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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

**MOTION FOR DETERMINATION
THAT DESERT CLAIM HAS
SATISFIED WAC 463-28-030(1)**

I. Introduction

The Applicant, Desert Claim Wind Power ("Desert Claim"), asks the Council to make a formal determination that it has made "all reasonable efforts to resolve the noncompliance" with local land use requirements, for purposes of WAC 462-28-030(1), and therefore, may proceed to file a written request for preemption. Prior to submitting its Application for Site Certification to this Council, Desert Claim applied for local land use approvals required under the Kittitas County Code. Desert Claim made all reasonable efforts to obtain those approvals, but after a more than two-year process, the Kittitas Board of County Commissioners denied its application. Desert Claim has satisfied WAC 462-28-030(1). It would not be reasonable to require Desert Claim to make further efforts to obtain approval at the county level.

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II. Background

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

In 2002, the County enacted Ordinance 2002-19, which established the wind power siting provisions now found in Kittitas County Code chapter 17.61A. According to the chapter 17.61A, a wind project may be permitted in any area zoned as Ag-20, Forest and Range, Commercial Agriculture or Commercial Forest. KCC 17.61A.020(4). However, it requires a Wind Farm Resource Development Permit and development agreement with the County, a site-specific amendment to the Comprehensive Plan land use designation map, and a site-specific rezone. It is impossible to know whether a project at any particular location would be able to obtain these required approvals without filing an application and going through the County process to obtain a final decision.

After considering the wind resource, land availability, transmission access, potential environmental impacts and neighboring land uses, Desert Claim selected a location for its project approximately 8 miles northwest of Ellensburg. Steeb Decl. ¶ 2. At that point, Desert Claim considered whether to file an application with Kittitas County or with EFSEC. Looking at EFSEC's regulations, Desert Claim understood that, if it filed with EFSEC, the Council's proceedings would be stayed while Desert Claim made reasonable efforts to obtain County land use approvals. *See* WAC 463-28-030(1). However, if Desert Claim went through the County process and obtained County approvals, it would not need to obtain EFSEC's approval as well. Desert Claim concluded that the most efficient way to proceed

1 was to file an application with Kittitas County first. If it did not obtain local approval, it
2 could then proceed with an application to EFSEC. Steeb Decl. ¶ 3.
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5 In January 2003, Desert Claim submitted an application to Kittitas County. Steeb
6 Decl. ¶ 5. As explained in more detail below, the County prepared an Environmental Impact
7 Statement (EIS), conducted public hearings, and ultimately denied Desert Claim's
8 application. Desert Claim then modified the Project to try to further address concerns raised
9 during the County process, and submitted an Application for Site Certification to this
10 Council in November 2006.
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17 **A. January 2003 Application to Kittitas County**
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19 Having decided to apply to Kittitas County for local land use approvals to construct
20 and operate its project, Desert Claim met with Community Development Services planning
21 staff. Based on the input from planning staff, Desert Claim finalized its project design in a
22 way it thought would address potential concerns. Steeb Decl. ¶ 4.
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26 On January 28, 2003, Desert Claim filed an application with Kittitas County to
27 obtain the approvals necessary to construct and operate a 180 MW wind power project. The
28 Project described in the original application to the County included 120 turbines spread out
29 over a 5,237-acre project area. Steeb Decl. ¶ 5. The original project area and turbine
30 configuration is shown in **Exhibit 1** to David Steeb's Declaration.
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36 For more than two years, Desert Claim's application worked its way through the
37 Kittitas County process. In April 2003, the County issued a SEPA Determination of
38 Significance. In December 2003, the County prepared and published a Draft EIS and in
39 August 2004, the County published its Final EIS.
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44 In September 2004, Desert Claim worked with the planning staff and County
45 attorney to prepare a "draft" development agreement, which the County then circulated to
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1 the public. On October 25 and 26, 2004, the Kittitas County Planning Commission and the
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3 Kittitas County Board of County Commissioners (BOCC) held joint hearings. At the
4
5 conclusion of those hearings, the Planning Commission recommended denial of Desert
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7 Claim's application. Steeb Decl. ¶ 6.

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9 For the next five and a half months, the BOCC held a series of hearings and meetings
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11 to consider Desert Claim's application. After hearings held on November 8, November 9
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13 and December 7, 2004, the BOCC asked Desert Claim to revise its draft development
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15 agreement. Steeb Decl. ¶ 6. On December 27, 2004, Desert Claim submitted a revised
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17 agreement. *Id.* The County Commissioners then indicated that further revisions might be
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19 necessary and deferred any decision until January 2005, when two new commissioners
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21 would take office. *Id.* At meetings held on January 11, 20 and 27, 2005, Desert Claim
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23 reported on additional modifications to the revised development agreement. *Id.* At a
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25 hearing held on February 15, 2005, Desert Claim presented another revised development
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27 agreement, which the BOCC decided to put out for public comment. *Id.* The BOCC then
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29 held public comment hearings on March 1 and 9, 2005. *Id.* At the conclusion of the March
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31 9, 2005, hearing, the BOCC deliberated and voted to deny Desert Claim's application. *Id.*
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33 On April 5, 2005, more than twenty-six months after Desert Claim had filed its application
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35 with the County, the BOCC issued Findings of Facts, and Resolution 2005-46 formally
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37 denying Desert Claim's application. *Id.*

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39 Desert Claim appealed the decision to Superior Court, but the court upheld the
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41 decision. *Desert Claim Wind Power, LLC v. Kittitas County*, No. 05-2-00243-6, slip. Op. at
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43 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005). In its decision, the Superior Court noted that
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45 "Desert Claim made extraordinary efforts to satisfy two different boards of county
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47 commissioners over the process of the application it submitted to the County." *Id.* at 10-11.

1 **B. November 2006 Application for Site Certification**

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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. ¶ 8. After obtaining a lease on neighboring DNR land, Desert Claim
6 was able to consolidate the Project on contiguous parcels and eliminate the western portion
7 of the Project. *Id.*
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12 On November 6, 2006, Desert Claim submitted an Application for Site Certification
13 ("the Application") to EFSEC. The Application describes the Project now proposed for
14 certification, which consists of 90 turbines (2.0 MW capacity each), located on 4,783 acres
15 of public and private land northwest of Ellensburg. **Exhibit 2** to the Steeb Affidavit
16 compares the Project Area to the area identified in the original application to Kittitas
17 County.
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25 The revised Project has several advantages over the original proposal:

- 26 • The Project Area has been consolidated from four separate parcels to one
27 contiguous area.
- 28 • The Project Area has been reduced from 5,237 acres to 4,783 acres.
- 29 • The total number of turbines has been reduced by 25% from 120 to 90.
- 30 • There are only 32 non-participating residences located within 3,000 feet of a
31 proposed turbine. Only seven of those are located less than 1,500 feet from a
32 proposed turbine and the closest is 1,106 feet from a proposed turbine.
- 33 • Sound from the Project will be no more than 50 dBA, the state nighttime
34 limit for residential properties, at the Project Area boundary.
- 35 • Shadow flicker at adjacent residences has been substantially reduced. For
36 those residences (if any) that are affected by perceptible shadow flicker,
37 Desert Claim will stop the blades of the wind turbine that causes the flicker
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1 during those hours and conditions when shadow flicker occurs, or offer a
2 voluntary waiver agreement o the landowners in lieu of stopping the turbine.
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- 4 • The Project will not result in any temporary or permanent impacts to
5 wetlands, stream or their buffers.
6
- 7 • Daytime white strobe lighting has been eliminated and nighttime red lighting
8 has been reduced to only 36 of the Project turbines.
9

10 *See* Desert Claim Wind Power, Application for Site Certification (Nov. 2006).
11

12 On January 30, 2007, EFSEC held a Land Use Consistency Hearing pursuant to
13 RCW 80.50.090 and WAC 463-26-050. At the conclusion of that hearing, the Council
14 determined that the Project is not consistent with the Kittitas County Code because Desert
15 Claim has not obtained the approvals required by KCC chapter 17.61A.
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18 At this time, Desert Claim seeks a determination that it has already satisfied WAC
19 463-28-030(1) by making reasonable efforts to obtain land use consistency, and therefore,
20 that Desert Claim may proceed to file a written request for preemption.
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23 **III. Argument**

24 Through RCW chapter 80.50, the Legislature established a one-stop process for
25 permitting certain energy facilities. A Site Certification Agreement (SCA), recommended
26 by EFSEC and approved by the Governor, authorizes the construction and operation of
27 energy facilities covered by RCW chapter 80.50. The decision of EFSEC and the Governor
28 takes precedent over local land use requirements. The SCA supersedes and takes the place
29 of all state and local permits that would otherwise be required for these projects. *See* RCW
30 80.50.120 ("The issuance of a certification shall be in lieu of any permit, certificate or
31 similar document required by any department, agency, division, bureau, commission, board,
32 or political subdivision of this state").
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1 Although the Legislature gave EFSEC and the Governor the ultimate permitting
2 authority over these energy facilities, it did not allow EFSEC to simply ignore local land use
3 requirements in making its recommendation to the Governor. Rather, the Legislature
4 required EFSEC to consider whether a proposed facility was consistent with local land use
5 requirements. In that regard, RCW 80.50.090(2) provides that "the council shall conduct a
6 public hearing to determine whether or not the proposed site is consistent and in compliance
7 with city, county, or regional land use plans or zoning ordinances."
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9 Significantly, EFSEC's governing statute does not require an applicant to make any
10 effort to cure an inconsistency with local land use requirements identified during the land
11 use hearing. On the contrary, the statute makes clear that EFSEC and the Governor have
12 final permitting authority regardless of consistency with local land use requirements. RCW
13 80.50.110(1) provides:
14

15 The state hereby preempts the regulation and certification of the location,
16 construction, and operational conditions of certification of the energy
17 facilities included under RCW 80.50.060 as now or hereafter amended.
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19 Nonetheless, for several years, the Council's regulations have required an applicant
20 to attempt to cure whatever inconsistency may exist between the proposed project and local
21 land use requirements. WAC 463-28-030 provides:
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23 If the council determines during the hearing required by RCW 80.50.090 that
24 the site of a proposed energy facility or any portion of a site is not consistent
25 and in compliance with land use plans or zoning ordinances in effect at the
26 date of the application, the following procedures shall be observed:
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28 (1) As a condition necessary to continue processing the application, it shall
29 be the responsibility of the applicant to make the necessary application for
30 change in, or permission under, such land use plans or zoning ordinances, and
31 make all reasonable efforts to resolve the noncompliance.
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1 (2) All council proceedings on the application for certification may be stayed
2 at the request of the applicant during the period when the plea for resolution
3 of noncompliance is being processed by local authorities.
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5 (3) The applicant shall submit regular reports to the council regarding the
6 status of negotiations with local authorities on noncompliance issues.¹
7

8 Desert Claim requests that the Council issue a formal determination that it has
9 satisfied 463-28-030(1). Subsection (1), which is set forth in full above, requires an
10 applicant "to make the necessary application for change in, or permission under, such land
11 use plans or zoning ordinance, and all reasonable efforts to resolve the noncompliance." In
12 this case, Desert Claim has clearly done so. In January 2003, Desert Claim filed an
13 application with Kittitas County to obtain necessary approvals, including site-specific
14 changes to the Comprehensive Plan and Zoning designations. During a County process that
15 took more than two years, Desert Claim made all reasonable efforts to obtain those
16 approvals. Indeed, the Kittitas County Superior Court found that Desert Claim made
17 "extraordinary efforts" to obtain those approvals. *Desert Claim Wind Power, LLC v. Kittitas*
18 *County*, No. 05-2-00243-6, slip. Op. at 11 (Kittitas Cty. Super. Ct. Nov. 4, 2005). Having
19 been unsuccessful, however, Desert Claim should be permitted to move forward with the
20 EFSEC process without further delay.
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34 During EFSEC's Land Use Hearing, Kittitas County nonetheless argued that Desert
35 Claim should be required to file a new application with the County because it has made
36 changes to the Project since the BOCC's 2005 decision. EFSEC should reject the County's
37 argument for several reasons.
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45 ¹ The Council is currently considering an amendment to these regulations that would make
46 them more closely track the relevant statutory provisions.
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1 First, the County's argument is factually incorrect. During EFSEC's Land Use
2 Hearing, County representatives claimed that Desert Claim is now proposing a new and
3 different project that occupies different properties and is located within a different zoning
4 district. These statements are inaccurate and/or misleading. Desert Claim continues to
5 propose a wind power project occupying roughly five thousand acres located northwest of
6 Ellensburg. Although Desert Claim has eliminated a portion of the original Project Area and
7 has added some other property to the Project, the Project Area remains in the same general
8 location. Two-thirds of the current Project Area was part of the original proposal, and all of
9 the revised Project Area falls within the same Comprehensive Plan "Rural" designation and
10 within the same "Ag-20" and "Forest and Range" zoning districts as the original project. No
11 reasonable person one would characterize Desert Claim's project proposal as an entirely new
12 and different project. To the contrary, a common theme expressed by those who spoke
13 against the Project during the Council's Initial Public Hearing and Land Use Hearing was
14 that the Project had already been denied at the local level. In fact, EFSEC's own SEPA
15 consultant has stated that the project Desert Claim proposed to the County was "essentially
16 the same as the one proposed to the Council (i.e. same technology, of similar size [i.e. not an
17 expansion], at similar location by an identical applicant)." Golder Associates, *Analysis in*
18 *Support of a SEPA Threshold Determination for the Desert Claim Wind Power Project 3*
19 (Feb. 2007).

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39 Second, the County's argument is not supported by the language of WAC 463-28-
40 030. Nothing in the language of the regulation requires a project developer to re-file with
41 the local land use authority every time it modifies its project proposal to address concerns
42 expressed by interested parties.
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1 Third, the County's interpretation of WAC 463-28-030 is contrary to the Council's
2 regulations, when read as a whole. Under Washington law, statutes and regulations are
3 properly interpreted by looking at the statute or regulation as a whole.² Read as a whole,
4 chapter 463-28 of the Council's regulations merely requires a project developer to make
5 "reasonable" and "good faith" efforts to cure inconsistencies with local land use
6 requirements. See 463-28-030(1) and 463-28-040(1). This Chapter does not require
7 repeated re-application to local authorities every time a project proposal is changed in any
8 way.
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10 Fourth, the County's interpretation is contrary to EFSEC's governing statute and the
11 Legislature's intent. In Washington, an agency's regulation must be interpreted in a manner
12 that is consistent with the agency's governing statute,³ and the Legislature's intent.⁴ In this
13 case, however, the County advocates an interpretation that is contrary to several aspects of
14 EFSEC's statute. Through EFSEC's governing statute, the Legislature plainly intended to
15 give EFSEC and the Governor, not local land use jurisdictions, the primary role of
16 permitting energy facilities. See RCW 80.50.110(1); RCW 80.50.120. In 2001, the
17 Legislature amended the EFSEC statute to require that its implementation "avoid costly
18 duplication in the siting process and ensure that decisions are made timely and without
19 unnecessary delay." RCW 80.50.010(5). Likewise, by amending the EFSEC statute in 2001
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38 ² *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64, 67 (1993); *Postema v.*
39 *Postema Enterp., Inc.*, 118 Wn. App. 185, 198 n.31, 72 P.3d 1122, 1129 (2003), *rev. denied*, 151
40 Wn.2d 1011, 89 P.3d 712 (2004).
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42 ³ *Roller v. Department of Labor & Indus.*, 128 Wash. App. 922, 927-28, 117 P.3d 385, 387
43 (2005); *Delagrave v. Employment Sec. Dept.*, 127 Wash. App. 596, 610, 111 P.3d 879, 886 (2005).
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45 ⁴ *Children's Hosp. & Med. Center v. Washington Dept. of Health*, 95 Wash. App. 858, 870,
46 975 P.2d 567, 575 (1999), *rev. denied*, 139 Wn.2d 1021, 994 P.2d 847 (2000).
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1 to allow renewable energy projects to "opt in" to the EFSEC process, the Legislature clearly
2 intended to provide a way that renewable energy projects could avoid permitting
3 proceedings in unfriendly local jurisdictions. The County's interpretation, which would
4 require a renewable project developer who has already spent more than two years going
5 through the County's process to restart the same process a second time, is contrary to each of
6 these policies embodied in EFSEC's governing statute.
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12 Fifth, the County's interpretation would be contrary to public policy. Washington
13 law requires regulations to be interpreted in way that furthers the underlying policies of the
14 agency's regulations and the governing statute.⁵ The County's interpretation is contrary to
15 public policy because it would discourage project developers from modifying their projects
16 to minimize or mitigate potential environmental impacts. This is contrary to the statute's
17 policy of using reasonable methods to minimize adverse effects on the environment, RCW
18 80.50.010, and is contrary to the State Environmental Policy Act's policy encouraging the
19 mitigation of environmental impacts, *see* RCW 43.21C.020, 43.21C.060. Indeed, it is
20 contrary to the Council's regulation encouraging negotiated resolution of issues identified
21 during the EFSEC process. *See* WAC 462-30-251 (providing for alternative dispute
22 resolution); WAC 462-30-252 (authorizing settlements).
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35 Sixth, the County's interpretation would lead to absurd results. Washington law
36 requires regulations to be interpreted in a rational, sensible way.⁶ Under the County's
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41 ⁵ *Maplewood Estate, Inc. v. Department of Labor & Indus.*, 104 Wash. App. 299, 305, 17
42 P.3d 621, 625 (2000).

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44 ⁶ *Mader v. Health Care Authority*, 149 Wash. 2d 458, 472, 70 P.3d 931, 937 (2003); *State v.*
45 *Reier*, 127 Wash. App. 753, 757-58, 112 P.3d 566, 569 (2005), *rev. denied*, 156 Wn.2d 1019, 132
46 P.3d 735 (2006).
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1 interpretation, however, an EFSEC applicant would be required to file a new local land use
2 application every time it made any change to its project proposal. Since the Council and the
3 Council's regulations encourage applicants to address concerns raised during the EFSEC
4 process, and to compromise and reach negotiated settlements with participants in the EFSEC
5 process, the County's interpretation would lead to the absurd result of requiring an applicant
6 to re-file at the local level every time it modified its project proposal. The Council has never
7 followed this approach in the past.
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14 Finally, the County's interpretation is contrary to the general principle that parties
15 should not be required to pursue processes that would be futile.⁷ As the Superior Court
16 found, Desert Claim made "extraordinary efforts" to obtain approval from the BOCC, yet
17 was ultimately unable to convince the BOCC to grant approval. EFSEC should not require
18 Desert Claim to repeat a lengthy local approval process that may well lead to the same
19 result.
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27 V. Conclusion

28 For the foregoing reasons, the Council should make a formal determination that
29 Desert Claim has made "all reasonable efforts to resolve the noncompliance" with local land
30 use requirements, for purposes of WAC 462-28-030(1), and therefore, may proceed to file a
31 written request for preemption.
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45 ⁷ *South Hollywood Hills Citizens Ass'n for Preserv. of Neighborhood Safety & Env't v. King*
46 *County*, 101 Wash. 2d 68, 74, 677 P.2d 114, 118 (1984); *Harrington v. Spokane County*, 128 Wash.
47 *App.* 202, 215, 114 P.3d 1233, 1241 (2005).

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MOTION FOR WAC 463-20-030(1)
DETERMINATION – 13

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