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BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of Application No. 2006-02

**Desert Claim Wind Power Project**

**DESERT CLAIM'S REQUEST FOR  
PREEMPTION**

**I. Introduction**

The Applicant, Desert Claim Wind Power LLC ("Desert Claim"), hereby requests that the Council recommend preemption of local land use requirements and the issuance of a Site Certification Agreement authorizing construction and operation of the Desert Claim Project (the "Project"). The Council's rules require consideration of preemption requests along with the Application for Site Certification in its adjudicatory proceedings.

Accordingly, Desert Claim bases its request for preemption on the materials filed herewith, together with the testimony and evidence to be presented during the adjudicatory hearings to be held in this matter.

**II. Factual and Procedural Background**

In 2001, enXco, Inc. began evaluating potential sites in Kittitas County for a commercial scale wind project. Declaration of David Steeb ¶ 2 (hereinafter "Steeb Decl."). In January 2003, Desert Claim filed an application with Kittitas County seeking the

DESERT CLAIM'S  
REQUEST FOR PREEMPTION – 1

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1 approvals necessary to construct and operate the Project. Steeb Decl. ¶ 5. For more than  
2 two years, Desert Claim met with Kittitas County Community Development Services staff,  
3 and attended hearings and meetings of the Board of County Commissioners ("BOCC")  
4 regarding the Project. Steeb Decl. ¶ 6. In an effort to address concerns expressed during the  
5 County process, Desert Claim made numerous revisions to the Project and to the conditions  
6 and mitigation requirements outlined in a draft Development Agreement. *Id.* Nonetheless,  
7 in April 2005, the BOCC issued a final decision denying Desert Claim's application. Steeb  
8 Decl. ¶ 7. Desert Claim then made some additional changes to the Project to address the  
9 expressed concerns further, and filed an Application for Site Certification with this Council  
10 in November 2006. Following this Council's issuance of Order No. 826 recommending  
11 certification of the Kittitas Valley Wind Project, Desert Claim announced its intention to  
12 incorporate the setbacks and shadow flicker mitigation recommended by the Council in the  
13 Kittitas Valley proceedings. Desert Claim has since met with Kittitas County's Community  
14 Development Services, but has been unable to resolve one of the County's concerns about  
15 the Project.

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31 **A. Desert Claim's Application to Kittitas County**

32 In 2001, enXco, Inc., Desert Claim's parent corporation, began evaluating potential  
33 sites in Kittitas County for a commercial scale wind project. Steeb Decl. ¶ 2. At that time,  
34 under Kittitas County Ordinance 2001-12, wind projects were allowed as a conditional use  
35 in all Agricultural-20 ("Ag-20"), Forest and Range, Commercial Agriculture and  
36 Commercial Forest zoning districts. Steeb Decl. ¶ 2.

37 In late 2002, the County enacted Ordinance 2002-19, which established the wind  
38 power siting provisions now found in Kittitas County Code chapter 17.61A. According to  
39 the chapter 17.61A, a wind project may be permitted in any area zoned as Ag-20, Forest and  
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1 Range, Commercial Agriculture or Commercial Forest. KCC 17.61A.020(4). However, it  
2 requires a Wind Farm Resource Development Permit and Development Agreement with the  
3 County, a site-specific amendment to the Comprehensive Plan land use designation map,  
4 and a site-specific rezone of the project area. It is impossible to know whether a project at  
5 any particular location would be able to obtain these required approvals without filing an  
6 application and going through the County process to obtain a final decision.  
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12 After considering the wind resource, land availability, transmission access, potential  
13 environmental impacts and neighboring land uses, Desert Claim selected a location for its  
14 project approximately 8 miles northwest of Ellensburg. Steeb Decl. ¶ 2. At that point,  
15 Desert Claim considered whether to file an application with Kittitas County or with EFSEC.  
16 Looking at EFSEC's regulations, Desert Claim understood that, if it filed with EFSEC, the  
17 Council's proceedings would be stayed while Desert Claim tried to obtain County approvals.  
18 See WAC 463-28-030(1). However, if Desert Claim went through the County process and  
19 obtained County approvals, it would not need to obtain EFSEC's approval as well. Desert  
20 Claim concluded that the most efficient way to proceed was to file an application with  
21 Kittitas County first. If it did not obtain County approvals, it could then proceed with an  
22 application to EFSEC. Steeb Decl. ¶ 3.  
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34 On January 28, 2003, Desert Claim filed an application with Kittitas County to  
35 obtain the approvals necessary to construct and operate a 180 MW wind power project. The  
36 Project described in the original application to the County included 120 turbines spread out  
37 over a 5,237-acre project area. Steeb Decl. ¶ 5.  
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42 For more than two years, Desert Claim's application worked its way through the  
43 Kittitas County process. Steeb Decl. ¶ 6. The following is a summary of that process. A  
44 detailed chronology is also provided as **Exhibit 2** to the Steeb Declaration.  
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1 In April 2003, the County issued a SEPA Determination of Significance. Steeb  
2 Decl. Ex. 2. In December 2003, the County published a Draft EIS and in August 2004, the  
3 County published its Final EIS. *Id.*

4  
5  
6 In September 2004, Desert Claim worked with Community Development Services  
7 and the County attorney to prepare a draft Development Agreement, which the County then  
8 circulated to the public. Steeb Decl. Ex. 2. On October 25 and 26, 2004, the Kittitas County  
9 Planning Commission and the Kittitas County Board of County Commissioners ("BOCC")  
10 held joint hearings. *Id.* At the conclusion of those hearings, the Planning Commission  
11 recommended denial of Desert Claim's application. *Id.*

12  
13 For the next five and a half months, the BOCC held at least ten hearings and  
14 meetings to consider Desert Claim's application. Steeb Decl. ¶ 6, Ex. 2. In between them,  
15 Desert Claim worked with staff to revise the Development Agreement and try to address  
16 concerns that had been raised. Steeb Decl. ¶ 6. On March 9, 2005, the BOCC deliberated  
17 and voted to deny Desert Claim's application. Steeb Decl. ¶ 7. On April 5, 2005, more than  
18 twenty-six months after Desert Claim had filed its application with the County, the BOCC  
19 issued Findings of Facts and Resolution 2005-46 formally denying Desert Claim's  
20 application. *Id.*

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Desert Claim appealed to Superior Court, but the court upheld the BOCC's decision.  
*Desert Claim Wind Power, LLC v. Kittitas County*, No. 05-2-00243-6, slip. Op. at 11  
(Kittitas Cty. Super. Ct. Nov. 4, 2005). In doing so, the Superior Court noted that "Desert  
Claim made extraordinary efforts to satisfy two different boards of county commissioners  
over the process of the application it submitted to the County." *Id.* at 10-11.

1 **B. Revised Project Description and EFSEC Application**

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3 Following the BOCC's decision, Desert Claim considered whether additional  
4 changes could be made to the Project to address concerns that were raised during the County  
5 process. Steeb Decl. ¶ 9. After obtaining a lease on neighboring DNR land, Desert Claim  
6 was able to consolidate the Project and eliminate the eastern portion of the Project. *Id.*  
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9  
10 On November 6, 2006, Desert Claim submitted an Application for Site Certification  
11 ("the Application") to EFSEC. The Application described the Project, which consisted of 90  
12 turbines (2.0 MW capacity each), located on 4,783 acres of public and private land  
13 northwest of Ellensburg. **Exhibit 3** to the Steeb Declaration compares the Project Area to  
14 the area identified in the original application to Kittitas County.  
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17 The revised Project described in the November 2006 Application has several  
18 advantages over the original proposal:  
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- 21
- 22 • The Project Area has been consolidated from four separate parcels to one  
23 contiguous area.
  - 24 • The Project Area has been reduced from 5,237 acres to 4,783 acres.
  - 25 • The total number of turbines has been reduced.
  - 26 • There are only 32 non-participating residences located within 3,000 feet of a  
27 proposed turbine.
  - 28 • Sound from the Project will be no more than 50 dBA at adjacent properties.
  - 29 • Shadow flicker at adjacent residences has been substantially reduced. For  
30 those residences (if any) that are affected by perceptible shadow flicker,  
31 Desert Claim will stop the blades of the wind turbine that causes the flicker  
32 during those hours and conditions when shadow flicker occurs, or offer a  
33 voluntary waiver agreement to the landowners in lieu of stopping the turbine.  
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  - 35 • The Project will not result in any temporary or permanent impacts to  
36 wetlands, stream or their buffers.  
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- 1                   • Daytime white strobe lighting has been eliminated and nighttime red lighting  
2                   has been reduced.  
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4                   *See* Desert Claim Wind Power, Application for Site Certification (Nov. 2006).  
5

6                   Both before and after filing the Application, Desert Claim made efforts to  
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8                   communicate with Kittitas County about the changes it had made to the Project. In summer  
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10                  and fall 2005, Joe Fahrendorf (enXco Vice President Business Development) attempted to  
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12                  contact the Commissioners to discuss changes Desert Claim was considering to address the  
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14                  County's concerns, but his calls were not returned. Steeb Decl. Ex. 2. On October 24, 2006,  
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16                  Darin Huseby (enXco Development Director Northwest Region) met individually with each  
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18                  of the Commissioners to explain the changes made to the Project. Steeb Decl. Ex. 4 (Letter  
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20                  from D. Huseby to Commissioners dated Nov. 30, 2006). On November 6, 2006, David  
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22                  Steeb (Desert Claim Project Director) hand-delivered copies of the Application to each of  
23  
24                  the Commissioners and to the Director of Community Development Services. Steeb Decl.  
25  
26                  ¶ 11. Thereafter, Mr. Huseby attempted to contact each of the Commissioners again, but his  
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28                  calls were not returned. Steeb Decl. Ex. 4.  
29

30                  By letter dated December 5, 2006, Kittitas County Commissioner David Bowen  
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32                  explained the County's position that Desert Claim was required to submit an application to  
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34                  the County to seek the approvals required by the County's Wind Overly Ordinance. Steeb  
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36                  Decl. Ex. 5. Commissioner Bowen stated unequivocally that the County had "no interest" in  
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38                  "making a decision about the project" outside the process outlined by chapter 17.61A. *Id.*  
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40                  Nonetheless, he did offer to arrange a public meeting to discuss the Project changes with  
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42                  Desert Claim, but also emphasized that "[i]n that we do not have an application the Board  
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44                  will not, however, be able to make any decision on your project. As such, a meeting like  
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46                  this would be an information meeting only." *Id.* In light of the position set forth in this  
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1 letter, Desert Claim did not believe a public meeting would be productive and did not take  
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3 Commissioner Bowen up on his offer at that time.

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5 **C. EFSEC Land Use Consistency Process**

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7 On January 30, 2007, the Council held a Land Use Consistency Hearing in  
8  
9 Ellensburg regarding the Desert Claim Project. During the hearing, Desert Claim and  
10  
11 Kittitas County agreed that Desert Claim had not obtained the approvals required by Kittitas  
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13 County Code chapter 17.61A. The Council therefore found that the Project was not  
14  
15 consistent with the Kittitas County land use requirements in existence at the time Desert  
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17 Claim filed its application with the Council. *See* Council Order No. 825.

18  
19 Soon thereafter, Desert Claim filed a motion with the Council seeking a  
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21 determination that it had satisfied WAC 463-28-030(1)'s requirement that it make reasonable  
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23 efforts to cure the inconsistency with local land use requirements and, therefore, could  
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25 proceed to submit a request for preemption. The Council heard argument on the motion  
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27 during its Council meeting on April 10, 2007, and requested supplemental briefing on  
28  
29 certain issues. Desert Claim submitted additional briefing, and in doing so, also offered to  
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31 spend another thirty days meeting with the County to try to identify and resolve any County  
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33 concerns about the revised Project. *See* Desert Claim's Supplemental Briefing re WAC 463-  
34  
35 28-030(1) (April 17, 2007).

36  
37 Shortly before Desert Claim submitted its supplemental briefing, the Council issued  
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39 Order No. 826 recommending certification of the Kittitas Valley Wind Project on March 27,  
40  
41 2007. In its Supplemental Briefing, therefore, Desert Claim informed the Council that it  
42  
43 would be amending its Application to incorporate two mitigation measures that the Council  
44  
45 had included in the recommended K.V. Site Certification Agreement. Specifically, Desert  
46  
47 Claim indicated that it was re-configuring the Project to ensure that all turbines would be

1 located a distance from existing residences equal to at least four times the tip height of the  
2 turbine (4 x 414 feet = 1,656 feet). *See* Desert Claim Supplemental Briefing at 7.<sup>1</sup> Desert  
3 Claim also indicated that it would mitigate potential shadow flicker in the same manner  
4 specified in Article VII, Section I of the Kittitas Valley Site Certification Agreement. *Id.*  
5  
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7  
8 On May 8, 2007, the Council granted Desert Claim's motion and ruled that Desert  
9 Claim is not required to file an application with Kittitas County under Kittitas County's  
10 Wind Overlay Ordinance, KCC chapter 17.61A. *See* Council Order No. 830 at 7 (May 8,  
11 2007). The Council also sent a letter to the Kittitas County Commissioners encouraging  
12 them "to use your best efforts to work with the Applicant and to resolve as many issues as  
13 possible in advance of any adjudication." Letter from J. Luce to Commissioners dated May  
14 17, 2007.  
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17  
18 On May 17, 2007, Desert Claim met with Kittitas County Community Development  
19 Services. Steeb Decl. ¶ 13.<sup>2</sup> During the meeting, Community Development Services  
20 Director Darryl Piercy explained that he believed three issues led to the BOCC denial of  
21 Desert Claim's original application to the County: (1) inadequate mitigation of potential  
22 shadow flicker, (2) the Project area included several non-contiguous parcels, and  
23 (3) inadequate setbacks from existing residences. *Id.* Mr. Piercy said that the changes  
24 Desert Claim has made to the Project addressed the first two of these issues. However, Mr.  
25 Piercy indicated that Desert Claim's proposal to locate all turbines at least 1,656 feet (four  
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41 <sup>1</sup> Desert Claim is now evaluating the revised configuration in light of the Governor's  
42 decision last week regarding the K.V. Project.  
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44 <sup>2</sup> Desert Claim was represented at the meeting by Darin Huseby (enXco Development  
45 Director Northwest Region), David Steeb (Claim Project Director) and Karen McGaffey (attorney).  
46 Attending from Kittitas County Community Development Services were Darryl Piercy (Director),  
47 Allison Kimball (Assistant Director), Joanna Valencia (Planner) and Neil Caulkins (attorney).



1 times the turbine height) from existing residences was inadequate; he believed the BOCC  
2 would require a 2,500-foot setback from existing residences absent site-specific reasons  
3 justifying a lesser distance. *Id.* Mr. Piercy stated that he did not believe the County had any  
4 other concerns about the revised Project. *Id.*  
5  
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8  
9 Desert Claim appreciated Mr. Piercy's candor and his willingness to clearly state that  
10 he believes the County's only remaining concern about the Desert Claim Project is the  
11 setback from existing residences. Steeb Decl. ¶ 14. However, as Mr. Piercy acknowledged,  
12 the BOCC has the responsibility for making decisions under KCC chapter 17.61A. Desert  
13 Claim, therefore, requested to meet directly with the BOCC to hear the Commissioners'  
14 views about the Project first-hand. *Id.* In effect, Desert Claim asked to take the BOCC up  
15 on the offer that Commissioner Bowen had made back in December to hold a public meeting  
16 about the Project.  
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24 However, the BOCC denied Desert Claim's request. In a letter dated May 22, 2007,  
25 Mr. Piercy explained:  
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29 In our meeting you requested we consider the possibility of conducting a  
30 public meeting with the Board of County Commissioners, prior to  
31 application, to provide you with an opportunity to hear directly from the  
32 Commissioners any concerns or issues they may have in regards to your  
33 project. The Commissioners have considered your request but must  
34 respectfully decline. It is felt that to hold a public meeting where some  
35 measure of approval or rejection seems to be the goal may leave the  
36 community and applicant to believe the Commissioners have prejudged a  
37 specific project without full and fair opportunity for public participation.  
38 Such discussion is best conducted as part of the public hearing process on  
39 your application where the full details of the project are known and the  
40 Commissioners can take specific action consistent with the County code.  
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43 Steeb Decl. Ex. 6 (Letter from D. Piercy to D. Steeb and D. Huseby dated May 22, 2007).  
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1 Short of filing an application under the County's Wind Farm Overlay Ordinance,  
2 which this Council has already ruled is not required, there appears to be nothing further  
3  
4 Desert Claim can do to reach resolution of outstanding issues with the County.  
5  
6 Accordingly, Desert Claim now files this request for preemption.  
7

### 8 **III. RCW Chapter 80.50 Preempts Local Authority**

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10 Through RCW chapter 80.50, the Legislature established a one-stop process for  
11 permitting certain energy facilities. A Site Certification Agreement, recommended by  
12 EFSEC and approved by the Governor, authorizes the construction and operation of energy  
13 facilities covered by RCW chapter 80.50. The decision of EFSEC and the Governor takes  
14 precedent over local land use requirements.  
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20 The Legislature unequivocally expressed its intention to preempt local regulation of  
21 energy facilities that fall within the Council's jurisdiction:  
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24  
25 The state hereby preempts the regulation and certification of the location,  
26 construction, and operational conditions of certification of the energy  
27 facilities included under RCW 80.50.060 as now or hereafter amended.  
28

29 RCW 80.50.110(1). The Legislature further provided that a Site Certification Agreement  
30 would supersede and take the place of all state and local permits that would otherwise be  
31 required for these projects:  
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35 The issuance of a certification shall be in lieu of any permit, certificate or  
36 similar document required by any department, agency, division, bureau,  
37 commission, board, or political subdivision of this state.  
38

39 RCW 80.50.120.  
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42 In its recent decision regarding the Kittitas Valley Wind Project, the Council  
43 explained the tension between the Legislature's command in RCW chapter 80.50 and the  
44 wind power siting process created by ordinance in Kittitas County:  
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1 In an Application for Site Certification filed with EFSEC, site-specific details  
2 are not for a county or city to negotiate and impose, but are firmly within the  
3 jurisdictional realm of this Council. EFSEC is charged with unitary  
4 permitting authority for energy facilities seeking its site certification,  
5 allowing for a streamlined siting process. EFSEC's preemptive statutory  
6 power to certify and regulate the location, construction, and operation of  
7 energy facilities such as the proposed KVVPP simply cannot be usurped by  
8 local governments seeking to impose their own imprimatur on the siting  
9 process.

10  
11 Council Order No. 826 at 17.  
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13  
14 Despite the Legislature's clear intention to preempt local regulation, the Council has  
15 for many years had regulations that require an applicant to "request preemption" when a  
16 project is not consistent with all of the local land use requirements that otherwise apply to  
17 development of the project site. *See* WAC 463-28-040, -050, -060. Thus, Desert Claim  
18 requests preemption.  
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#### 23 **IV. EFSEC Should Recommend Preemption**

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25 Desert Claim will present testimony and other evidence during the Council's  
26 adjudicatory proceedings demonstrating that approval of the proposed Project is in the  
27 State's best interests, and that approval is justified under the Council's governing statute and  
28 regulations. The Council should, therefore, recommend that the Governor issue a Site  
29 Certification Agreement, preempting local land use regulation of the Project.  
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34 The Council's regulations require an applicant to submit a written request for  
35 preemption that addresses the following points:  
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40 (1) That the applicant has demonstrated a good faith effort to resolve the  
41 noncompliance issues.  
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43 (2) That the applicant and the local authorities are unable to reach an  
44 agreement which wills resolve the issues.  
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1 (3) That alternative locations which are within the same county and city  
2 have been reviewed and have been found unacceptable.

3  
4 (4) Interests of the state as delineated in RCW 80.50.010.

5  
6 WAC 463-28-040.<sup>3</sup> Desert Claim addresses these criteria in the following sections, and will  
7 present additional evidence regarding each of these factors during the adjudicatory  
8 proceedings.  
9

10  
11  
12 **A. Desert Claim has made good faith efforts to resolve inconsistency with local**  
13 **land use requirements.**  
14

15 As the Council is aware, Kittitas County has established a siting process for wind  
16 power projects. Under Kittitas County Code chapter 17.61A, a wind project may be  
17 permitted in any area zoned as Agricultural-20, Forest and Range, Commercial Agriculture  
18 or Commercial Forest. However, Chapter 17.61A requires an applicant to obtain a Wind  
19 Farm Development Permit and development agreement, a site-specific amendment to the  
20 Comprehensive Plan land use designation map, and a site-specific rezone. The process of  
21 obtaining these approvals amounts to a site-specific siting process, not a change in the  
22 general zoning requirements for the property at issue.  
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31 Desert Claim has made good faith efforts to obtain local land use approvals. In  
32 January 2003, Desert Claim submitted an application for these approvals to Kittitas County.  
33 Desert Claim then spent the next 26 months trying to obtain the required approvals. That  
34 lengthy process is discussed above and outlined in greater detail in a chronology attached as  
35 **Exhibit 2** to the Declaration of David Steeb. In summary, Desert Claim attended numerous  
36 hearings and meetings before the BOCC, provided requested information and repeatedly  
37 revised a proposed Development Agreement in an effort to address concerns about the  
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<sup>3</sup> The Council has formally proposed to repeal this regulatory requirement.

1 Project. The Kittitas County Superior Court found that Desert Claim made "extraordinary  
2 efforts to satisfy two different boards of county commissioners over the process of the  
3 application it submitted to the County." *Desert Claim Wind Power, LLC v. Kittitas County*,  
4 No. 05-2-00243-6, slip. op. at 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005).  
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7  
8 Following the BOCC's decision in 2005, Desert Claim made several changes to the  
9 Project in an effort to address concerns raised during the County process further, and those  
10 changes are reflected in the Application filed with this Council in November 2006. Since  
11 filing its Application, Desert Claim has made additional efforts to resolve the County's  
12 concerns about the revised Project. Most recently, in a meeting with Community  
13 Development Services on May 17, 2007, Director Darryl Piercy indicated that the County's  
14 only remaining concern about the Project is the length of the setback from existing  
15 residences. Steeb Decl. ¶ 12. Desert Claim proposes a 1,656-foot setback, based on the  
16 four-times-height standard EFSEC recommended in the Kittitas Valley proceedings, and  
17 Kittitas County apparently believes a 2,500 foot setback is appropriate.  
18  
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20  
21 Over the almost four and a half years since Desert Claim filed its initial application  
22 with the County, Desert Claim has attempted to resolve this setback issue. In January 2003,  
23 Desert Claim originally proposed a 1,000-foot setback from existing residences. Steeb Decl.  
24 ¶ 14. In 2004, Desert Claim submitted various iterations of a Draft Development Agreement  
25 to the County, each of which proposed a 1,000 foot setback. Initial comments by the BOCC  
26 about the proposed setback seemed to focus primarily on noise impacts, and at a BOCC  
27 hearing on January 25, 2005, all three commissioners seemed to find a 1,000 foot setback  
28 from the build line on adjacent properties to be acceptable. Commissioner Bowen stated it  
29 "doesn't cause me any grief." Commissioner Huston said that it was "an acceptable buffer"  
30 and that he had "no issue with that." Commissioner Crankovich said "I can agree with that."  
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1 Ex. 7 at 48-57. However, on January 27, 2005, County Attorney Jim Hurson advised the  
2 Commissioners that the turbines could be "visually dominant" from one-quarter to one-half  
3 mile away. Ex 8 at 47. Ultimately, in April 2005, the BOCC issued Resolution No. 2005-  
4 46, in which it concluded that "a minimum of 1/2 mile separation from wind turbines and  
5 residences would be necessary to reduce significant adverse impacts to moderate adverse  
6 impacts." In November 2006, Desert Claim filed its EFSEC Application, and configured  
7 turbines to ensure that noise levels would not exceed 50 dBA at the boundary line of  
8 adjoining properties where residences were or could be constructed. In this new  
9 configuration, the closest residence was 1,106 feet from a turbine. Following the Council's  
10 decision on the K.V. Project, Desert Claim reconfigured the Project to ensure that all  
11 turbines were at least 1,656 (four times tip height) from existing residences. Desert Claim is  
12 now evaluating the revised configuration in light of the Governor's decision last week  
13 regarding the K.V. Project.  
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15  
16 In attempting to resolve this disagreement, Desert Claim has acted in good faith.  
17 Likewise, Desert Claim does not question the good faith of the County. The parties simply  
18 disagree about the length of setback that is necessary and appropriate. Under RCW chapter  
19 80.50, EFSEC should resolve this siting issue.  
20

21  
22 In its recent decision regarding the Kittitas Valley Wind Project, this Council  
23 explained the "good faith effort" requirement as follows:  
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26 [T]he Council believes this requirement to mean that an Applicant must work  
27 through local government land use processes to resolve inconsistencies as  
28 extensively as possible, but not to the point where further efforts would be futile.  
29 Further reasonable compromises in position must be explored by both sides. Finally  
30 a good faith effort to resolve a land use consistency dispute need not result in actual  
31 resolution of all underlying matters.  
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34 Council Order No. 826 at 17-18.  
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DESERT CLAIM'S  
REQUEST FOR PREEMPTION – 14

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1 Desert Claim has demonstrated good faith efforts. WAC 463-28-040 does not  
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3 require an applicant to make every conceivable effort to cure local land use inconsistencies,  
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5 or to simply agree to whatever conditions a local jurisdiction proposes. Given the  
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7 Legislature's clear intent that EFSEC preempt local siting authority and that the EFSEC  
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9 process avoid duplication and delay in the siting process, the Council should not require  
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11 Desert Claim to make any further effort to obtain local land use approvals.

12 **B. Desert Claim has been unable to reach agreement with Kittitas County.**

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14 Desert Claim has applied for and been denied local land use approvals by the Kittitas  
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16 County Board of County Commissioners. Since the BOCC's April 2005 decision, Desert  
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18 Claim has made changes in the Project to try to address the concerns raised during the  
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20 County process. According to the County's Director of Community Development Services,  
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22 the changes made by Desert Claim have resolved all of the County's concerns other than the  
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24 setback from existing residences. As explained above, Desert Claim has been unable to  
25  
26 reach agreement with the County on that issue.

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29 **C. Alternative locations were considered and found to be either unavailable or**  
30 **inferior to the Project site.**

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32 WAC 463-28-040 requires a request for preemption to address the extent to which an  
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34 applicant has evaluated other sites in the county and found them to be unacceptable. As a  
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36 threshold matter, there are no areas in Kittitas County where wind power is an outright  
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38 permitted use. Wind power projects may be permitted on any lands, such as the Project  
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40 Area, zoned Ag-20, Forest and Range, Commercial Forest or Commercial Agriculture, but  
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42 only if the Board of County Commissioners grants the necessary approvals following an  
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44 extensive project siting process. KCC 17.61A. This is not a situation in which an applicant  
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46 has selected a site that is not zoned for wind project development despite the availability of  
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