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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.*

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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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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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- 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).
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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
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24 the Commissioners and to the Director of Community Development Services. Steeb Decl.
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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.
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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
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9 Ellensburg regarding the Desert Claim Project. During the hearing, Desert Claim and
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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
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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.

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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
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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-
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35 28-030(1) (April 17, 2007).

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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,
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41 2007. In its Supplemental Briefing, therefore, Desert Claim informed the Council that it
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43 would be amending its Application to incorporate two mitigation measures that the Council
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45 had included in the recommended K.V. Site Certification Agreement. Specifically, Desert
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47 Claim indicated that it was re-configuring the Project to ensure that all turbines would be

