well, they --

1 they comment -- typically you'll see a lot of their
2 comments through the SEPA process, though, through the
3 SEPA process that certainly becomes more controlling
4 than if it was a CUP criteria item. And so I would say
5 that we -- I can't remember the last time, if -- if a
6 State agency requested an item through SEPA, that we
7 would not include that in -- if we were going to do a
8 DNS or an MDNS, that we would not include that as a
9 condition through the MDNS process.

10 JUDGE TOREM: All right. So if I
11 understand correctly, then, most of the time, requested
12 mitigation measures through SEPA or perhaps showing up
13 at another form of hearing tend to be followed and
14 worked into the ultimate permit?

15 **THE WITNESS: Yes. Absolutely.**

16 JUDGE TOREM: All right.

17 **THE WITNESS: Part of my job --**

18 JUDGE TOREM: Mr. McMahan, I'm going
19 to tender the witness back to you. I hope I picked up
20 on where you were going.

21 MR. McMAHAN: By and large, Your
22 Honor. Thank you.

23 Q (By Mr. McMahan) I do have one question kind of along
24 these lines. Maybe two, depending how this goes.

25 Does the Washington State Department of Fish and

1 Wildlife ever provide comment that habitat conversions
2 are negatively impacting ferruginous hawk habitat?

3 **A I would probably -- to that detail, I can't re- -- I**
4 **would probably defer that to be better answered by**
5 **Michelle Cooke, the planning manager, from the**
6 **standpoint of she's probably read those in more detail**
7 **than I have over the course, if you're looking for the**
8 **last six -- six or 12 months.**

9 **Q** Okay. Fair enough. We'll be talking to her as well.

10 Moving on to compatibility as defined by your
11 zoning code.

12 So of the five conditional use criteria that you
13 testify about in your testimony, there's one of those
14 five that truly dominates, and that is -- that is, in
15 fact, the so-called compatibility test, correct?

16 **A Yes.**

17 **Q** So, but before we go on, if I could just clarify
18 something that's related to this.

19 In your testimony, you, I think three times,
20 characterize the project as a 75,000-acre project and
21 characterize 75,000 acres in terms of losing
22 agricultural or farming activity.

23 Do you recall that from your testimony?

24 **A I -- yeah, I thought it was 72,000.**

25 **Q** 72. That may be more accurate.

1 So you're not implying that 72,000 acres would be
2 entirely removed from farming, are you?

3 **A I believe it was already established earlier today that**
4 **that was the project boundary.**

5 Q Right. Yeah. Just --

6 **A No, I -- I -- I'm understanding of that.**

7 Q Okay. Great. And I just want to make sure we're on
8 the same page.

9 And so the project does not, in your view, cause
10 the cessation of farming on 75,000 acres, does it?

11 **A No. It could potentially fragment it and cause some**
12 **potential impacts, depending on how you're going to be**
13 **accessing and in some of the activities out there.**
14 **But, in general, no, probably not 75,000 or 72,000**
15 **acres.**

16 Q Okay. So to punctuate that, you indicated if -- if
17 the -- if -- if -- I guess, is if access, you know,
18 works, that it wouldn't cause fragmentation, right?
19 Access --

20 **A I don't -- I don't understand the question.**

21 Q All right. You -- well, you -- you indicated that it
22 might not be 75,000 acres and, in fact, depending upon
23 how the project is accessed.

24 Are there other attributes that would say that
25 it's certainly nowhere near 75,000 acres?

1 **A For -- I guess I'm -- I'm a little bit confused.**

2 Q Agricultural use.

3 **A Yeah, I mean, the project boundary is 72,000 acres.**

4 You guys have stated that you're going to permanently
5 impact 11,800; is that correct?

6 Q No. I don't remember 11,800. I think it's more like
7 7,000.

8 **A Or excuse me. Six thousand eight -- yeah, it was --**
9 **sorry -- 6,800.**

10 Q Right. All right. Okay.

11 So compatibility in the zoning code -- and I'm --
12 I'm looking at your definition of Subsection 53, states
13 that compatibility means the congruent arrangement of
14 land uses and/or project elements to avoid, mitigate,
15 or minimize to the greatest extent reasonable
16 conflicts.

17 Right? That is how you define compatibility?

18 **A Correct.**

19 Q So just digging in a little bit, does this generally
20 mean, then, that development will not interfere with
21 the ongoing use of the land or nearby land?

22 Is that -- is that an attribute of compatibility?

23 **A I mean, compatibility, I mean, it -- I think it's more**
24 **does it create a con- -- a greater conflict with the**
25 **allowed uses in the zone, is really what we're trying**

1 to dive into here.

2 Q That is what we're trying to dive into. That's what
3 I'm asking you.

4 Is interference with ongoing use of land or nearby
5 land an attribute of compatibility?

6 A It's a small part of it. It's a smaller portion,
7 but -- but you also have all the existing uses that you
8 just mentioned. You have -- and you have the future
9 uses. I mean, everybody out there is allowed a
10 permitted use. It's not allowed to have, you know, a
11 72,000-acre project, but it is allowed to have the list
12 of 19 allowable uses that we have in this county can
13 land on each and every one of those parcels, and those
14 are the ones --

15 Q You just said --

16 A -- we need to protect.

17 Q You just said it's not allowed to have a 72,000-acre
18 project. Those your words --

19 A It's --

20 Q -- you just said, right?

21 A Well, and that was bad use of words. It's -- it's --
22 it's not an outright allowed use.

23 Q I understand.

24 A It's allowed conditionally.

25 Q I understand that.

1 **A** Where there are outright allowed uses that you need to
2 show that you're less objectionable than.

3 **Q** Less objectionable than what?

4 **A** That you create less conflict than those permitted
5 uses.

6 **Q** Okay. So let's walk through some of this.

7 So is whether or not a use would undermine another
8 use, is that an attribute of incompatibility?

9 **A** What does "undermine" mean?

10 **Q** Destroy, make impractical.

11 I assume that that's -- that that would be a
12 factor determining compatibility or not, right?

13 **A** I -- I -- I don't -- I don't fully understand it. So I
14 don't know.

15 **Q** Okay. What about -- what about whether a use would
16 force any changes in the practices of farming?

17 **A** Well, farming is a permitted use. So, you know, if
18 you're going to create the test, the test is are you in
19 greater conflict. So I would certainly hope you
20 wouldn't be doing that. But, you know, are you
21 accessory to and ancillary to and furthering and
22 supporting agricultural? is really, you know, the most
23 important part there.

24 **Q** But there are uses that can actually force a change in
25 farming practices, aren't there?

1 **A** **I would assume. I think farming is always changing.**
2 **And you're -- I think farmers are always trying to do**
3 **things to improve their industry. And so absolutely.**
4 **And that's --**

5 **Q** **Mr. Wendt, that wasn't --**

6 **A** **-- those are the type of uses we're trying to encourage**
7 **out there that help and -- that help farmers.**

8 **Q** **I understand that. But the question was whether there**
9 **are uses out there that could, in fact, force a change**
10 **in agricultural or farming practices.**

11 **A** **What's out there? I don't understand.**

12 **Q** **In the rural landscape near the farms, there are uses**
13 **that can conceivably force changes in farming**
14 **practices. For example, let's just say a residential**
15 **development that becomes so close to a farm that it**
16 **impairs or impacts the ability of the farmer to farm.**
17 **That's just a hypothetical.**

18 **A** **Yeah, but if you do good land-use planning, there's**
19 **ways of buffering that and allowing -- allowing it to**
20 **happen if you have a residential development.**
21 **Typically rural development out in this area,**
22 **they're -- the lots are of size, and you have hobby**
23 **farms and different things and agriculture going on**
24 **anyway, there's usually not an impact to a neighboring**
25 **farmer's operation. They're all like uses. They're**

1 all -- a lot of our uses in the RL-5 are also permitted
2 uses in our GMA ag zone, so they're all very
3 compatible.

4 Q Can you conceive of -- of uses, land uses that would
5 increase the cost of farming?

6 A Well, I mean, you can go down the list of allowable
7 uses. We can -- and see if any of those increase the
8 cost of farming. And -- and I'm happy to do that. We
9 have agriculture, agricultural buildings,
10 agriculturally related industries, agricultural stands,
11 a home, domestic animal raising. I mean, all those
12 things are -- all the permitted uses out there support
13 and encourage agriculture. They're all there to allow
14 agriculture to function and prosper.

15 Q Yes. I understand that.

16 So -- so -- so you are not -- you can't imagine
17 uses that could actually make it more expensive or
18 increase the cost of farming for agricultural
19 operators?

20 A I don't see that on our list of allowed uses.

21 Q Now, when the County found Nine Canyon to be
22 permissible, I assume that whoever made that decision
23 made a determination that it was a congruent
24 arrangement of land uses?

25 A I have no idea.

1 Q Three permits were issued that must have made that
2 determination, right?

3 A I haven't read them. But, I mean, they issued
4 conditional uses. The CUP criteria is different. But
5 I would assume that that would be the case, but it
6 would be an assumption on my part.

7 Q All right. So as compared to other activities for Nine
8 Canyon, you are not aware of any specific or
9 objection -- or excuse me -- or objective ability to
10 prove one way or the other whether that project was
11 considered to be incompatible?

12 A I don't know.

13 Q Okay. So for Horse Heaven, while the Siting Council
14 has found conformance with and it is -- and that Horse
15 Heaven is consistent, by your view that the project is
16 incompatible, is that because the wind turbines are
17 taller?

18 A No. It's because -- well, I mean, certainly that's
19 part of it. I mean, we're talking about the size, the
20 mass, the location, just the overall scope of the
21 project as it relates to the permitted uses in the
22 zone.

23 Q So what --

24 A It's an industrial use. It's not an agricultural use.

25 Q So you just used this term "industrial use" again.

1 That term --

2 **A Yes.**

3 Q -- again, was never applied to Nine Canyon, was it?

4 **A I have no idea. I didn't review Nine Canyon.**

5 Q So --

6 **A I haven't looked at one document regarding Nine Canyon.**

7 Q Okay. Very well.

8 So -- so you're considering this to be -- this
9 project to be an industrial use, like -- oh, I don't
10 know -- a oil terminal?

11 Is it akin to an oil terminal?

12 **A I -- I -- that's -- I -- I'll -- I'm happy to compare**
13 **an oil terminal versus this. I mean, bring me plans.**
14 **I'll take a look at them.**

15 Q Okay. All right. And the Horse Heaven project is not
16 anticipated to displace any land use, is it?

17 **A Well, it's removing agriculture. It's not -- it's**
18 **not -- it's not in compliance with, you know, our**
19 **long-term commercially significant ag lands. It's an**
20 **incompatible --**

21 Q I understand that.

22 **A -- use.**

23 Q I understand that.

24 The question, though, is: Isn't it true that
25 Horse Heaven -- you have no objective information that

1 would indicate that Horse Heaven will displace any land
2 use?

3 **A Displace? I guess maybe you --**

4 Q Yeah. Remove, whatever.

5 **A Well, you're -- you guys have stated earlier today**
6 **you're moving agriculture.**

7 Q A discrete -- so you do understand that a discrete
8 number of acres will be used for placement of wind
9 turbines, and around those acres, this land will be
10 farmed.

11 You do understand that certainly, don't you,
12 Mr. Wendt?

13 **A I understand that your plan is to continue farming**
14 **portions of the 72,000 acres, yes.**

15 Q In fact, a vast majority, some 90-plus percent, will
16 continue farming, isn't it?

17 **A Okay. It's your application, not mine.**

18 Q I'm just checking on whether or not you think there's
19 something different with this application that I don't
20 understand.

21 So I -- I don't know if you've had an opportunity
22 to read -- have you had an opportunity to read
23 Mr. Wiley's testimony?

24 **A I did early, but I don't -- I don't really recall it.**
25 **I mean, it was -- it was a couple weeks ago.**

1 Q All right. Well, I'm just going read something to you
2 and see if you concur or not.

3 And he actually, on Page 5 of his rebuttal
4 testimony, states: I disagree with Mr. Wendt's
5 statement that construction and operation of the
6 project is -- is inconsistent with the rural character
7 of the Horse Heaven Hills, especially because the
8 project will provide economic stability to our rural
9 community like it has never seen since the first
10 homesteader ran a plow across virgin Horse Heaven soil.
11 I believe the project complements the rural character
12 of the area both in its physical presence and its
13 economic benefit. In fact, I believe the project is
14 the single change that can protect the rural character
15 of the Horse Heaven Hills for the foreseeable future.

16 He then goes on to talk about, further down the
17 page on Line No. 9, Page 6: Throughout my father's --
18 my grandfather's, father's, and especially my own life,
19 we have watched thousands of acres of both agricultural
20 sagebrush-covered land be bulldozed for the
21 construction of housing development after housing
22 development. And I am unsure as to whether or not
23 there was a net positive impact of all of the urban
24 expansion of the Tri-Cities, but regardless, it is done
25 now. All those homes lie on land that used to have

1 rural character.

2 So do you disagree with Mr. Wendt's -- Mr. Wiley's
3 testimony?

4 A Well, you know, I think it's really important to know
5 that those areas that he's talking about with all those
6 housing developments are designated rural. Everybody
7 there has the allowance, under growth management in the
8 state of Washington, to develop there. We're
9 preserving or protecting our ag lands. We've added
10 4,000 acres to our ag lands over the last since 2006.
11 We have an active agricultural study that we follow,
12 and we preserve and we protect our agricultural lands.

13 In terms of the other ideas that he has spoken to,
14 you know, we support agriculture. We support the rural
15 character. But at the end of the day, the issue here
16 is this is an industrial project that has to meet the
17 cri -- the CUP criteria as it relates to our allowed
18 uses. They have to meet the test. And I'm looking at
19 Tests 1 through 5, and I think that should be the
20 focus.

21 Q Mr. Wendt, where did these additional agricultural
22 lands come from?

23 A Our ag lands? We did a study in 2018. And as part of
24 that, the criteria for our ag land -- long-term
25 commercially significant ag lands was established. And

1 I think there's nine or ten different criteria. And as
2 that, some of our rural lands -- some GMA ag land was
3 taken out that didn't necessarily meet the test as
4 much, and then some were put in that -- that met the
5 test. And so with that, there was a net gain of 2- or
6 3,000 acres.

7 I'm assuming the difference then for the 4,000
8 acres, just looking at it, I don't know of any other
9 modifications other than the GIS practices probably got
10 better from a -- from -- from an acreage standpoint
11 from two thou- -- from the early 2000s to the current
12 to get the 4,000-acre difference.

13 Q Do you acknowledge that, in the past decade or so, that
14 this County, that the County has converted some one
15 hun- thous- -- 100,000 acres of habitat land and
16 farmland to rural residential land?

17 A I don't know of any acreages for that, no.

18 Q Well, I was referring to your testimony where those
19 numbers were derived.

20 A A hundred thousand acres?

21 Q Nearly a hundred thousand acres converted for
22 residential use in approximately the last decade.

23 MR. HARPER: I'm going to object,
24 Your Honor. That's contrary to the evidence that I
25 established with Ms. McClain. Again, if Mr. McMahan

1 wants to lay a foundation for the question, he needs to
2 do so.

3 JUDGE TOREM: Mr. McMahan, it might
4 help if you can direct him to what page of the
5 testimony so that Mr. Wendt can refresh his
6 recollection and make any clarifications needed.

7 MR. McMAHAN: Yeah, what I would
8 like to do, if I may, is -- is take that up again in
9 recross or withdraw the question, but I would like to
10 keep moving along here, if possible.

11 JUDGE TOREM: All right. Question's
12 withdrawn.

13 Q (By Mr. McMahan) Mr. Wendt, do you dispute the
14 positive impacts for landowners from the leases for the
15 Horse Heaven facility for the development of the wind
16 facility?

17 A I don't think that's why we're here. We're here to
18 review it under the conditional use permit criteria.

19 Q Understood.

20 But do you -- you don't dispute, though, that
21 there will be added value to existing agricultural
22 lands as a consequence of the lease revenues for the
23 project?

24 A I don't know that.

25 Q Okay. Let's move on to issues of fire risk.

1 I assume you're familiar that fires are a fairly
2 common occurrence on the Horse Heaven Hills, correct?

3 **A Unfortunately, yes.**

4 Q And that the county fire agencies have historically
5 dealt with these fires as a common occurrence?

6 **A Yes.**

7 Q Are you aware that Mr. Wiley, in fact, is a volunteer
8 firefighter?

9 **A I didn't know that.**

10 Q Are you aware that it's pretty common for agricultural
11 operators to kind of pinch hit as firefighters as well?

12 **A Sure. That's -- that's what you do in rural areas.**
13 **Everybody helps everybody.**

14 Q Exactly. Right.

15 And that dryland wheat, in fact, is pretty risky
16 for fires, especially due to crop residue?

17 **A I would assume.**

18 Q Okay. Do most farmers or farm operations have some
19 training in fire response?

20 **A I have no idea.**

21 Q Okay. So you're unaware of whether it's common for
22 farmers to be volunteer firefighters?

23 **A I assume they do. But as for their training, I have no**
24 **idea.**

25 Q Okay. Is there any evidence, Mr. Wendt, in your view,

1 or evidence, your objective evidence, that wind
2 turbines propose any unique or appreciable fire risk?

3 **A Well, I mean, just once again, you would have to take**
4 **the risk back to the permitted uses. What is it --**
5 **does it cause more of a risk than the permitted uses in**
6 **the zone? That's the question. That's the question**
7 **the applicant should be providing us.**

8 **Q Well, and we are providing that. I'm asking you not**
9 **what your code says. I'm asking you, as a -- as a --**
10 **as an objective question: Is there any evidence that**
11 **you're aware of that wind turbines pose any unique or**
12 **appreciable fire risk? And I'm not asking you what**
13 **your code says.**

14 **A Sure. Well, it's an industrial use, so it's certainly**
15 **higher than many of the permitted uses, yes.**

16 **Q And, Mr. Wendt, you're there again comparing an oil**
17 **terminal or whatever to a wind farm and saying that**
18 **it's -- that it's a risky thing because it's an**
19 **industrial use.**

20 That is not a fair comparison, is it?

21 MR. HARPER: Objection, Your Honor.

22 That is entirely --

23 **THE WITNESS: I'm just fine with it.**

24 MR. HARPER: -- argumentative.

25 JUDGE TOREM: Mr. Harper, can you

1 restate that?

2 MR. HARPER: Yes, Your Honor. My
3 objection is that is just entirely argumentative.

4 JUDGE TOREM: It is. But I'll
5 overrule the objection. I think Mr. Wendt can -- can
6 answer this within the scope of the back-and-forth he's
7 had with Mr. McMahan.

8 Mr. Wendt, did you understand the question? Is it
9 a fair comparison on the use of the word industrial for
10 a wind farm versus this oil terminal and the
11 hypothetical?

12 THE WITNESS: Well, I view -- I view
13 a project of this mass -- this mass, this size, this
14 location absolutely as an industrial use. I've been
15 doing this for 26 years. I see applications come
16 across this desk every day. I've been in the Columbia
17 Basin for 24 years. There's very few projects that
18 have gone through here that I'm not aware of. I know
19 this is an industrial project.

20 Q (By Mr. McMahan) Okay. But that's an opinion, isn't
21 it?

22 A Absolutely.

23 Q Yes. A subjective opinion.

24 That is not how Siting Council described this --
25 this project in order 883, is it?

1 **A Did they -- did they say it was an industrial project?**

2 Q No.

3 **A Okay.**

4 Q Are you aware -- I'm still trying to figure out this
5 fire risk.

6 Are you aware of really any fire -- aside from the
7 Klickitat County fire at the beginning of the wind farm
8 days that I think you mention in your testimony, are
9 you aware of any fire caused by a wind turbine in
10 20-something years of wind energy operation in the
11 Northwest?

12 **A I -- me personally, I'm not.**

13 Q Okay. So you are not aware that wind turbines pose
14 some unique hazard or fire risk, are you?

15 **A No. But incorporating an industrial project into our
16 ag lands does.**

17 Q Mr. Wendt, Mr. Wendt, you're back to the industrial --

18 **A Yes.**

19 Q -- the industrial straw man here, and it's -- and it's
20 -- it's a straw man that isn't accurate, right?

21 **A I -- I believe it to be an industrial project.**

22 Q I understand. All right. Let's just leave it at that.
23 You believe it's an industrial development like a --

24 **A Yes.**

25 Q -- oil terminal or whatever. Very well.

1 You're not aware of any wind turbines
2 spontaneously combusting all over the Northwest, I
3 assume?

4 **A I have not read that in news. I have -- you know,**
5 **when -- when -- when they do, we typically read about**
6 **them, yes.**

7 Q Yeah, we would all be talking about that if that
8 happened, wouldn't we?

9 Did you pay attention to the local news in the
10 recent Klickitat County fires?

11 **A Not closely, no.**

12 Q All right. So you're not aware of whether all those
13 turbines burned down when those fires happened in
14 Klickitat County?

15 **A I'm not aware. I don't -- I didn't pay attention to**
16 **it.**

17 Q And so you're not aware of livestock and wildlife
18 congregating around wind turbines to protect themselves
19 from fires?

20 You're not -- you didn't get those news stories?
21 You didn't read that?

22 **A No, sir.**

23 Q All right. I think I might be close to done here.

24 Do you believe, similarly to wind facilities, that
25 solar PV projects uniquely cause fire risk?

1 **A** Well, all of it. You're talking about having --
2 you're -- you're incorporating a project out in our
3 agricultural areas that has a higher potential for fire
4 than other allowed uses.

5 Q What is your objective evidence of that?

6 **A** Size, scope, mass. Facilities, infrastructure.

7 Q So size, scope, and mass causes greater fire risk?

8 **A** Potentially.

9 Q Okay. Do you think that there is any stronger risk
10 that, in fact, fire on a solar facility would be from
11 fire coming into the solar facility versus the solar
12 facility, itself, spontaneously combusting?

13 **A** I don't have any idea.

14 Q And you are not aware of any fires on Nine Canyon --
15 other than the recent transmission line maintenance
16 issue, you are not aware, I assume, of any fires at
17 Nine Canyon, right?

18 **A** I haven't heard. But I also don't track where all the
19 fires are.

20 MR. McMAHAN: Okay. All right. I
21 think I'm done. Thank you, Mr. Wendt. I appreciate
22 your testimony.

23 THE WITNESS: Thanks, Tim.

24 Appreciate it.

25 JUDGE TOREM: All right. We've been

1 going for about an hour and 15 minutes for those of us
2 that came back a little bit before.

3 I'd like to take the next five or six minutes for
4 everybody just to have a comfort break. We'll come
5 back with cross-examination from Mr. Aramburu and then
6 the Yakama Nation. So 2:40, we'll come back on the
7 record.

8 (Pause in proceedings from
9 2:34 p.m. to 2:40 p.m.)

10
11 JUDGE TOREM: All right. It's 2:40.
12 We're going to go back and see where Mr. Aramburu -- if
13 he's ready for cross-exam of Mr. Wendt.

14 And I'm going to ask the parties, as they call out
15 witness exhibits that they'd like, to be specific if --
16 as you refer to them, if you'd like Ms. Masengale to
17 pull them up. Or if you're going to be sharing your
18 own screen, fantastic.

19 For those that are looking for Lisa Masengale to
20 put that exhibit up on the screen, if it's going to be
21 a quick reference, great. We probably don't need it.
22 If we need it for Council to dial in, I've got a
23 request that more often than not, giving a page or line
24 number is going to help us know what we're looking at
25 as the Council goes back and reviews questions and

1 answers. And sharing it on the screen if it's
2 something new, specifically a cross-exam exhibit,
3 that's desired as well.

4 All right. We're going to mute on this end.
5 Mr. Aramburu, you can go ahead with your questions.

6 MR. ARAMBURU: Judge Torem, I'm --
7 I'm prepared to go ahead with questions. Would it be
8 more efficient to have the cross-examination go first
9 so we're not repeating issues? I can do it either way.
10 Whatever your preference is.

11 JUDGE TOREM: When you refer to
12 cross-examination, I think Mr. McMahan was done with
13 his cross-exam, but you're listed for this witness for
14 a half an hour of time.

15 MR. ARAMBURU: Yes. My only
16 question is -- is -- is the -- is the redirect --
17 excuse me -- coming better now and then our questions
18 later?

19 JUDGE TOREM: Let me ask -- let me
20 ask Mr. Harper if he'd like to pick up where
21 Mr. McMahan left off and then come back to
22 Mr. Aramburu, and I'll have to ask if Ms. Voelckers
23 would prefer her questions ahead of yours or not.

24 But, Mr. Harper, how would you like to proceed?

25 MR. HARPER: Well, (videoconference

1 technical difficulties) unusual situation here. We
2 work off of prefiled testimony, and then the next thing
3 that happens was this cross-examination. I would just
4 as soon have all of whatever we're going to describe as
5 cross-examination take place (videoconference technical
6 difficulties), frankly.

7 JUDGE TOREM: Mr. Harper, the court
8 reporter's having a little bit of difficulty getting
9 your connection, so we'll just try to go slowly.

10 And, Mr. Aramburu, I think I'm with Mr. Harper on
11 this, that he's presented the prefiled testimony and
12 has listened to the applicant's cross-exam. And I know
13 that -- I would consider other parties aligned with the
14 County's interest on some of these, so I'd rather have
15 your questions and then the Yakama Nation's questions.
16 And we can then have Mr. Harper redirect on everything
17 that's been asked of Mr. Wendt. And then if we need
18 to, we can go quickly around for recross or
19 re-examination from there.

20 So let's take TCC's questions built on the
21 prefiled testimony and anything we've heard from
22 Mr. McMahan.

23 MR. ARAMBURU: Okay. Happy to
24 proceed.

25 ////

CROSS-EXAMINATION

BY MR. ARAMBURU:

Q Good afternoon, Mr. Wendt. We have met briefly when we had the Kobus deposition. It's nice to see you again.

A You as well.

Q I have a number of questions for you. If you don't understand the question, I'm happy to repeat it so we make sure we're -- we're clear with each other.

So some questions about how Benton County does its business.

Are you familiar with the local project review statute?

A Yes.

Q And does the local project review statute call for the submission of a complete application for action for --

A Yes.

Q -- permit applications?

A Yeah, that's typical to have a complete application, yes.

Q And -- and when you have a complete application, is there notice given to the public and agencies?

A It depends on the type of application.

Q Well, it's a conditional use application.

A A conditional use, we take it in, and we will establish -- we will establish a complete letter, then

1 a notice of application. And then if a SEPA review is
2 needed at that point, we would send notice --
3 notification out to the agencies and to -- to
4 surrounding property owners.

5 Q A project of this scale, would it require a
6 environmental checklist under SEPA?

7 A Absolutely.

8 Q Was one submitted to you?

9 A No.

10 Q No, there was never --

11 A We -- we never --

12 Q -- a complete application?

13 A We never received an application from this applicant.

14 Q And sometimes applicants -- I don't know what the
15 experience is in Benton County, but sometimes an
16 applicant will submit an environmental checklist to --
17 to local government to see what they think about the
18 project.

19 Does that ever happen?

20 A No. That would not be normal practice for somebody to
21 submit one and then not proceed with their application.
22 That would be unusual.

23 Q And in the -- Benton County has rules that it uses to
24 apply to SEPA; is that correct?

25 A Yes.

1 Q And in the environmental checklist, are there
2 provisions for review of aesthetic matters?

3 **A Yes.**

4 Q And do those -- those provisions -- I'm looking here; I
5 don't want to put it up on the screen. But Section 10
6 of environmental checklists has aesthetics, and it
7 says: Proposed measures to reduce or control aesthetic
8 impacts, if any.

9 Do you recall that as a -- as a provision of
10 the -- of an environmental checklist?

11 **A Yes.**

12 Q Okay. So no environmental checklist was submitted
13 here.

14 **A No, they submitted their application through EFSEC.**

15 Q Yeah, I understand.

16 But did they tell you, when they came in to talk
17 to you, that they were going to prepare an
18 environmental impact statement if they made application
19 to the County?

20 **A I don't know that we -- I don't remember exactly having**
21 **that conversation. They certainly knew that would be**
22 **part of the process, because that is the requirement**
23 **under the conditional use to do so, for that type of**
24 **facility. So, yes, they -- they were aware they would**
25 **have to.**

1 Q They would have to do an environmental impact
2 statement?

3 A No. That they would have to apply for a SEPA
4 checklist.

5 Q Okay.

6 A Sorry.

7 Q And -- and is -- is it -- does it sometimes happen in
8 Benton County that an applicant will not follow through
9 on the threshold determination process but simply say,
10 "Well, we're going to do an EIS for this project, and
11 we'll skip all the preliminaries with SEPA"?

12 A I'm confused by the question.

13 Q Okay. Are you sometimes told for substantial projects
14 in Benton County that an applicant comes in and says,
15 "We're going to not have a threshold determination
16 process. We're not going to go through that process.
17 We're just going to do an EIS and skip that"?

18 Does that happen?

19 A No.

20 Q Doesn't happen?

21 A No. That's part of -- that's -- the SEPA process, you
22 have to go through a SEPA checklist. And then the lead
23 agency makes the determination on the environmental
24 impacts and whether or not an EIS is necessary. An
25 applicant doesn't get to choose whether or not that's

1 **the process. The lead agency does.**

2 Q Okay.

3 JUDGE TOREM: Mr. Aramburu, this is
4 Judge Torem. I just want to interject. I don't
5 believe it's appropriate to inquire to what could have
6 happened in the County for SEPA.

7 It's gone to the Council. It's gone to EFSEC.
8 And if you want to ask -- I thought you were going
9 there -- about whether an application was ever started
10 and withdrawn in the County, maybe that has some
11 relevance. But I'm trying to understand the relevance
12 of this line of inquiry, and you've already confused
13 the witness at least once. Enlighten me on where we're
14 going.

15 MR. ARAMBURU: Very relevant as to
16 whether or not the process in Benton County would have
17 included full SEPA compliance, which includes a
18 complete application, a complete environmental
19 checklist, a threshold determination, a draft impact
20 statement, and a final impact statement.

21 That's all relevant to all the questions that
22 Mr. McMahan asked about the preliminary to'ing and
23 fro'ing with the County.

24 JUDGE TOREM: All right. But today
25 we're focused on the land use and the conditional use

1 permit requirements. And I don't recall reading any of
2 those requirements into the five things that the
3 Council has to look at for criteria for conditional
4 use.

5 As you're well aware, we have a significant
6 determination. There was a withdrawal of the expedited
7 application to get an MDNS, and there's a pending final
8 environmental impact statement that I know you've made
9 inquiry about multiple times. That will be in front of
10 the Council.

11 What would have been the process in front of
12 Benton County now is the question of the conditional
13 use permit. That's what's relevant today. So with all
14 due respect, let's focus in on that so we can see what
15 Mr. Wendt has to say from TCC's perspective about
16 conditional use permits, not about the overall SEPA
17 process.

18 Q (By Mr. Aramburu) Do you apply the SEPA process,
19 Mr. Wendt, to -- to review of conditional use
20 applications?

21 A Yes.

22 Q Okay. And does that process ordinarily involve
23 submission of a checklist?

24 A Yes.

25 Q And a threshold determination?

1 **A Yes.**

2 Q If there is a determination of significance that's
3 issued as a result of the threshold determination, is
4 an environmental impact statement required?

5 **A Yes.**

6 Q In -- in the practice in Benton County, does Benton
7 County require the preparation of a final environmental
8 impact statement in advance of making a decision on a
9 conditional use permit application?

10 **A Yes.**

11 Q Okay. And the County has specific standards for
12 conditional use applications and other applications?

13 **A Yes.**

14 Q Did -- did the applicant ever submit that, submit an
15 application to you?

16 **A No.**

17 Q Did he ever sit down with a draft and go through the
18 requirements and ask what was required?

19 **A I remember having conversations with the applicant**
20 **and -- about, I remember, a number of turbines'**
21 **location. I remember the project over time in**
22 **different conversations that didn't know it'd changed**
23 **the scope of it. But I don't -- he -- they never got**
24 **to the point where they submitted an application.**

25 Q Well, Mr. McMahan asked you a number of questions about

1 some -- some preliminaries back with some e-mails and
2 some other things back in --

3 **A Yes.**

4 Q -- in 2020, as I recall.

5 Did they submit to you a detailed application that
6 would include the location of the -- the wind turbines?

7 **A I don't -- an official, detailed application, no. I do**
8 **remember having a sheet of paper outlining the Horse**
9 **Heaven Hills with dots on it.**

10 Q Okay. Do you remember how many dots?

11 **A I don't. I don't remember specifically. I just**
12 **remember that in our conversations over time, the**
13 **application from -- I mean, we probably met with the**
14 **project manager back in 2018. The project just**
15 **continue -- I mean, the project grew over time in terms**
16 **of the size and scope of it --**

17 Q What were the --

18 **A -- to the point where they ended up going to EFSEC. I**
19 **don't remember all the specifics. I just remember**
20 **generally that was the -- the take I remember.**

21 Q Okay. And -- and as I recall, there's a Washington
22 State statute, and as I was thinking about the
23 testimony here, I can't remember the citation. But as
24 I recall, in Washington State, nuisance actions are
25 prohibited for ordinary farming activities.

1 Have I got that right? Have I remembered that
2 right?

3 **A I think typically, yeah, there are -- even Benton**
4 **County has a nuisance code. And typically it's very**
5 **lenient towards agricultural activities absolutely.**
6 **Because they do do work all, you know, throughout the**
7 **day and throughout the evening typically.**

8 **Q** Okay. And there were some questions to you about fire
9 risk for this property and some of the discussions back
10 and forth.

11 Did -- did the applicant ever submit -- well,
12 withdraw that.

13 There was some questions about the fire risks from
14 wind turbines. And did the applicant ever submit to
15 you any scientific data or quantification from reliable
16 sources about the frequency of -- of turbine fires?

17 **A No, I don't remember ever having a conversation with**
18 **the applicant related to anything to do with fire**
19 **and/or fire-related risks.**

20 **Q** And is it not the case that a SEPA checklist has a
21 provision on public services, and in that section, the
22 question is: Would the project result increase need
23 for public services; for example, fire protection?

24 Is that included in the -- the Benton County
25 version of the SEPA environmental checklist?

1 **A Yeah. Everybody has the same version.**

2 Q Okay. You ever seen a video of a burning wind turbine?

3 **A I personally have not, no.**

4 MR. ARAMBURU: Okay. Okay. I think
5 that's all the questions I have, Mr. Wendt. Thank you
6 very much.

7 **THE WITNESS: Thank you, sir.**

8 JUDGE TOREM: All right. Thank you,
9 Mr. Aramburu.

10 Ms. Voelckers.

11 MS. VOELCKERS: Thank you, Your
12 Honor.

13

14 CROSS-EXAMINATION

15 BY MS. VOELCKERS:

16 Q I'm trying to get everything straight on my screen.

17 Good afternoon, Mr. Wendt.

18 **A Hi.**

19 Q Shona Voelckers for Yakama Nation. We met briefly
20 during Mr. Kobus's deposition.

21 **A Nice to see you.**

22 Q You as well.

23 I do have a couple questions that will jump around
24 between some of what's already been discussed.

25 Is it fair to say that you have been looking at

1 every project that comes through Benton County for more
2 than 20 years?

3 **A Yeah, in Benton County, I have been here for six and a**
4 **half to seven. I have been previously -- I've been in**
5 **the Columbia Basin as a public planner for little over**
6 **24 years.**

7 Q Thank you. I meant to -- I meant to ask about the
8 Columbia River Basin. So thank you for that
9 clarification.

10 In those 24 years of experience, is it fair -- is
11 it fair to say that this is one of the biggest projects
12 that you've seen proposed for this part of the Columbia
13 River Basin?

14 **A Completely, yes. Yes. By far.**

15 Q And is it fair to say that one of the main takeaways
16 from your written testimony as well as today is that
17 the project is incompatible with the GMAAD zoning
18 designation that is pervasive throughout the project
19 footprint?

20 **A Based upon the purpose of -- of that district, this**
21 **would be an incompatible use. That's correct.**

22 Q And are you aware that WDFW has made public comments
23 about this project proposal?

24 **A I -- I remember back when we had the original public**
25 **comment periods, hearing from their representatives.**

1 Q I have a few questions based upon what Mr. McMahan
2 asked you.

3 Michael Ritter, who is WDFW's lead planner for
4 wind and solar --

5 **A Mm-hmm.**

6 Q -- was prohibited by EFSEC from testifying in this
7 proceeding, but we were able to ask him questions in
8 the scope of a deposition.

9 And Mr. Ritter testified during his deposition
10 about WDFW's process for engaging on new proposed
11 energy development projects. And rather than talk
12 through that whole process, I'll represent to you today
13 that he used the term "collaborative" to discuss what
14 is sometimes a years-long engagement between WDFW
15 applicants and the respective regulators for each
16 project.

17 Is it fair to generalize the general engagement
18 between your office and WDFW on projects as
19 collaborative between you as a regulator and WDFW as an
20 interested commentator with specialized expertise?

21 **A Yeah, that's how we as -- myself and our staff, we have**
22 **a very collaborative approach with WDFW. Their staff**
23 **has been great.**

24 Q And if -- based upon your own experience, if I
25 represent to you today that the record for this case

1 shows engagement between EFSEC and WDFW through both
2 the public SEPA comment process as well as meetings
3 between EFSEC staff, WDFW, and Scout Clean Energy over
4 the last number of years to discuss WDFW's concerns
5 with the project, would that be consistent with your
6 experience working with WDFW in your current role?

7 **A Yeah. I've always found them to be very engaged.**

8 **Q** Shifting now to the Benton County Code's requirements
9 for complete applications, does Benton County planning
10 department require conditional use project applications
11 to include identification of any water source that the
12 proposed development will be relying upon?

13 **A Well, it's interesting, you know. That's -- at the**
14 **time of application, it's, like -- if it was a**
15 **conditional use permit required of SEPA, there is a**
16 **water resources section in the SEPA that would identify**
17 **what their water supply is.**

18 And so while it may not be a specific listing and
19 requirement at the time of application, we would then
20 take that information and -- and then carry that on and
21 go and evaluate the conditional use permit criteria and
22 integrate it into 1 through 5 and see if that helps
23 answer any of those questions.

24 In the past, we've had situations here in Benton
25 County where we required a well impairment analysis for

1 a rural -- you know, for -- for a conditional use
2 permit to go out and determine whether or not that
3 conditional use would, based upon the amount of water
4 that they're wanting to access, would impair other
5 permitted uses. And -- and so that would help us then
6 be able to determine whether or not it met the
7 conditional use permit criteria.

8 So I don't know. That's kind of a long way around
9 answering your question, but hopefully it did.

10 Q I think you're referring to Benton County Code
11 17.10.090, which talks about the -- what all needs to
12 be included in an application, including that SEPA
13 checklist; is that correct?

14 A That is -- that is correct.

15 Q And as a County, you cannot under state law permit new
16 development that impairs existing water right holders,
17 correct?

18 A Well, that would certainly -- you know, if it's going
19 through a conditional use permit process, that would
20 certainly be evaluated for sure if it was going to be.
21 You know, if it's an outright permitted use, they need
22 to verify that they have access to legal water at the
23 time of building permit. The conditional uses are
24 certainly different than permitted uses from that
25 standpoint.

1 Q Is it fair, then, to say that it is the County's
2 responsibility, when it reviews applications under
3 Benton County Code, to ensure that it's not issuing a
4 conditional use permit that would allow a project to
5 move forward without a legal water source?

6 A **That's correct.**

7 Q Are you aware of any provision in the Benton County
8 Code or EFSEC regulations that would allow for a
9 conditional use permit to be issued for a development
10 that does not have a legally viable water source?

11 A I mean, unless it was a use that didn't -- for a
12 conditional -- boy, I don't know of any conditional
13 uses that -- I'm not a hundred percent sure. I'd have
14 to go through the CUP list to see if there was anything
15 on there that didn't require water.

16 Certainly if it does require water, then we would
17 be evaluating, you know, are they under an exemption,
18 are they under a water right, are they accessing a
19 community system, are they near an urban growth area.

20 I mean, there's just a lot of different avenues
21 there. But certainly we would- -- we wouldn't issue it
22 unless it didn't meet some requirements for water
23 resources.

24 Q So then is it fair to say that if the development
25 requires water, then the County would not issue a

conditional use permit before determining that there is a legal, valid water source for that development?

A Yes.

MS. VOELCKERS: Okay. Thank you. I don't have any other questions at this time.

JUDGE TOREM: All right. Thank you, Ms. Voelckers.

Mr. Harper, I think that was all the scheduled questions and cross and from the other parties. Let me turn back to you at the County and see what other redirect you have, and then we'll go back to Mr. McMahan.

And, Mr. McMahan, when I come back to you, as we talked about coming back from the break, we need to address whether you wanted Exhibits 1055 and 1057 moved to be admitted. So when we come back to you, I'll ask you if that's appropriate or not.

And then, Mr. Aramburu and Ms. Voelckers, we'll come back to you for one more round of any additional cross.

Mr. Harper.

MR. HARPER: Thank you, Your Honor.

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REDIRECT EXAMINATION

BY MR. HARPER:

Q Mr. Wendt, a few questions I want to go through with you.

Mr. McMahan spent a fair amount of time drawing comparisons to the Nine Canyon wind farm.

Do you remember that?

A Yes. The Nine Canyon wind farm, yes.

Q He asked you whether Nine Canyon wind farm was immediately adjacent to an urbanized area.

Do you remember that?

A Yes, I do remember that.

Q I wonder if you could characterize, Mr. Wendt, a bit about the proximity of Nine Canyon and rural land and then perhaps draw some comparison between that and resource lands that we're talking about and Horse Heaven wind farm facility.

A Sure.

Well, the Nine Canyon facility is approximately three and a half miles from a designated urban growth area. Under growth management, we have our designated urban growth area boundaries, and then we have our rural lands that are adjoining the designed urban growth area typically as a transition to then move out into our agricultural lands.

1 Under the state law, you have different levels of
2 rural development that you're allowed. You have the
3 limited areas of more rural intensive development that
4 you'll see the one acres or less that are typically
5 established pre-growth management or the early days of
6 growth management. You see a lot of those lots.

7 And then you move into what we have is our RL-5
8 zoning as well as our RL-20 zoning. Those are
9 typically hab- -- hobby-type farms. You'll see people
10 with animals, 4-H, FAA [sic], those type of activities
11 going on in there. There's a wide range of different
12 typical single-family home-type activities.

13 And then you move into our agricultural areas that
14 are not typically hobby farms. Those are our
15 commercial agricultural operations there to -- to make
16 money and make a living doing agricultural. And -- and
17 those are designated by the County in compliance with
18 the state law for long-term commercially significant ag
19 under the GMA.

20 Q So just to be perfectly clear, with respect to the
21 Horse Heaven wind farm, is this Council's compatibility
22 criteria, is that keyed to agricultural lands and
23 long-term commercial significance, or is that keyed to
24 rural lands?

25 A I'm having trouble hearing you. I just need to turn

1 **this up. I'm going to ask you to repeat that question,**
2 **if I could.**

3 Q Sure.

4 For this Council's consideration of the CUP
5 analysis, is the relevant consideration the
6 compatibility of this project with rural lands or with
7 GMA agricultural lands?

8 A **The -- the compatibility test is with our GMA**
9 **agricultural lands, not with our rural lands. Our**
10 **rural lands are -- is the transition area.**

11 Q Is it fair to describe a core and a periphery in terms
12 of your agricultural lands in the Horse Heaven
13 vicinity?

14 A **Core and the periphery. No. I mean, we've designated**
15 **649,000 acres of our GMA lands, and they're all --**

16 Q Let me approach this a different way.

17 Is the Nine Canyon wind farm in the core of your
18 agricultural resource lands in the Horse Heaven area?

19 A **Yes.**

20 Q Okay. It's no closer to the periphery than Nine
21 Canyon?

22 A **They're -- they're -- they're in the same -- no,**
23 **they're -- they're both designated GMA ag --**

24 Q Okay.

25 A **-- and under the state law.**

1 Q All right. That's fair.

2 Can you describe, then, a little bit of the
3 factual distinction in your mind that's relevant to the
4 compatibility consideration by comparing Horse Heaven
5 with Nine Canyon?

6 A Sure.

7 I mean, in addition to the code changes and the
8 way that their -- they -- their approval process are
9 going, certainly the Nine Canyon project, if -- based
10 upon what I -- the limited knowledge I do have of it,
11 was approximately 63 turbines that were less than 300
12 feet in height. I think -- I think the maximum was
13 some -- I was told it was approximately about 270. And
14 the project was about 32 megawatts. And this is in
15 comparison to the proposal, which is 1,150 megawatts.
16 So the size, mass is just completely different.

17 Q Is the County allowing new residential uses in the
18 GMAAD zoning district?

19 A You can have a single-family home on a farm, and you
20 can have -- it's an allowed use. It's permitted. It's
21 on the allowable use list.

22 In terms of land development, you can only short
23 plat, and typically the minimum lot size is 20 acres or
24 more. If -- and we do have a little bit that -- of
25 that up on the Clodfelter area. On the edge of our

1 rural land designation, we do have a little bit of that
2 where a farmer is taking his land and under the state
3 exemption of creating 20 acres for a single-family
4 home.

5 Q Okay. I want to focus, then, Mr. Wendt, on an exhibit
6 that Mr. McMahan showed you. This was Exhibit 1057_X.

7 MR. HARPER: I wonder if
8 Ms. Masengale can bring that up.

9 MS. MASENGALE: Sorry. Can you
10 repeat that? Thank you.

11 MR. HARPER: Sure. 1057.

12 JUDGE TOREM: I think, Mr. Wendt,
13 he's going to be directing you back to the e-mail
14 exchange in 1057 as soon as that's put up on the
15 screen.

16 MR. HARPER: I found it. Actually,
17 Ms. Masengale had it exactly right. Yeah. It's --
18 it's the e-mail exchange, and then it's Page 2 of 3
19 that I'm interested in.

20 Q (By Mr. Harper) Okay. Mr. Wendt, can you see the
21 sentence that begins in the middle of the paragraph
22 that's on the screen? And it starts about halfway
23 across and begins with the words, "The code states."

24 A (Videoconference technical difficulties.)

25 Q I'm sorry?

1 **A Would you like me to read that sentence?**

2 Q Yeah. Why don't you go ahead and read that sentence
3 and the following sentence.

4 **A "The code states the use shall be granted only if the**
5 **findings of fact can be affirmed and made based upon**
6 **the evidence presented during the process. As we**
7 **discussed this morning, for these reasons we fail to**
8 **see how the County could provide a certification before**
9 **the EFSEC hearing as to the County's conclusion as to**
10 **whether or not a CUP would be appropriately issued for**
11 **this project."**

12 Q This was your communication to Mr. McMahan of January
13 11, 2021, correct?

14 **A That is correct.**

15 Q And in that letter, or that e-mail, you were telling
16 him that you weren't able to take a position on CUP
17 compatibility at that time?

18 **A That is correct.**

19 Q Would it be appropriate for the County to predetermine
20 an issue like compatibility for a project of this
21 nature based on an informal meeting with Mr. McMahan
22 and his clients?

23 **A Absolutely. It would be typical to take in an**
24 **application and do an evaluation, and -- and at the end**
25 **of the process, the hearing examiner would com- --**

1 **would determine the compliance with the criteria.**

2 Q Okay. But I think we've crossed fires a little bit.

3 My question was whether or not the County would
4 predetermine the compatibility prior to
5 (videoconference technical difficulties).

6 **A Yeah, we would not predetermine an application.**

7 Q Mr. Wendt, Mr. McMahan also asked you if this project
8 actually displaced a land use. And I don't think he
9 liked your answer, so he asked you a couple times would
10 it displace any land use.

11 Mr. Wendt, would this project displace almost 11
12 square miles of agricultural land?

13 **A Yes.**

14 Q Now, we've also talked a little bit about the overall
15 lease boundary. And I understand that there may be
16 differences of opinion regarding the effect of
17 fragmenting that farmland outside of the actual
18 displacement area. I understand.

19 But there's also been testimony that the area of
20 the lease boundary is something like 72,000 acres or --
21 (videoconference technical difficulties) -- 113 square
22 miles.

23 Do you remember that testimony?

24 **A Yes.**

25 Q In your experience, Mr. Wendt, have you ever seen a

1 single application, whether it's for a conditional use
2 permit or a rezone or a permitted use outright, have
3 you ever seen any single application that has that kind
4 of scale?

5 **A Not even close.**

6 Q I'd like you to take a look at Benton County
7 Exhibit 2009. I believe Ms. Masengale is working on
8 that one, so we'll just pause for a moment here.

9 MR. HARPER: I'm sorry,
10 Ms. Masengale. I asked for 2009.

11 MS. MASENGALE: I apologize.
12 Your -- your sound keeps cutting out when you say the
13 number.

14 MR. HARPER: I'm asking for
15 Exhibit 2009, please.

16 MS. MASENGALE: 2009. Okay. Sorry.
17 Literally every time you say the number, my sound cuts
18 out.

19 MR. HARPER: Okay.

20 MS. MASENGALE: So 2009.

21 MR. HARPER: We're almost done.

22 MS. MASENGALE: Yes.

23 MR. HARPER: There we go. Thank you
24 very much.

25 Q (By Mr. Harper) Okay. Because my audio doesn't appear

1 to be too great, Mr. Wendt, I wonder if you can read
2 this.

3 Do you recognize this, first of all, to be your
4 testimony?

5 **A Yes.**

6 Q Could you read this, please?

7 **A "There are no mitigation measures that are sufficient**
8 **for the permanent loss of such a large percentage of**
9 **the county's agricultural land, which is the dominant**
10 **land."**

11 Q Is that still your position, Mr. Wendt?

12 **A Yes.**

13 MR. HARPER: I have nothing further.

14 JUDGE TOREM: All right. We're
15 going to come back to Mr. McMahan for any recross and,
16 again, on those exhibits that I asked you about.

17 MR. McMAHAN: Thank you, Your Honor.
18 Yes, we would like to have those two exhibits submitted
19 into evidence. I kind of thought that happened more
20 automatically, but now I understand that's not the way
21 it works.

22 JUDGE TOREM: Yes. Thank you. With
23 cross-exam exhibits.

24 It's Mr. Harper, I know you re-referred to 1057_X.
25 But as to that one and the other cross-examination in

1 1055, the County have any objections I need to
2 consider?

3 MR. HARPER: No objection, Your
4 Honor.

5 JUDGE TOREM: All right. Now
6 they're admitted, Mr. McMahan. Thank you.

7 (Exhibit Nos. 1055_X and
8 1057_X admitted.)
9

10 MR. McMAHAN: Thank you, Your Honor.

11 JUDGE TOREM: Any additional
12 questions for the witness in cross-exam?

13 MR. McMAHAN: No, Your Honor. Thank
14 you.

15 JUDGE TOREM: All right.
16 Mr. Aramburu, I'm going to come to you and
17 Ms. Voelckers, and then I'll come to the Council
18 members to see if these discussions with Mr. Wendt have
19 any questions.

20 So Mr. Aramburu?

21 MR. ARAMBURU: Nothing further.
22 Thank you.

23 JUDGE TOREM: All right.
24 Ms. Voelckers, anything further?

25 MS. VOELCKERS: Nothing further at

1 this time. Thank you.

2 JUDGE TOREM: All right. Members of
3 the EFSEC Council, you've heard Mr. Wendt answer
4 questions from all -- many of our attorneys here.

5 I see Ms. -- Chair Drew has her hand up. Once you
6 come off --

7 COUNCIL CHAIR DREW: Thank you.
8 Yes.

9 JUDGE TOREM: There you go.

10 COUNCIL CHAIR DREW: Mr. Wendt, a
11 couple questions --

12 **THE WITNESS: Yes.**

13 COUNCIL CHAIR DREW: -- for you.

14 Can you hear me?

15 **THE WITNESS: Yes.**

16 COUNCIL CHAIR DREW: Okay. Great.

17 I heard you talk about 11 square miles that's
18 being taken out of agricultural as you look at the --
19 the project.

20 Have you been there and seen specifically that the
21 area that's being discussed is planted right now in
22 agriculture?

23 **THE WITNESS: I do know that a large**
24 **percentage. I don't know specifically based upon that**
25 **boundary if it is. I'm going based upon what was**

1 **submitted.**

2 COUNCIL CHAIR DREW: Okay. So it's
3 zoned agricultural?

4 **THE WITNESS: Yes.**

5 COUNCIL CHAIR DREW: Okay. But you
6 don't know if that's actually where roads are already
7 existing within the project site?

8 **THE WITNESS: In terms of the...?**

9 COUNCIL CHAIR DREW: 11 square
10 miles. Do you know how much is literally -- how many
11 of those acres are actually in production of
12 agricultural right now?

13 **THE WITNESS: I do not know that,**
14 **no.**

15 COUNCIL CHAIR DREW: Okay. So have
16 you talked to any of the farmers who are leasing their
17 property?

18 **THE WITNESS: I personally have not.**
19 **We've just heard from Mr. Wiley.**

20 COUNCIL CHAIR DREW: So from
21 Mr. Wiley's perspective, does he think that this will
22 help or hurt his agricultural production economically?

23 **THE WITNESS: He'd stated that it**
24 **would.**

25 COUNCIL CHAIR DREW: It would what?

1 **THE WITNESS:** It would -- it -- it
2 would -- he stated that it would benefit him.

3 COUNCIL CHAIR DREW: Okay. So in
4 terms of a person whose property is involved in this
5 project, that person has said that it would benefit him
6 to keep his property in agriculture?

7 **THE WITNESS:** That would be my
8 understanding.

9 COUNCIL CHAIR DREW: Okay. Thank
10 you.

11 Then in terms of the Nine -- is it the Nine Canyon
12 project? I've heard you -- I'm a little confused as to
13 whether or not you know about the Nine Canyon project
14 or not. Because when Mr. McMahan was asking you
15 questions, you said that you didn't know anything about
16 it, and yet when Mr. Harper asked you, you compared the
17 Nine Canyon project to the impacts of.

18 So which is it?

19 **THE WITNESS:** I do know -- I do know
20 that -- I knew the size of it. But I didn't -- I don't
21 know any of the details about how -- the process it
22 went through.

23 COUNCIL CHAIR DREW: So as your job
24 in looking and reviewing projects, is this the only
25 wind project in Benton County that you're aware of?

1 **THE WITNESS: The --**

2 COUNCIL CHAIR DREW: Nine Canyon.

3 **THE WITNESS: -- Nine Canyon? Yeah,**
4 **I believe so.**

5 COUNCIL CHAIR DREW: Okay. So you
6 didn't go back and research that at all --

7 **THE WITNESS: No.**

8 COUNCIL CHAIR DREW: -- when Scout
9 came up?

10 You didn't want to --

11 **THE WITNESS: No.**

12 COUNCIL CHAIR DREW: -- hear or see
13 why the mitigated determination of nonsignificance --
14 you didn't read through any of the water requirements
15 at that time?

16 **THE WITNESS: I personally have not,**
17 **no.**

18 COUNCIL CHAIR DREW: So you wouldn't
19 care what was decided in the Nine Canyon wind project
20 in order to use it as any kind of precedent to the
21 Horse Heaven, because it's not anything similar?

22 **THE WITNESS: It's not a permitted**
23 **use. It was a conditional use.**

24 COUNCIL CHAIR DREW: Correct.

25 **THE WITNESS: I was comparing it --**

1 COUNCIL CHAIR DREW: And this is a
2 conditional use, so they are the same.

3 THE WITNESS: The criteria for this
4 permit is permitted uses, not conditional uses.

5 COUNCIL CHAIR DREW: So Nine Canyon
6 was a permitted use?

7 THE WITNESS: Nine -- Nine Canyon
8 was issued as a conditional use.

9 COUNCIL CHAIR DREW: Right. So
10 they're the same.

11 THE WITNESS: But the correct --

12 COUNCIL CHAIR DREW: Right?

13 THE WITNESS: They're both --

14 COUNCIL CHAIR DREW: They're both --

15 THE WITNESS: They're both --

16 COUNCIL CHAIR DREW: -- conditional
17 uses.

18 THE WITNESS: They're both
19 conditional uses.

20 COUNCIL CHAIR DREW: Okay. Okay.

21 THE WITNESS: But the criteria --

22 COUNCIL CHAIR DREW: I just wanted
23 to get that straight.

24 THE WITNESS: The criteria -- the
25 criteria is a permitted use, is what you judge it by.

1 COUNCIL CHAIR DREW: But you didn't
2 look at all about how the hearing examiner reviewed or
3 made determination on Nine Canyon because it has
4 nothing to do with Horse Heaven from your opinion?

5 **THE WITNESS: It may have something**
6 **to do with it, but I didn't review it.**

7 COUNCIL CHAIR DREW: Ah. Okay. So
8 you don't know whether the water resources used for
9 Nine Canyon, how they went about that?

10 **THE WITNESS: I don't.**

11 COUNCIL CHAIR DREW: And you don't
12 know about the fire plan or how they developed that?

13 **THE WITNESS: None. No.**

14 COUNCIL CHAIR DREW: So an existing
15 wind project next door has not been used for a
16 comparison in your analysis for this project?

17 **THE WITNESS: I reviewed it against**
18 **permitted uses.**

19 COUNCIL CHAIR DREW: Okay. Thank
20 you. I have no further questions.

21 **THE WITNESS: You're welcome.**

22 JUDGE TOREM: Mr. Levitt, you have
23 your hand up.

24 COUNCIL MEMBER LEVITT: Yeah.

25 Hello, Mr. Wendt. My name's Eli Levitt. I'm a

1 section manager at the Department of Ecology and the
2 EFSEC Council member for Ecology.

3 I just wanted to clarify one thing in Exhibit
4 2009. You say that the -- the change cannot be
5 mitigated for -- or I'm sorry. I don't have the
6 language right in front of me.

7 But is that statement from the time when you
8 believed 72,000 acres would be impacted or from your
9 earlier statement you were discussing with one of the
10 attorneys that 6,000-something acres would be
11 permanently impacted?

12 I guess I'm wondering if that -- if that
13 statement's based on a certain number of acres from
14 your perspective.

15 **THE WITNESS: No. It's based upon**
16 **the use. The -- the use of the project that -- the**
17 **size, scope of the project.**

18 COUNCIL MEMBER LEVITT: Okay.

19 **THE WITNESS: I mean, the -- based**
20 **upon the size, scope, location of the project, and its**
21 **relationship back to the permitted uses of meeting the**
22 **CUP criteria, there -- there -- there are and have been**
23 **no conditions presented that can help this project**
24 **comply with that criteria.**

25 COUNCIL MEMBER LEVITT: And, you

1 know, let's say -- let's say this -- this is
2 hypothetical -- this was a much smaller wind project on
3 scale with, like, Nine Canyon.

4 Are there any mitigation options for a proponent,
5 in your mind --

6 **THE WITNESS: Well, the County.**

7 COUNCIL MEMBER LEVITT: -- that
8 would be acceptable?

9 **THE WITNESS: Sure. The Coun- --**
10 **the County did remove these from -- as a conditional**
11 **use permit option, because we -- there are no abilities**
12 **to create conditions to the C -- CUP criteria for**
13 **large-scale projects not related to agricultural.**

14 COUNCIL MEMBER LEVITT: Okay. Thank
15 you. That's it.

16 JUDGE TOREM: Chair Drew.

17 COUNCIL CHAIR DREW: So just
18 following up on my colleague. When did the County
19 remove wind projects as a conditional use? Before --

20 **THE WITNESS: 2021.**

21 COUNCIL CHAIR DREW: -- the
22 application to EFSEC or after the application to EFSEC?

23 **THE WITNESS: It was after.**

24 COUNCIL CHAIR DREW: Right.

25 So it's not relevant to our consideration. Thank

1 you.

2 **THE WITNESS: You're welcome.**

3 JUDGE TOREM: Do any other Council
4 members have a question they want to pose to Mr. Wendt?

5 All right. I don't see any others popping up.

6 Mr. Harper, in fairness, I want to come back to
7 you if there's any redirect after hearing Chair Drew's
8 and Council Member Levitt's questions.

9 MR. HARPER: No, Your Honor.

10 JUDGE TOREM: All right. Mr. Wendt,
11 unless there's others that want to speak up now that
12 have questions for you?

13 Not hearing --

14 MS. VOELCKERS: Your Honor.

15 JUDGE TOREM: Ms. Voelckers. Thank
16 you.

17 MS. VOELCKERS: Sorry to jump back
18 in here, but I -- I would like to clarify one -- one
19 part for myself at least, if not for the Council.

20
21 CROSS-EXAMINATION

22 BY MS. VOELCKERS:

23 Q Mr. Wendt, even if that change in 2021 to remove wind
24 development from the conditional use permit list had
25 not happened, would your -- does the county code still

1 require either the County or EFSEC to apply the same
2 criteria in comparing a conditional use against
3 permitted uses?

4 Would that -- would that actually fundamentally
5 change the analysis that's required here under
6 conditional use regulations?

7 **A Well, the -- that -- based upon the 20 -- when they**
8 **applied, that is the requirements. Subsequently, in**
9 **2021, after they had already applied with EFSEC, the**
10 **County went and changed the rules. And they would not**
11 **be eligible to apply for a conditional use permit at**
12 **this location subsequent of the rule change.**

13 Did that answer your question? I don't know if it
14 did.

15 **Q** I think it did.

16 But just so I'm clear: Your testimony in this
17 case is based upon the law that was in place at the
18 time of the application?

19 **A Oh. Absolutely. 100 percent.**

20 MS. VOELCKERS: Thank you.

21 No further questions, Your Honor.

22 JUDGE TOREM: All right. Anyone
23 else need a clarification?

24 Okay. Thank you, Mr. Wendt. I appreciate your
25 time today.

1 **THE WITNESS: Thank you.**

2 (Witness excused.)

3
4 JUDGE TOREM: Let me shift back to
5 the parties, then.

6 We've had all the witness testimony we anticipated
7 today. Let's shift a little bit to what we can tell
8 the Council to anticipate for tomorrow, as well as that
9 will help Ms. Masengale and the rest of staff get
10 exhibits prepped and the rest of things for Tuesday's
11 proceeding.

12 It looks like we're going to have one witness at
13 9:00 with Ms. Cooke, cross-examination from the
14 applicant from Aramburu on behalf of TCC and then,
15 Ms. Voelckers, you on behalf of the Yakama Nation.
16 That's estimated, Council members, to be from 9 a.m.
17 until 10:40.

18 It sure sounds like we're going to not have, I
19 think the agreement, witnesses that Ms. Perlmutter was
20 geared up to cross-examine. That would be the Jansen
21 and Rahmig testimony and -- and her redirect on those.

22 So I'm thinking we'll have a fairly short day
23 tomorrow unless parties can make a proposal to bring
24 another witness over. They may have some discussions
25 offline tonight. And if they're able to identify a

1 witness that makes sense to present tomorrow to
2 preserve the time left, they'll let us know in the
3 morning.

4 And I'll let you know when we come on at 9:00,
5 with the understanding that if that's a surprise, you
6 may not have reviewed their direct testimony, and we
7 might just simply take a break to allow you to skim it
8 and refamiliarize yourself before we present any
9 surprise witnesses that are not on tomorrow's schedule.

10 They'd be somebody you've received testimony from,
11 but there may be none, but I'm anticipating maybe folks
12 will circle the wagons tonight and just see who might
13 be available that makes sense to take out of order
14 tomorrow to preserve time later.

15 I'm going to do a quick round-robin with the
16 parties just to see if there's anything else they need
17 all of us as a group to know, and then I'll reconvene
18 with them at 8:30 tomorrow morning.

19 For the applicant, anything else on the
20 proceedings that we need to know and the Council
21 members need to know?

22 MS. STAVITSKY: Your Honor, based on
23 the latest we have heard from Ms. Perlmutter, I would
24 ask if it's possible for you to let -- to let us know
25 your position, and we can arrange for the schedule on

1 Wednesday as well. Because if -- based on our current
2 understanding of Ms. Perlmutter's health, she's also
3 not going to be available to question anyone on
4 Wednesday, the morning of the 16th.

5 So if Your Honor -- if we're required to proceed
6 with Mr. Jansen and Mr. Rahmig's testimony on that day,
7 we'll need to, frankly, scramble over the next day to
8 schedule more sessions with them and -- and regroup on
9 our end. So I'd appreciate if you're able and the
10 parties are able to just decide whether that proposed
11 schedule is workable for Wednesday as well.

12 JUDGE TOREM: My understanding from
13 our discussion previously was that we were going to
14 move all that testimony to next Friday. And so I'm not
15 anticipating the Rahmig testimony and possibly even the
16 McIvor testimony to go forward on Wednesday morning,
17 but I'm still looking for better ways to use that time
18 rather than to attempt to rush everything on Friday,
19 the 25th.

20 MS. STAVITSKY: Okay. Understood.
21 Thank you for that clarification.

22 JUDGE TOREM: Mr. Harper, from the
23 County's perspective, anything?

24 MR. HARPER: Nothing further from
25 County. Thank you.

1 JUDGE TOREM: Ms. Reyneveld?

2 MS. REYNEVELD: No. Nothing from
3 me. Thank you.

4 JUDGE TOREM: All right.
5 Mr. Aramburu?

6 MR. ARAMBURU: I guess this is --
7 this is almost purely a procedural question.

8 We have some material on the EFSEC website from
9 the FAA, three letters that are there are that -- that
10 talk about the turbines. Would those be considered
11 part of the adjudication, and can we refer to them?

12 JUDGE TOREM: You'd have to direct
13 me to where they are on the EFSEC website and how they
14 got there. I just don't know if there's a sponsoring
15 party at this time, Mr. Aramburu, or if those are some
16 other public comment.

17 MR. ARAMBURU: They're under the --
18 the federal kind of coordination section. I think the
19 parties know where that is. I don't know that they
20 need a sponsoring witness. They're -- they're
21 agreements between the applicant and the FAA. So the
22 question is, can we refer to those for testimony
23 purposes and for hearing purposes?

24 JUDGE TOREM: Mr. McMahan, does the
25 applicant have an objection to that? If it's on file

1 with an agreement with EFSEC, I'm not sure if that's
2 part of the SEPA process or some other part of the
3 permitting process.

4 I honestly, Mr. Aramburu, don't read everything
5 that's on the EFSEC website.

6 So, Mr. McMahan, if maybe you can help dial in as
7 to what Mr. Aramburu's referring to, I can give you a
8 better opinion.

9 MR. McMAHAN: Thank you, Your Honor.
10 I am not entirely sure about what Mr. Aramburu's
11 referring to either. Although I think what I'm hearing
12 is they're a public record. And if that's the case,
13 then I don't think there's an issue here.

14 But if there's something else that I'm just not
15 understanding, I'd like the opportunity to assess that
16 with my client.

17 JUDGE TOREM: All right. Because,
18 Mr. Aramburu, if it is a public record, I don't see why
19 you couldn't refer to it. And if there is something to
20 direct the counsel to where it is or Ms. Masengale so
21 that it can be facilitated during the hearing when it
22 comes up, I don't see a problem. But I'm not going to
23 waive anybody's right to object if it does come up and
24 it appears irrelevant or out of context from wherever
25 it is on the website as applied to Horse Heaven.

1 I don't know what else to tell you at this time,
2 but it sounds like likely you can refer to it, and
3 we'll just see what the other counsel's reaction is at
4 that time.

5 MR. ARAMBURU: So to -- to direct
6 the parties, the adjudication website for the Horse
7 Heaven project has -- has a section called "Federal
8 Activities," which include three agreements between the
9 Department of Defense and the applicant regarding the
10 wind turbines. And the most recent one is January 20
11 of 2023. So that would be -- that would be the
12 documents -- the document that I would reference.

13 We don't have to decide it today. But I just
14 wanted to alert the parties that we may want to
15 reference it.

16 JUDGE TOREM: All right. I'll take
17 a look at that, Mr. Aramburu. Thank you.

18 Ms. Voelckers, anything else for the Yakama Nation
19 today?

20 MS. VOELCKERS: Thank you, Your
21 Honor. I -- I just would really encourage all the
22 parties and Your Honor to reconsider putting all 6.4 --
23 I just did the math -- 6.4 estimated hours of wildlife
24 testimony on Friday. So I would ask -- continue to ask
25 that we have some reasonable middle ground here where

1 perhaps Mr. McIvor still goes on Wednesday or one of
2 the witnesses since Ms. Perlmutter's role was simply
3 for redirect on -- on Scout's witnesses.

4 And, you know, also just like to flag that
5 there -- while I certainly -- as the one who suggested
6 we have a half day on August 23rd, am not trying to
7 make everyone sit through a full day and then public
8 testimony, but I do want to flag that as also another
9 spot where one of the wildlife witnesses could be
10 slotted into.

11 So I remain very concerned about pushing at least
12 a full day's worth of testimony to Friday since
13 wildlife impacts really are, you know, a significant
14 portion of what's been raised in this adjudication.

15 JUDGE TOREM: I assure you,
16 Ms. Voelckers, I will do my best. And I have the same
17 time management fears that you do. So I'm going to
18 continue to just manage the best I can and according to
19 attorney and witness availability.

20 We'll reengage on that tomorrow morning at 8:30
21 and see where we can go from there, but I do share your
22 concerns, and I want to make sure we get all of the
23 evidence before the Council as part of the
24 adjudication. You've definitely been heard on that,
25 and I think all the other nodding heads on my screen

1 say, Yes, we hope this will all work out.

2 All right. It is now 3:36. We'll adjourn the
3 hearing for today and see everybody back on screen at
4 8:30 tomorrow. And I will get back to work on some of
5 the other pending motions and other things that you are
6 waiting to hear on.

7 Somewhere this morning in the course of things,
8 Mr. Aramburu, you should have seen come across the list
9 of the public -- or the list of the members of the
10 public's prefiled testimony that I designated as public
11 comment. So those witnesses, I don't think that you
12 had them listed in any case, but now that's formally
13 out there for you and the other parties to know. So
14 that's the one thing that developed overnight that got
15 published this morning.

16 All right. Thank you, all. We're going to go
17 dark here. We'll see you at 8:30 tomorrow morning.

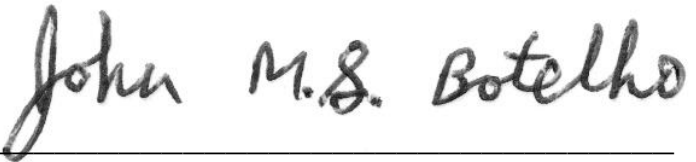
18 (Proceedings adjourned at
19 3:37 p.m.)
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4
5 That the foregoing proceedings were taken in my
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8 That I am not a relative, employee, attorney or counsel
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