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## Transcript of Proceedings

*August 25, 2023*

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**Horse Heaven Wind Farm v.**

EF-210011

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Horse Heaven Wind Farm  
Verbatim Record of Proceedings, Adjudicative Hearing - August 25, 2023

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

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In the Matter of the )  
Application of: )  
 )  
 )  
Scout Clean Energy, LLC, for ) Docket No. EF-210011  
Horse Heaven Wind Farm, LLC, )  
 )  
 )  
Applicant. )

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ADJUDICATIVE HEARING  
VERBATIM RECORD OF PROCEEDINGS

VOLUME 8

August 25, 2023

Lacey, Washington

(CLOSED-RECORD SESSIONS REDACTED)

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25 Reporter. All other participants are  
appearing remotely via Microsoft Teams.

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1 BE IT REMEMBERED that on Friday,  
2 August 25, 2023, at 621 Woodland Square Loop Southeast,  
3 Lacey, Washington, at 8:30 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 continued, to wit:

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

9  
10 JUDGE TOREM: Good morning,  
11 everyone. It's 8:30, and it is Friday, August 25th.  
12 We're ready to have our housekeeping session for the  
13 Horse Heaven wind project, and then at 9:00, get  
14 started with our last adjudicative hearing session.

15 Applicant online this morning?

16 MR. McMAHAN: Yes, Your Honor.

17 MS. PERLMUTTER: Good morning, Your  
18 Honor.

19 JUDGE TOREM: Good morning.

20 And do we have Benton County this morning?

21 MS. FOSTER: Yes, Your Honor.

22 JUDGE TOREM: Is that Z. Foster?

23 MS. FOSTER: That is correct.

24 Mr. Harper is here as well.

25 JUDGE TOREM: All right. Good

1 morning.

2 Counsel for the environment.

3 Ms. Reyneveld, have you joined us?

4 Do you see her on there?

5 We'll come back around.

6 I saw Mr. Aramburu there.

7 And I see Ms. Voelckers. Good morning.

8 Hopefully we're going to -- we're just trying to  
9 look and see in the chat if she's there.

10 All right. Not yet. She'll catch up with us.  
11 Maybe she's working with Mr. McIvor this morning before  
12 his 9:00 testimony.

13 Ms. Voelckers, let me come to you first on  
14 scheduling and what Mr. Meninick's flexibility was and  
15 what Council Member Wallahee's status is.

16 MS. VOELCKERS: Thank you, Your  
17 Honor. Good morning.

18 We were not able to get ahold of Mr. Wallahee  
19 yesterday. I believe he was still with his family. So  
20 I will continue to update you if I am able to contact  
21 him this morning.

22 Mr. Meninick is confirmed to be available at 1,  
23 and we're -- possibly earlier, but I don't want to  
24 overcommit him. So he did confirm again yesterday that  
25 he is available at 1. Possibly at 11. But I hesitate

1 to give that firm answer.

2 JUDGE TOREM: Okay. Well, we can  
3 update that later and see how things are going for the  
4 rest of the day. Thanks, Ms. Voelckers.

5 As to Councilman Wallahee, if we're not able to  
6 get ahold of him, I would suggest we consider the same  
7 approach as for Lonnie Click, the fire chief, and adopt  
8 that testimony by stipulation and see where we go from  
9 there. If we do have a supplemental hearing in  
10 September, then we can see about rescheduling him. But  
11 if we don't have that, we clearly want to have his  
12 testimony submitted.

13 Does any party have a concern about taking  
14 Caseymac Wallahee's testimony by stipulation if that's  
15 the only way we can do it?

16 All right. Not seeing any concerns. And I would  
17 hope that Ms. Reyneveld would feel the same way.

18 Moving on to the next scheduling question.  
19 Mr. Aramburu, it appeared to me that Alaska Airlines  
20 let me know both those flights had left Anchorage on  
21 time this morning. So at some point in the next two to  
22 three hours, we should hear from Mr. Simon that he's on  
23 the ground in Seattle. So hopefully we'll get that  
24 done today too.

25 MR. ARAMBURU: Well, Murphy's Law

1 applies to EFSEC proceedings as well. Mr. Simon, when  
2 he got one of the 37 schedules we've had here and it  
3 didn't have his name on it, he thought he wasn't going  
4 to have to testify, submitted material, which I haven't  
5 seen, to the -- during the public conference session.

6 But I have made contact with him. I believe he is  
7 on the plane. I might like just a little extra time to  
8 speak with him. But I think we can make it work. But  
9 there was kind of a misstep at this end. So if you  
10 give us just a bit of patience with him, we'll work to  
11 get him on and avoid any further complications.

12 JUDGE TOREM: Okay. I imagine, once  
13 he's on the ground, you'll be able to reach out. We'll  
14 take an appropriate break as those flights come in.

15 MR. ARAMBURU: And perhaps I can ask  
16 the applicant: Do you have questions for Mr. Simon?

17 MR. McMAHAN: We will have  
18 questions, Mr. Aramburu. Not a lot of them, but we  
19 will have questions.

20 MR. ARAMBURU: Okay. Okay. Good.  
21 Well, we'll make him available, Mr. McMahan.

22 JUDGE TOREM: And Mr. Kobus, I  
23 imagine, has a flexible schedule today, Mr. McMahan?

24 MR. McMAHAN: I believe he is quite  
25 flexible today, yes.

1 JUDGE TOREM: Okay. And so I think  
2 Don McIvor at 9 will follow with likely Mr. Kobus, it  
3 sounds like. Then we'll see where we are, take a  
4 break, and have Mr. Aramburu check with Mr. Simon,  
5 whichever flight he's on, if he's on the ground. Then  
6 we'll see -- if he's not available right away, we'll go  
7 if Jerry Meninick is available, and then we can talk  
8 about adopting the Caseymac Wallahee testimony. But I  
9 think those are the remaining witnesses along with  
10 Mr. Simon's coming in. So hopefully people are  
11 available before the lunch hour. We could be done even  
12 with a late lunch, and then if we have to take people  
13 after, maybe we'll take an early lunch and wrap up.

14 That's what I see on the schedule.

15 Anybody have any other comments scheduling-wise?

16 MR. ARAMBURU: Judge Torem, we are  
17 continuing our efforts with -- with Mr. Click. We're  
18 continuing our efforts with regard to rebuttal  
19 testimony to some of the fire and lithium ion battery  
20 material. And so we're continuing with those efforts.  
21 But we're kept from intense involvement with that  
22 giving the hearings.

23 JUDGE TOREM: And I think,  
24 Mr. Aramburu, the Lonnie Click situation is unlikely to  
25 resolve to free him up for this. Let's get to the

1 exhibits, and then we can talk about waiving any  
2 objections that are -- if there are none, that we could  
3 just stipulate to the admission of that testimony.

4 So, Ms. Masengale had sent out an updated exhibit  
5 list. And unless there's something else we should take  
6 up, I'd like to just kind of shift to that page by page  
7 right now. It's the one that says updated August 24th,  
8 and it looks to be 29 pages as it displays on my  
9 screen.

10 Let's go through the applicant's first just by the  
11 numerical sequence, Mr. McMahan.

12 It looks like for Brynn Guthrie on the first page,  
13 those were admitted yesterday.

14 We have Jansen and Ragsdale, and those are,  
15 according to Ms. Masengale's notes and my recollection,  
16 all admitted.

17 And then we get down to Rahmig and Morgan Shook on  
18 Page 2. I don't think there was anything that was left  
19 out so far.

20 Page 3 looks clean to me.

21 Page 4.

22 Just kind of scrolling down and looking for  
23 anything that doesn't have a note as to its status.

24 So now on top of Page 7, and everything seems to  
25 be there.

1 We get to Greg Wendt, and as we shift into the  
2 cross-exam exhibits. Was that 1052\_X offered or used?  
3 I think it's one of those code indications that may or  
4 may not have been used in cross-examining Mr. Wendt.

5 Mr. McMahan, that's going to be a question to you.

6 MR. McMAHAN: We didn't use 1052,  
7 1053, or 1054, says the smarter side of the table here.

8 JUDGE TOREM: All right. So we're  
9 just going to mark those as not offered?

10 MR. McMAHAN: I believe. Yes. That  
11 is true. That is correct.

12 JUDGE TOREM: Okay. So I'll have  
13 Ms. Masengale update those if they were not offered.  
14 So 1052, -53, and -54 we don't have to worry about.

15 Then we get to 1056. Looks like 1057 was  
16 admitted. So we have 1056, 1058, -59, and 1060.

17 What does the smarter side of the table say on  
18 those, Mr. McMahan? 1056, -58, -59, and -60.

19 MR. McMAHAN: Yes, Your Honor, I  
20 believe we did bring in -- so looking at the list here  
21 for Greg Wendt indicates that was admitted.

22 JUDGE TOREM: Which number?

23 MR. McMAHAN: And it was -- I'm  
24 sorry. Yeah, 55 -- 1055\_X.

25 JUDGE TOREM: Yeah, that one's

1 admitted.

2 MR. McMAHAN: And then 1056\_X was  
3 e-mail correspondence that we also discussed that  
4 should also be admitted.

5 JUDGE TOREM: Mr. Harper, what were  
6 your notes looking like on Mr. Wendt's cross-exam?

7 MR. HARPER: You know, Your Honor,  
8 I'm actually trying to catch up on that. And I wonder  
9 if we could table that and I could come back to it.  
10 I'm not sure I have my notes on that where I can access  
11 them right now.

12 JUDGE TOREM: Okay. So we've got  
13 1056 unresolved.

14 Were there any others, Mr. McMahan, that we can  
15 resolve and have Ms. Masengale mark as admitted or not?  
16 I'm trying to pull up my notes from that first day.

17 MR. McMAHAN: Your Honor, I think  
18 everything else looks fine. I think that -- if I  
19 remember right, Mr. Harper, I think the comprehensive  
20 plan came in through the County.

21 MR. HARPER: Yeah, that is correct,  
22 Tim. I do remember that.

23 MR. McMAHAN: Yeah.

24 So other than that, there's 1056\_X. But the other  
25 two, meaning -55 and -57, are admitted. So I think

1 that's the only one, plus the comp plan, Your Honor.

2 MS. VOELCKERS: Sorry to jump in  
3 here, but -59 is a demonstrative video. I don't  
4 remember seeing that in the cross.

5 MR. McMAHAN: Thank you,  
6 Ms. Voelckers. Yes, we did not -- we did not end up  
7 putting that forward.

8 MR. HARPER: I agree with that too.

9 JUDGE TOREM: Yeah, so -56, question  
10 mark. -57 we know is admitted. I've got that in my  
11 notes as well. 58, never saw it. Well, 59 I never  
12 saw. The County comprehensive plan, I think as you  
13 just said, -58, there's a mutual agreement that was  
14 used. So -58 is admitted.

15 (Exhibit No. 1058\_X  
16 admitted.)

17  
18 JUDGE TOREM: 1060. We also have  
19 the Yakama Nation petition to intervene, so I'm not  
20 sure it matters one way or the other. But I don't  
21 remember that being bandied about at all on -- well,  
22 maybe.

23 Did -- did we show that to Ms. Lally?

24 MS. VOELCKERS: Your Honor, I don't  
25 believe we saw that. I think we saw the map, the map

1 exercise that applicant walked through, but I don't  
2 remember Ms. Lally being asked to comment on the  
3 petition and agree that it's more appropriate to just  
4 reference it as it is in the agreement.

5 JUDGE TOREM: Do you remember  
6 offering that or maybe just referencing it,  
7 Mr. McMahan? I don't remember that 1060 coming up.

8 MR. McMAHAN: No. It was  
9 referenced. I don't believe it was offered. And,  
10 frankly, it's in the record.

11 JUDGE TOREM: Okay. So really we  
12 just have a question of -- we know not offered for 59  
13 and 60. That leaves -- and 58 was admitted.

14 Ms. Masengale, are you catching all these  
15 descriptions?

16 MS. MASENGALE: Yes, Your Honor.  
17 What date do you want me to use for admitting 1058\_X?

18 JUDGE TOREM: I think unless there's  
19 another concern with that, we'd go back to the date the  
20 witness was presented. 'Cause this is probably just  
21 something we might have missed the note on. It was  
22 admitted on those dates, I'm sure. Or we could use  
23 that or we could use today as a housekeeping session.  
24 I'm not sure materially that it matters.

25 Parties, any -- you want to put it for today, or

1 do you want to...?

2 MR. HARPER: Well, no, I don't have  
3 a position on that, Your Honor. But I'm actually kind  
4 of confused. Because I'm not sure -- I'm not sure  
5 whether what I'm tracking here is the same as what I  
6 understood to be the status of the exhibit lists at the  
7 close of Mr. Wendt and Ms. Cooke's testimony. So I  
8 just want to point out that I'd like to have a little  
9 bit more time to kind of work with this and be sure I  
10 understand at least as to those two witnesses.

11 But on the point you just raised, Your Honor, I  
12 don't have a position on that.

13 JUDGE TOREM: Okay. Mr. Harper,  
14 which exhibits are you wanting a little more time to  
15 look at so just Ms. Masengale knows that we need to  
16 close -- close out on those?

17 MR. HARPER: Yeah, well, the  
18 exhibits associated with -- again, with Mr. Wendt and  
19 Ms. Cooke's testimony -- not necessarily the cross-exam  
20 exhibits, but I'm struggling on this -- this exhibit  
21 list to sort of confirm what I understood to be the  
22 exhibits that were admitted in his testimony in chief,  
23 or perhaps I'm struggling to recall how that matches  
24 with -- okay. I think it's becoming clear to me, Your  
25 Honor.

1           Yeah, I'm kind of getting mixed up between  
2 Ms. McClain's exhibits and Mr. Wendt's. If I could  
3 just have a little bit of time to kind of reconsider  
4 what we're discussing regarding, I guess, -50 -- -56.  
5 Yeah, maybe just -56 is the only one I'm really  
6 thinking of here, Your Honor. I guess also -52, -53,  
7 -54.

8                         JUDGE TOREM: Yeah. And remember,  
9 these are just the exhibits starting with a "1" that  
10 are --

11                        MR. HARPER: I understand. Yeah.

12                        JUDGE TOREM: Okay. Yeah, so  
13 we'll -- we'll get to the ones with a "2" here shortly.  
14 Okay. So -56 is still a question.

15           As I go down through the Lally exhibits, it was  
16 just 1060 that wasn't offered.

17           So let's switch now to Benton County's.

18           And it looks like Mr. Wendt's two exhibits were  
19 admitted. His reply testimony was admitted. And so  
20 was --

21                        MR. HARPER: Yeah.

22                        JUDGE TOREM: -- Ms. Cooke's  
23 testimony. We know about that.

24                        MR. HARPER: Yep.

25                        JUDGE TOREM: Yeah, it doesn't look

1 like there's any other questions. Because all the rest  
2 of the ones offered by the County were admitted, it  
3 looks like.

4 MR. HARPER: I think that's right  
5 too, Your Honor.

6 JUDGE TOREM: It does get a little  
7 burdensome, doesn't it, Mr. Harper, just trying to  
8 remember what happened eight days ago or something.  
9 It's like --

10 All right. And we get down to the McIvor  
11 testimony. We haven't had that yet today. So we'll  
12 scroll on past counsel for the environment's McIvor  
13 exhibits.

14 And then there's a few cross-exam exhibits. And  
15 if Ms. Reyneveld is on today, we'll see. Maybe she put  
16 down 8:45, so maybe she's joining us shortly. If we  
17 don't see her by about 8:55, we'll have to get someone  
18 to give her a call.

19 There she is.

20 MS. REYNEVELD: I'm here, Your  
21 Honor.

22 JUDGE TOREM: All right.

23 MS. REYNEVELD: I did put down 8:45.  
24 I apologize for my tardiness.

25 JUDGE TOREM: Well, you came in just

1 on time as we're going through the exhibit list. And  
2 we confirm that Mr. McIvor, I think, is at 9:00.

3 MS. REYNEVELD: That's correct.

4 JUDGE TOREM: So as we go through  
5 the exhibit list that Ms. Masengale sent out, the  
6 August 24th update, we're down to Page 14, looking at  
7 some of your cross-exam exhibits. And we've confirmed  
8 on Ms. Masengale's scorecard that 3017 through 3020  
9 were offered and admitted, and so was 3021. So I don't  
10 think there are any other questions until we have  
11 Mr. McIvor's direct exam exhibits.

12 MS. REYNEVELD: I believe that's  
13 correct.

14 JUDGE TOREM: All right. As we get  
15 to, Ms. Voelckers, your exhibits, we have those still  
16 waiting for Mr. Meninick and for Caseymac Wallahee.

17 Based on what we know, should we stipulate to the  
18 Wallahee exhibits being admitted, or do you want more  
19 time to consider, parties, if there's any objection to  
20 those in case he doesn't testify today?

21 Any party have an objection to Caseymac Wallahee's  
22 exhibits being admitted?

23 MR. McMAHAN: No objection from the  
24 applicant, Your Honor.

25 MR. HARPER: No.

1 JUDGE TOREM: Okay. So let's,  
2 Ms. Masengale, indicate that those were admitted by  
3 stipulation. And then I'll call out -- if Caseymac  
4 Wallahee does testify today, we can take out the "by  
5 stipulation," because he will have adopted them. But  
6 if we could note these as admitted by stipulation.

7 (Exhibit Nos.  
8 4007\_T\_Confidential and  
9 4007\_T\_Redacted admitted by  
10 stipulation.)

11  
12 JUDGE TOREM: Scrolling down. Erik  
13 Jansen and the wind power guidelines. 4017\_X. That  
14 one's not got a notation.

15 MS. VOELCKERS: Your Honor, we  
16 didn't end up -- just out of trying to get us back on  
17 schedule, I didn't get into those guidelines further  
18 with him. I think they've been cited by many parties,  
19 and, you know, prefer to have an exhibit number to cite  
20 to. But, you know, I think either way we're -- we all  
21 know which guidelines we're talking about. I just  
22 would ask that we consider still bringing them in as an  
23 exhibit for ease of reference.

24 JUDGE TOREM: Did they get sponsored  
25 by another witness elsewhere? That's my only concern.

1 I won't have a duplicate. But if there's not a  
2 duplicate, we can see if other parties have that.

3 Did anybody else put together an exhibit or  
4 somebody sponsor the DFW wind power guidelines? I  
5 don't remember for sure or not, but it sounds like no.

6 And I know they were referenced, Ms. Voelckers.

7 Do parties have any strong feelings about them  
8 being -- becoming an exhibit by stipulation as opposed  
9 to maybe it wasn't identified and offered during cross?

10 I think they are what they are. And they might be  
11 helpful to the Council. So I see nodding heads. So if  
12 there's objection, let me know. But otherwise, for  
13 4017\_X, Ms. Masengale, if you'll mark that as  
14 stipulated admitted, whatever words to that effect.

15 (Exhibit No. 4017\_X admitted  
16 by stipulation.)

17  
18 JUDGE TOREM: And I think that takes  
19 care of the Yakama Nation exhibits except for the  
20 Meninick, which we expect to be adopted later today.

21 Mr. Aramburu --

22 MR. HARPER: Can I interject --

23 JUDGE TOREM: Yes.

24 MR. HARPER: Can I interject there,  
25 Your Honor, and --

1 JUDGE TOREM: Yeah.

2 MR. HARPER: -- clean up the issue  
3 of -56?

4 Yeah, with a very friendly assist from Z. Foster,  
5 we don't think -56 was ever used and is out.

6 JUDGE TOREM: Okay. So we'll have  
7 1056\_X marked as not offered.

8 MR. HARPER: Correct.

9 JUDGE TOREM: Okay. Ms. Masengale  
10 will make a note of that.

11 Mr. Aramburu, your Exhibit 5000, I think, is a  
12 continually evolving exhibit -- right? -- that just  
13 says who you are and all of the exhibits that TCC is  
14 sponsoring. So that's never been ultimately offered.  
15 And since you're not a witness in the matter, do we  
16 just want to stipulate that 5000 and 5001 and, I guess,  
17 5002, if necessary, are there? Or are they just for  
18 helpers and they're not offered?

19 Tell me, Mr. Aramburu, how you'd like to treat  
20 those.

21 MR. ARAMBURU: I would like them in  
22 the record, please. So I would offer them.

23 JUDGE TOREM: Counsel, you've had a  
24 chance to look at these as they've come in, I think  
25 every time there's an amendment to the TCC witness

1 list. And they're kind of guidance as an overall  
2 cover. I don't think there's any other substantiative  
3 purpose, but they're helpful as a guide.

4 Ms. Perlmutter, your thoughts?

5 MS. PERLMUTTER: No, Your Honor, as  
6 long as they're fixed in time at some point, I don't  
7 see any issue with having that admitted for -- you  
8 know, for what it's worth.

9 JUDGE TOREM: Yeah. And I think if  
10 it's a scorecard -- Mr. Aramburu, do you anticipate any  
11 further updates to those?

12 MR. ARAMBURU: I do not.

13 JUDGE TOREM: Yeah, I think maybe I  
14 misspoke. 5000 and 5002 really haven't changed much.  
15 It's 5001 that has the eighth revision. So that  
16 Revised8, Ms. Perlmutter, seems to be where we're fixed  
17 in time as of Wednesday.

18 MS. PERLMUTTER: As long as that's  
19 the last one, then we have no objection.

20 JUDGE TOREM: Right. And if there  
21 is a ninth one, Mr. Aramburu, you'll file it with a  
22 motion to update the exhibit, and then we'll see if the  
23 other parties have any concerns. But, I think, sounds  
24 like substantively we're -- we've exhausted the numbers  
25 clicking up on that.

1           So, Ms. Masengale, if you'll mark 5000,  
2           5001\_Revised8, and 5002 as stipulated.

3                                 (Exhibit Nos. 5000,  
4                                 5001\_T\_Revised8, and 5002  
5                                 admitted by stipulation.)  
6

7                                 JUDGE TOREM:   And then we have a  
8           series of items that were stricken.

9           And as far as the Krupin exhibits, you can see  
10          that they've been marked on partially admitted or fully  
11          admitted on the ones that we talked about earlier this  
12          week.

13          And the same for Dave Sharp's testimony, being  
14          partially admitted.

15          And that takes us to the bottom of Page 21 of 29.

16          In the middle of Page 22, we have the Rich Simon  
17          exhibits still pending.  And if for some reason  
18          Murphy's Law applies today, Mr. Aramburu, we'll see  
19          what Murphy's stipulations look like and go from there.

20          Pam Minelli, I think, didn't appear to adopt her  
21          testimony.  And it wasn't stricken, because I thought  
22          she was on the board -- is that right, Mr. Aramburu? --  
23          of TCC or was otherwise in a representative capacity?

24                                 MR. ARAMBURU:  She is on the board.  
25          I haven't looked at that exhibit in some time.  We can

1 make a note about that.

2 JUDGE TOREM: I don't think we're  
3 going to call her -- call her to adopt it. Did any --

4 MR. ARAMBURU: No.

5 JUDGE TOREM: Did any party have a  
6 concern? If you want to take a look at Pam Minelli's  
7 items. I think she testified Wednesday night at the  
8 public comment hearing. And I don't have any problem  
9 with having this come in as a stipulated exhibit that  
10 would be essentially complementary to her public  
11 comment hearing testimony Wednesday.

12 Does anybody have a concern about stipulating this  
13 one's admission? And, again, the reason I didn't  
14 strike it or move it into public comment was because  
15 she is a leader of the community.

16 All right. So we'll have 5602 marked as a  
17 stipulated exhibit.

18 (Exhibit No. 5602\_T admitted  
19 by stipulation.)

20  
21 JUDGE TOREM: That may be the last  
22 one that has a "to be determined" designation but for  
23 the witnesses for today.

24 I think Ronnie Fletcher falls into the same  
25 category as Ms. Minelli. I remember her testimony.

1 Remind me, Mr. Aramburu, if you recall. She was on the  
2 board of -- or in some leadership capacity. 5623.

3 MR. ARAMBURU: I'm going to have to  
4 go back and -- back and check on this, Your Honor.  
5 We'll check on it and then have some response to you at  
6 our next session.

7 JUDGE TOREM: I'm just looking to  
8 see if I have her testimony handy. I do.

9 Ronnie Fletcher, she was a precinct officer,  
10 former vice-chair of the Benton County Republican  
11 Party. So I consider that as political leadership in  
12 the community. That's where her testimony is coming  
13 from. So that's my -- that's what I had highlighted  
14 and the reason that she wasn't pushed into the public  
15 comment.

16 Does anybody have a problem with the precinct  
17 officer and Republican party previous official  
18 Ms. Fletcher having her testimony come in as a  
19 stipulated piece?

20 All right. Not seeing any. So we'll just go  
21 ahead and mark that stipulated and take that one off  
22 your homework board, Mr. Aramburu. That's in.

23 (Exhibit No. 5623\_T admitted  
24 by stipulation.)

25 ////

1 MR. ARAMBURU: Okay. Good. Thank  
2 you.

3 JUDGE TOREM: Little less work.  
4 Nothing bad happened yet today.

5 And let's go on to Page 27, it looks like.

6 You can see the bottom of 26, we've got  
7 Mr. Click's testimony admitted by stipulation. And  
8 we're just waiting for his answers to the Chair's  
9 questions.

10 And as much as there's a carryover box for Linda  
11 Lehman from 26 to 27, that was admitted.

12 And it looks like that's it. We've got everything  
13 taken care of but for the witnesses for today, I think.

14 So, Ms. Voelckers --

15 MR. ARAMBURU: That looks good from  
16 our side.

17 JUDGE TOREM: Great.

18 We've got Caseymac Wallahee taken care of and  
19 stipulated, so that takes some pressure off, just in  
20 case you don't hear from him. It will just be a  
21 question of he has an opportunity if there is a  
22 supplemental hearing decided. So we'll see how the  
23 rest of today goes.

24 Any other exhibit questions?

25 All right.

1 MS. VOELCKERS: Your Honor.

2 JUDGE TOREM: Any other house- --  
3 yeah, Ms. Voelckers.

4 MS. VOELCKERS: I do have a  
5 follow-up question to our conversation on Monday about  
6 Ms. Ragdale -- Ragsdale and what she's sponsoring. So  
7 we appreciated the ability to have access to that  
8 SharePoint folder, but we're only able to locate the  
9 redacted version of Appendix R, I believe. And so I  
10 just -- if that's the version that -- I mean, it's not  
11 the applicant's version, because they provided it. But  
12 my concern is what version the Council and yourself  
13 will be using so that we're all citing to the same  
14 thing.

15 And I think, you know, we would request the  
16 unredacted version, of course, because we've signed  
17 confidentiality agreements and don't understand there  
18 to be any limitation on getting that copy. So I guess  
19 that's my first question, is whether we can get a  
20 confidential copy.

21 And then, secondly, who -- which version is  
22 everyone going to be looking at as we move forward?

23 JUDGE TOREM: Ms. Masengale, can you  
24 address the status of Appendix R? And --

25 MS. MASENGALE: Yes.

1 JUDGE TOREM: -- I'm sure we have  
2 the confidential version, because that's what was  
3 submitted.

4 Go ahead.

5 MS. MASENGALE: Yes. So just for  
6 clarification right now, I had shared the redacted  
7 version because Judge Torem was referencing the  
8 redacted version of that appendix. But the unredacted  
9 version is, of course, available. Excuse me.

10 But that was why the redacted version was the only  
11 one submitted thus far and shared, because that was  
12 what Judge Torem was referencing.

13 JUDGE TOREM: All right. How do we  
14 get a copy of that out to Ms. Voelckers and the other  
15 parties that is confidential? Clearly, the applicant  
16 would have it; they submitted it. But just to make  
17 sure everybody's on the same page as Ms. Voelckers  
18 suggests is a good idea.

19 MS. MASENGALE: I can upload the  
20 redacted version to the MFT as well. So the attorneys  
21 that have access to that, I'll upload that later today.

22 JUDGE TOREM: Perfect. Thank you.  
23 Ms. Voelckers, does that address what you needed?

24 MS. VOELCKERS: Thank you. That is  
25 very helpful.

1 I did have another housekeeping matter, but I  
2 think you were just asking for feedback on exhibits, so  
3 that's the -- that was my only feedback on exhibits.

4 Thank you for the clarification, Ms. Masengale.

5 JUDGE TOREM: Okay. What's the next  
6 housekeeping matter that Yakama Nation has today?

7 MS. VOELCKERS: Thank you, Your  
8 Honor. I think it would be helpful to understand some  
9 parameters of the post-hearings briefs as we move into  
10 our next couple weeks. And I did try to look at --  
11 there appears to be a wide variety of lengths and  
12 styles. I saw a 95-page applicant brief for Tesoro  
13 Savage.

14 So I -- I don't think we need 95 pages, but I do  
15 think that there's -- significant issues have been  
16 raised. And, you know, something along the lines of  
17 half that, maybe 45, 50 pages would be appropriate.

18 But wanted to get further guidance from you as  
19 well as seeing if we can establish maybe some common  
20 convention of citations, whether you and the Council  
21 will prefer citations to come in footnotes or in-line  
22 with the briefings.

23 Since I know we're not a formal necessarily like a  
24 superior court, but a lot of us are used to working in  
25 those forms with in-line citations and so would

1 appreciate some more guidance on how you would like the  
2 parties to format our briefs so that we can be  
3 responsive that way.

4 And I know we're not quite done with the hearing  
5 yet, but as we, you know, move into the next couple  
6 weeks, would appreciate that guidance.

7 JUDGE TOREM: Yeah, let me circle  
8 back with the parties toward the end of today's  
9 hearing. I want to check with the court reporter as to  
10 timing on transcripts. I know that recordings are  
11 going up rather quickly, but I think it's traditional  
12 to work from transcripts for pages to cite to.

13 Much as you might review the testimony provided,  
14 citing to a time and minute on the video, you can do  
15 that if you want in line with the transcript as well,  
16 particularly if you think viewing it is going to be  
17 better for the Council or better for ultimate review by  
18 the governor or the supreme court for that matter.

19 So if there are particularly good spots in the  
20 video you think are better than just reading the  
21 transcript, feel free to use that. But I want to have  
22 you figure out the date that post-hearing briefs are  
23 due once the transcripts are out.

24 And I don't know if it's transcript plus 30 days  
25 or transcript plus some other, you know, X or minus

1 date. But think about that, and we can figure that  
2 into also the Council's deliberation dates that we were  
3 trying to sort out ballpark of when those might be set  
4 and available.

5 Clearly, you're going to have the whole month of  
6 September before the Council does anything with this.  
7 And transcripts should -- I'm guessing 30 days. But  
8 whether it's measured from today or each individual  
9 day, that's something we're looking at the contract to  
10 make sure and make sure John's not overburdened  
11 cranking these out for you.

12 All right. Any other -- that was a good point to  
13 bring up, Ms. Voelckers. It was on my list for later,  
14 but that gave me a lot more detail to know the  
15 questions the parties are thinking about.

16 Any other party want to tell me what else we need  
17 to resolve on post-hearing briefs besides the page  
18 length, citation style, and a due date?

19 MR. ARAMBURU: I haven't given this  
20 a lot of thought. The -- most of the court system now  
21 has moved to words instead of pages, so -- which tends  
22 to impact the length of footnotes. That was the reason  
23 that the supreme court decided to change things to  
24 words. So I don't have a recommendation about that,  
25 but that's an alternate way to do it that's being done

1 by the judicial system.

2 And the -- the briefing -- and I haven't given  
3 this a whole lot of thought either. It may be that the  
4 briefs will want to contain links to the record that  
5 can be used. And I do -- I do think that we will, as  
6 we discussed briefly yesterday, want to have appendices  
7 particularly of some of the visual materials, on  
8 oversize material. So I don't know that we need to  
9 resolve that today, but that has been a particular  
10 concern that we have about making sure that the Council  
11 has sufficient materials on the visual situation.

12 So I don't know we need to resolve that now, but  
13 that is -- that is a concern that we have.

14 JUDGE TOREM: And I want to make  
15 sure I interpret correctly, Mr. Aramburu. It's not the  
16 appendices that would be anything new, but a larger  
17 version of any exhibit that's already been admitted,  
18 correct?

19 MR. ARAMBURU: That's correct. We  
20 discussed that yesterday, and we had -- we had hoped,  
21 before the hearings became so compressed, that we might  
22 be able to get larger paper documents out to Council  
23 members. And we didn't -- just did not have a chance  
24 to do that.

25 But -- but the appendices that we would have in

1 mind at least would not be any new material but would  
2 include perhaps larger sizes of some of the key  
3 exhibits, so -- and I haven't given this a whole lot of  
4 thought and probably want to condense my thoughts on  
5 briefing.

6 JUDGE TOREM: Okay. Come back to  
7 me, and if parties can think about that. I think if an  
8 exhibit's already been admitted and it's simply the  
9 same exhibit, submitting new material, I think, trying  
10 to sneak something in, in the back door, if it's that  
11 way, I think a party's going to file a motion to strike  
12 and motion for sanctions.

13 And under CR 11, we don't want to be expanding the  
14 record without an explicit motion. So if it's coming  
15 in as a larger exhibit from anybody demonstrative,  
16 which I think anybody could -- could find something  
17 useful -- if anybody was doing that, be careful. Make  
18 sure it's exactly the exhibit and exactly an expansion  
19 of that with no further comments and no further  
20 information. Because I will entertain those motions to  
21 strike, and I will. And if it's not exactly the same,  
22 it's going to violate, I think, our common  
23 understanding of what's admissible.

24 And if there's going to be a larger exhibit, send  
25 it in to the EFSEC offices. And then if individual

1 Council members don't make use of it, it'll simply be  
2 'cause they think that they've got what they need on  
3 the screen. But I like the opportunity for them to  
4 have it available.

5 Some of us will be more paper-oriented and hang it  
6 on the wall, and others it won't work for,  
7 Mr. Aramburu. So no guarantee that the individual  
8 Council members will actually take the paper and the  
9 supplemental extra size. We'll just see how each one  
10 works, but I like the opportunity.

11 All right. Any other housekeeping items?

12 MR. ARAMBURU: On that, I am  
13 presuming that we would have paper copies of the brief  
14 for those Council members that wanted them, or perhaps  
15 all of them get a paper copy. I don't know that  
16 lawyers need the paper copies, but perhaps Council  
17 members are more comfortable with something they can  
18 stick in their files and take home. So that's another  
19 question to be resolved.

20 JUDGE TOREM: Yeah, I think the  
21 Council here has been pretty much paperless for a  
22 while. If I get a request -- I'll check with the  
23 Council members, Mr. Aramburu. I don't want any  
24 impacts on the environment unnecessarily, as we talk  
25 particularly about renewable energy. So we'll just, I

1 think, rely on electrons unless I get a specific  
2 request.

3 Again, on the briefs, people have been reading the  
4 prefiled testimony as it is. I think they can read the  
5 briefs as well. But if I get -- I'll survey the  
6 Council members, and if there's a request for paper,  
7 I'll let you know how many to send in.

8 MR. ARAMBURU: Thank you.

9 JUDGE TOREM: All right. But as  
10 long as we're of the understanding everything's going  
11 to come in electronically, we'll go from there.

12 All right. I think we're ready now at 9:07 to  
13 turn to the formal last day of our hearing.

14 (Witness Donald McIvor  
15 appearing remotely.)  
16

17 JUDGE TOREM: I see that we have our  
18 witness Don McIvor present. And, Mr. McIvor, we'll get  
19 to you as soon as we do the formal preliminaries,  
20 including a roll call of the Council members and a roll  
21 call of our parties formally on the record.

22 So good morning, everybody. Good morning, Council  
23 members. It is Friday, April 25th. And rarely has it  
24 been a TGIF like today must feel. But it is our last  
25 Day 8 of 8 for the hearing in the Horse Heaven wind

1 farm project.

2 I'm going to ask that staff take the Council roll.

3 MS. GRANTHAM: EFSEC Chair.

4 COUNCIL CHAIR DREW: Kathleen Drew,  
5 here.

6 MS. GRANTHAM: Department of  
7 Commerce.

8 COUNCIL MEMBER OSBORNE: Elizabeth  
9 Osborne, present.

10 MS. GRANTHAM: Department of  
11 Ecology.

12 COUNCIL MEMBER LEVITT: Eli Levitt,  
13 here.

14 MS. GRANTHAM: Department of Fish  
15 and Wildlife.

16 COUNCIL MEMBER LIVINGSTON: Mike  
17 Livingston, present.

18 MS. GRANTHAM: Department of Natural  
19 Resources.

20 JUDGE TOREM: Mr. Young may just  
21 have stepped away. I think he was in --

22 COUNCIL MEMBER YOUNG: Yeah, sorry.  
23 The audio cut out here briefly, Your Honor.

24 Lenny Young for Department of Natural Resources,  
25 present.

1 MS. GRANTHAM: Thank you.  
2 Utilities and Transportation Commission.

3 COUNCIL MEMBER BREWSTER: Stacey  
4 Brewster, present.

5 MS. GRANTHAM: For the Horse Heaven  
6 project: Department of Agriculture.  
7 And Benton County.

8 JUDGE TOREM: Did we see  
9 Mr. Brost --

10 MS. GRANTHAM: I did not.

11 JUDGE TOREM: -- today?

12 MS. GRANTHAM: I have not seen him  
13 yet this morning.

14 JUDGE TOREM: All right. We'll keep  
15 an eye out for when Mr. Brost joins us.

16 So it sounds like we have the Chair plus five  
17 today.

18 For those Council members present, last chance for  
19 me to put on the record any ex parte contacts that may  
20 have occurred through the course of the hearing.

21 Anything to disclose? I'm seeing some shaking  
22 heads to the negative.

23 All right. Well, maybe doing this stuff virtually  
24 precludes a lot of ex parte contacts, so that's a  
25 different experience than I've had before, but maybe a

1 good positive outcome of this.

2 Ms. Reyneveld, we're going to take your witness  
3 today, Mr. McIvor. And I'm going to have to scroll to  
4 the exhibit list to see what he's sponsoring and then  
5 might want to take a look with you as to any chance  
6 we're going to be into closed session today -- I think  
7 it's rather high -- so we can have staff build out the  
8 list of folks that need to get from the public session  
9 into the closed record.

10 So I see from Mr. McIvor, he's got response  
11 testimony starting with 3001. We have both the  
12 confidential and the redacted version. We have 3002, a  
13 cumulative effects study. 3003, another study. 3004  
14 and 3005, some additional studies. 3006, -7, -8, -9,  
15 and -10. These are all on Page 11 and 12 of your  
16 exhibit list. 3011, 3012, 3013, -14, and -15. And  
17 3016.

18 Parties, were there other cross-exam exhibits for  
19 Mr. McIvor that can easily be identified?

20 MS. PERLMUTTER: I don't anticipate  
21 any, Your Honor.

22 JUDGE TOREM: Did any other party  
23 have cross-exam exhibits specifically for Mr. McIvor  
24 that haven't already been admitted?

25 All right. I'm not seeing any.





1 for the environment on the project's impacts to  
2 wildlife and habitat and recommendations to mitigate or  
3 avoid those impacts.

4 JUDGE TOREM: All right. With that  
5 introduction, Ms. Perlmutter, I'll let you start with  
6 the cross-exam. Then we'll turn to Ms. Voelckers.

7 And, Mr. McIvor, just so you can anticipate, we  
8 may go back and forth with the lawyers a little bit,  
9 and then I'll call on the Chair of the Council and all  
10 the Council members to see if they have questions. And  
11 I think there's a pretty high likelihood there's a few  
12 Council members that will.

13 THE WITNESS: Okay. Your Honor, you  
14 offered an opportunity at this juncture to -- for me to  
15 offer a correction. And I would have a very small one,  
16 but I think an important one, that I would like to get  
17 on the record. And that is in my supplemental  
18 responsive testimony. That's Exhibit 3016, I believe.

19 On the first page of that testimony and my first  
20 answer, I indicated that the Region 6 U.S. Fish and  
21 Wildlife Service requires a two-mile buffer around  
22 ferruginous hawk nests. And it actually is a one-mile  
23 buffer. Minor math error on my part, transferring from  
24 kilometers to miles. But I think that's an important  
25 point to note as we get into this.

1 JUDGE TOREM: All right. Well, I'm  
2 glad we're not using the metric system today, but saves  
3 public math. And I'll hand you over to Ms. Perlmutter.

4 **THE WITNESS: Thank you.**

5 MS. PERLMUTTER: Thanks so much,  
6 Your Honor.

7  
8 CROSS-EXAMINATION

9 BY MS. PERLMUTTER:

10 Q Mr. McIvor, I was planning on grilling you on the  
11 difference between radius and diameter, but you've  
12 completely shut off that line of questioning.

13 My name is Willa Perlmutter, and I represent the  
14 applicant in this matter. And as I know you expect,  
15 I've got some questions to ask you this morning.

16 MS. PERLMUTTER: And, Ms. Masengale,  
17 can we please call up Exhibit 3001?

18 MS. MASENGALE: Yes. And did you  
19 want to show the redacted version right now, or do we  
20 need to go into a closed session to show the unredacted  
21 version?

22 MS. PERLMUTTER: The redaction --  
23 the redacted version is fine.

24 MS. MASENGALE: Thank you.

25 MS. PERLMUTTER: Thanks so much.

1 Q (By Ms. Perlmutter) Mr. McIvor, I'd like to start  
2 actually by talking about some things that we can agree  
3 on. And so we're looking at your initial testimony  
4 that you provided.

5 And specifically I'd like to look at Page 3.

6 Do you have a copy of that with you?

7 **A I do.**

8 Q Awesome.

9 **A I also see it on my screen. Yes.**

10 Q Great.

11 And really it's up for other people's benefit as  
12 much as for yours.

13 I'd just like to turn to Page 3.

14 **A Mm-hmm.**

15 Q And confirm with me, please, that on Page 3, you  
16 indicate that for this particular project, the  
17 applicant exceeded the usual effort for wind facilities  
18 to document that use at the site; is that right?

19 **A I would say that's a fair characterization, yes. I**  
20 **made that statement and still agree with it.**

21 Q And you also said that the applicant concluded that the  
22 local breeding population is small.

23 You agree with that, don't you?

24 **A Referring specifically to bats and hoary and**  
25 **silver-haired, yes.**

1 Q Understood. Thank you for the -- thanks for the -- for  
2 narrowing me in on that.

3 And you also agreed with the applicant's  
4 conclusion that we're mostly talking about migratory  
5 bats at the site; is that right?

6 **A Yes.**

7 Q And on Page 4, you noted that the applicant arrived at  
8 a reasonable estimate of the project's impacts on bats;  
9 is that right?

10 **A Eventually, yes.**

11 Q Okay. And you did specifically note that the  
12 applicant's estimate, in your opinion, constituted a  
13 proper application of the best available data; is that  
14 right?

15 **A Yes.**

16 Q Okay. And on Page 6, you note that the applicant --  
17 that the application accurately quantifies the  
18 project's potential impacts to avifauna; is that right?

19 **A Yes. I would say it's potentially exclusive of**  
20 **ferruginous hawk, but more broadly the avifauna in**  
21 **general, yes.**

22 Q And so can you educate me? Because I'm -- I'm a lawyer  
23 and not a scientist.

24 What is -- when you talk about avifauna, what does  
25 that mean?

1 **A Birds. It's -- it's just a fancy word for "birds."**  
2 **It's wildlife, but specifically the bird portion of the**  
3 **wildlife.**

4 Q Thank you.

5 I'm planning on using that at the dinner table  
6 tonight, for the record.

7 You also on Page 6 say that the analysis of -- the  
8 project's analysis of the impacts to birds is, quote,  
9 "well-informed by a greater than typical" -- "by  
10 greater than typical efforts to collect bird use  
11 activity data."

12 Do you still -- you still agree with that  
13 statement?

14 **A Yes, I do.**

15 Q And on Page 6, you also note that there's no reason to  
16 expect that the project will have a disproportionate  
17 impact on general avifauna.

18 And I know you're excluding bats from that --  
19 sorry. You're excluding ferruginous hawks from that.  
20 But otherwise, you agree with that statement?

21 **A Yes, I do.**

22 Q And on Page 7, you note that the revised application  
23 includes adequate safeguards and appropriate mitigation  
24 for general avifauna.

25 Again, you're still good with that?

1 **A Yes, I am.**

2 Q On the same page, you note that the applicant  
3 accurately quantified the project's potential impact on  
4 ferruginous hawks.

5 That statement still holds?

6 **A I would -- I would -- accurately quantifies potential**  
7 **impacts. That was the -- the ques- -- on ferruginous**  
8 **hawks. That was your question. Am I correct?**

9 Q Yes, it is.

10 **A I -- I would -- I would say that -- no. Based on what**  
11 **I have learned through the process of discovery that**  
12 **we've all been going through here, I think there are**  
13 **some gaps in the quantification of impacts or potential**  
14 **impacts to ferruginous hawks --**

15 Q But --

16 **A -- through this project.**

17 Q My apology.

18 **A No, go ahead.**

19 Q And I'll do my best not to interrupt you. It's a bad  
20 habit I have.

21 But certainly as of July 5th, you noted that, in  
22 your opinion, the applicant accurately quantified the  
23 potential impacts on ferruginous hawks; is that right?

24 **A That -- that was my belief at that time, yes.**

25 Q Okay. We'll get to the change shortly, as you might

1       imagine.

2               And you've noted in -- on Page 7 of your initial  
3       testimony, you've noted other threats to the  
4       ferruginous hawk. And you talk about -- you talk about  
5       impacts or threats extrinsic to the proposed project.

6               What do you mean by that?

7       **A Well, the ferruginous hawks situation, its population**  
8       **status, is the product of a wide range of negative**  
9       **influences. And significant number of those influences**  
10      **occur range-wide. So they are not limited to the**  
11      **project footprint, whether it was built or not.**

12              And there are things like, as others have  
13      enumerated through this process, but things like  
14      decline in its prey, things like loss of habitat,  
15      fragmentation of habitat, collisions, shooting,  
16      poisoning. There are a number of factors that have  
17      been identified that occurred in other parts of its  
18      range.

19      **Q** So let me say this to you, and you tell me if I'm  
20      getting this right.

21              What you just described is kind of a scientific  
22      way of saying that these birds have lots of threats,  
23      things that have nothing to do with the project; is  
24      that right?

25      **A Yeah, that's true, but I would -- I would also say that**

1 collision with wind towers has been identified as one  
2 of the threats and one of the sources of mortality for  
3 these birds.

4 Q Can you quantify that?

5 A Well, in the state of Washington, I think roughly  
6 starting with the date of when wind energy facilities  
7 started being implemented up until today, there have  
8 been, I believe, four mortalities associated with wind  
9 energy facilities. And I believe the number, if you  
10 cast the geographic net a little bit wider, the  
11 Columbia Plateau ecoregion, I think the number is  
12 eight --

13 Q And --

14 A -- mortalities.

15 Q Going back how far again?

16 A Roughly 2008, 2010, somewhere in there, I believe.

17 Q And you refer -- on Page 7, you talk about disturbance  
18 as being one of the threats to the ferruginous hawks.

19 What do you mean by that?

20 A Right. A good question.

21 The bird is -- is known to be sensitive to human  
22 disturbance. And so it appears that it demonstrates  
23 some avoidance behavior in the presence of human  
24 disturbance. And so it's one of the concerns that's  
25 associated with any project that's implemented on the

1 landscape in the hawks' range.

2 So at some -- some point, you know, we see these  
3 hawks out foraging at least, and I'll make the  
4 distinction between foraging and nesting.

5 So we see these hawks out foraging where there  
6 might be single-lane farm access roads or back-country  
7 gravel roads. That doesn't seem, just subjectively, to  
8 present a significant obstacle for the birds or  
9 something. It's a stimulus that they want to avoid.

10 But at some point, if you get enough human  
11 disturbance, enough construction, enough activity, the  
12 birds do start avoiding the landscapes and changing  
13 their behavior.

14 Q So would that include things like residential  
15 development?

16 A It certainly could, yes.

17 Q And just so I'm clear, when you talk about avoidance,  
18 you're talking about -- again, to put it in lay terms,  
19 would I be right if I thought about this as things that  
20 the birds don't like are happening on the ground, so  
21 they go someplace else? They fly -- they use other  
22 flyways and things?

23 A That's -- that a very good, succinct description, yes.

24 Q At Page 9 of your initial testimony, you are talking  
25 specifically about artificial nests.

1 A Mm-hmm.

2 Q And, again, if I'm right, you said that the applicant's  
3 artificial nest effort could help bolster regional  
4 populations; is that right?

5 A Yes. It certainly could.

6 Could I offer a little bit of insight into that, a  
7 little bit of nuance?

8 Q Sure.

9 A Well, I think this is a very interesting opportunity  
10 that the applicant has put forward. And it's not --  
11 here's this word again -- novel in the sense that there  
12 has been an effort in the state to place artificial  
13 nest platforms for ferruginous hawk. So this would not  
14 be the first attempt.

15 What is not apparent from my reading of the  
16 reports is whether or not those efforts in the state of  
17 Washington to supplement nesting opportunities through  
18 artificial platforms have been successful.

19 I think WDFW has put out, in conjunction with  
20 partners, something like 85 nest platforms. And I  
21 cannot find any data on occupancy rates or use rates  
22 for those platforms except for one effort in 2019 where  
23 29 platforms were put out and two were occupied. So  
24 that's a very low occupancy rate. That's about 7  
25 percent.





1 this to you, and you tell me if I'm right.

2 You don't want to put up a bunch of artificial  
3 nests so predators of ferruginous hawk can come in and  
4 say, Hey, great. You've sent us -- you've given us  
5 these great hunting blinds to go to after ferruginous  
6 hawks; is that right?

7 **A You may actually be a wildlife biologist. Yes.**

8 Q And when you talk about Mr. Jansen, we're talking about  
9 Erik Jansen who testified in this matter?

10 **A Yes. Correct.**

11 Q And one question.

12 If I represented to you that -- the  
13 post-construction fatality monitoring: You had talked  
14 about the documented bird fatalities, ferruginous hawk  
15 fatalities, that there were, you said, four in  
16 Washington.

17 If I represented -- if I represented to you that  
18 post-construction fatality monitoring in the Columbia  
19 Plateau started in 1999, would you have any reason to  
20 disagree with that?

21 **A No. No. I -- that --**

22 JUDGE TOREM: Ms. Perlmutter, while  
23 we're still on this particular subject of nesting or  
24 other breeding platforms, the witness's testimony  
25 sounded like in Washington, which of course is our

1 jurisdiction here.

2 I wanted to see, while we're there, if there was  
3 any studies outside of Washington that might be  
4 indicative of what best practices would be post-  
5 construction accomodation of these birds and  
6 encouragement of these birds.

7 So if that's okay with you, either I can ask the  
8 question, or maybe it's already out there, or you can.

9 MS. PERLMUTTER: I suppose it would  
10 be inappropriate for me to tell you to mind your own  
11 business. No, of course I'm fine with Mr. McIvor  
12 answering that question.

13 JUDGE TOREM: Outside the hearing,  
14 that would be just fine, but today I'll take it.

15 So Mr. McIvor, staying outside of Washington, is  
16 there any other indication of the ferruginous hawk that  
17 these have worked?

18 **THE WITNESS:** That's -- that's a  
19 really, really good and important question. There are  
20 other studies from within the range of the hawk,  
21 ferruginous hawk, that have looked at nesting,  
22 artificial nesting platforms and whether the hawks are  
23 using them.

24 Those studies have occurred in Alberta, Wyoming,  
25 Utah, possibly Nevada. The problem is that those are

1 landscapes that offer different opportunities to  
2 ferruginous hawk than what is offered in Washington.  
3 So the birds are probably reacting differently to the  
4 nesting opportunities.

5 Mr. Watson, Jim Watson, in his testimony, made the  
6 point that in the Alberta portion of the ferruginous  
7 hawks' range, they're primarily in grasslands with a  
8 different prey base, primarily -- I think it was  
9 primarily jackrabbits; I do recall a different prey  
10 base -- and fewer nesting opportunities.

11 So putting out platforms there, they were, I  
12 think, reasonably well accepted, as one might expect  
13 where, say, trees for nesting are quite limited.

14 The highest rate of nest platform use has been in  
15 Wyoming. And, again, it's a bit of a different  
16 environment. Big sagebrush. And not as many trees, I  
17 would say generally, where they range in Wyoming. And  
18 I think that they probably perceive the nest platforms  
19 as being advantageous, perhaps offering a higher perch  
20 from which to see predators and/or prey.

21 So how birds respond to presence or opportunities  
22 for nest platforms is going to be influenced to some  
23 degree what other opportunities their habitat --  
24 immediately surrounding habitat offers to them.

25 So it's very -- it's very risky, I think, to

1       **extrapolate from other states and experiences in other**  
2       **parts of their range to -- to our situation in**  
3       **Washington.**

4                               MS. PERLMUTTER: Your Honor, do you  
5       have follow-up?

6                               JUDGE TOREM: No. I think that took  
7       us as far afield as I wanted to go.

8                               MS. PERLMUTTER: No pun intended,  
9       Your Honor.

10                              JUDGE TOREM: Never.

11    Q    (By Ms. Perlmutter) So, Mr. McIvor, to go back, then,  
12       to your statement on Page 9, with all of this nuance  
13       that you've provided, what I'm hearing is that these --  
14       the proposed artificial nest effort might help bolster  
15       regional populations suggests that there's -- there's  
16       not enough data at this point and there are too many  
17       variables in what's going to happen to know, but it --  
18       but it's possible, and certainly we would all hope for  
19       that; is that right?

20    A    **That is correct, yes.**

21    Q    And I actually want to go back for one quick second.  
22       One other question about your -- the threats that you  
23       noted extrinsic to the proposed project to the  
24       ferruginous hawk.

25                              One that you didn't mention that I neglected to

1 mention is climate change.

2 **A Mm-hmm.**

3 Q Would you agree with me that climate change poses a  
4 giant threat to the ferruginous hawk?

5 **A Absolutely. Yes.**

6 Q Okay. And so to go back to -- to go back to Page 9 of  
7 your initial testimony, you noted that the ferruginous  
8 hawk was not documented using solar sites since data  
9 collection began; is that right?

10 **A That -- I believe that's correct, yes.**

11 Q And you also said that the site's utility for hawks in  
12 this region is hypothetical.

13 It's right at the -- it's near -- it's the --  
14 the -- in the last full paragraph of your response on  
15 Page 9.

16 There you go.

17 **A Right. The sites referring specifically to solar  
18 sites. Yeah.**

19 Q Right.

20 **A Right.**

21 Q And you said that planted grasses beneath solar arrays  
22 might actually offer small mammals an attractive food  
23 source.

24 **A Mm-hmm. Mm-hmm.**

25 Q Is that right?

1 **A Yes. That's -- that's correct.**

2 Q And also offer them protection from predation; is that  
3 right?

4 **A Right. Right.**

5 Q And so your conclusion there, if I understand  
6 correctly, is that that could present foraging  
7 opportunities for ferruginous hawks as animals disperse  
8 from these areas.

9 So if I get this right, that -- if I understand  
10 what you're talking about is planted grass beneath  
11 solar arrays might actually create a beneficial  
12 environment for the stuff that ferruginous hawks eat?

13 **A Yeah, this -- this is skating on some fairly thin ice**  
14 **for me. It's -- it's very hypothetical situation.**  
15 **What -- what I would say about solar arrays is that**  
16 **there is nothing analogous in ferruginous hawks'**  
17 **preferred habitat. So if you think about the fact that**  
18 **they've evolved in the -- the high desert ecosystem,**  
19 **you can't really go out and walk through that ecosystem**  
20 **and say, Well, that -- that's substantively similar to**  
21 **a solar array panel, and -- and, look, the hawks are**  
22 **using it.**

23 They're birds of open country. They need that  
24 open country to find their prey and to forage. So if  
25 you think about the way a solar array is structured, it

1 has three-dimensional height, thickness, relatively  
2 close together.

3 I find, based on the hawks' foraging strategy and  
4 their morphology, I find it difficult to believe -- and  
5 the fact that they tend to avoid human development -- I  
6 find it difficult to believe that ferruginous hawk  
7 would attempt to forage, attack pray, inside a solar  
8 array. So I think, you know, blocking that out, I  
9 think it becomes terrain that they would not physically  
10 use.

11 Could there be some ancillary benefit? Well,  
12 there have been studies that indicate that wildlife use  
13 these facilities. Some wildlife. And it could be  
14 because of the planted grasses there, which would be  
15 more heterogeneous, more complex than the planted wheat  
16 field. It could offer some forage or some  
17 opportunities for small mammals.

18 If their populations grew to be robust enough,  
19 they would need to disperse, they would leave the solar  
20 arrays, and there could be something for the hawk to  
21 forage on. That's -- but that's very hypothetical.  
22 There are no studies I'm aware of that -- that have  
23 looked at that.

24 Q Understood.

25 And, again, thank you.

1           But -- so let me -- let me again try to put this  
2           in my ama- -- my now amateur wildlife biologist way,  
3           which is that -- that it looks as though the -- the  
4           solar arrays may actually be benefit -- beneficial to  
5           the prey species for the things that ferruginous hawks  
6           eat; is that right?

7   **A   It's possible.**

8   Q   And when you talk about animals dispersing from these  
9           areas, if I understand correctly, what you're saying is  
10          that if this is a good environment, sooner or later  
11          that prey -- those prey species are going to leave the  
12          solar arrays, and -- and that would then flush them out  
13          into the open -- grossly oversimplified -- where they  
14          could be actually preyed upon by ferruginous hawks; is  
15          that right?

16   **A   Again, it's -- it's a hypothetical scenario, but it is**  
17          **possible.**

18   Q   Okay. And on Page 11, you talk about the threats to  
19          the prey of the ferruginous hawk. And we've talked  
20          about some of those things already, habitat conversion,  
21          poisoning, shooting, that kind of thing.

22                 You also talk about wildfires being a threat to  
23          ferruginous hawk prey.

24   **A   Mm-hmm.**

25   Q   What does that mean?

1 A Well, circles back to your question about climate  
2 change, because that -- this is the nexus. This is the  
3 link, or at least the primary nexus related to climate  
4 change.

5 One of the major problems -- well, yeah, certainly  
6 one of the major problems in the -- in the high desert  
7 is that we have a number of invasive plant species,  
8 probably the worst being cheatgrass. Our native  
9 shrub-steppe habitats evolved in the presence of fire,  
10 but they evolved to burn -- so some subtle  
11 distinctions -- roughly every 75 to a hundred years.

12 Well, cheatgrass, which comes from the steps of  
13 Asia, evolved to burn roughly every three years. So  
14 what happens is, when wildfires occur in these  
15 shrub-steppe landscapes, the cheatgrass is already  
16 there, at least in low levels. The native habitat,  
17 native vegetation burns. The cheatgrass thrives,  
18 creates fuel for the next fire event, and shortens that  
19 fire return cycle.

20 So instead of the next fire event occurring in 75  
21 years, it may occur in 30 years or 20 years or 10  
22 years. And when they start occurring more frequently,  
23 the native vegetation gets obliterated and gets  
24 replaced with cheatgrass.

25 So cheatgrass has very limited habitat and forage

1 value for wildlife. Things like chukar evolved with  
2 cheatgrass. Chukar is not a native species either.  
3 They do okay in cheatgrass. But for the vast majority  
4 of our native wildlife, it's -- it's complete habitat  
5 loss.

6 And so the prey, like the small mammals, likewise  
7 has a very hard time once its habitat is converted to a  
8 cheatgrass monotype and has a hard time thriving for  
9 sure.

10 Q And can you just connect the dots for me? When you  
11 talk -- and certainly the story you're telling is very  
12 clear.

13 Can you connect that to the effects of climate  
14 change, please?

15 A Sure.

16 So cheat- -- cheatgrass is adapted to -- not only  
17 to fire but also to -- to dry climates. It needs  
18 winter moisture. It's a -- it's a winter grass  
19 essentially, so it comes out, emerges very early in  
20 season.

21 And part of the problem with climate change is  
22 that with warming cycles, we get more drought, and we  
23 get increasing stress on our native plants, and we get  
24 a longer dry season; therefore, a longer window in  
25 which wildfires can occur.

1           **So less moisture in the landscape, higher risk of**  
2           **fire, and a longer period of time in which those fires**  
3           **can occur each year.**

4 Q So, again, let me say this to you and put it at a  
5 72,000-foot level.

6 **A Mm-hmm.**

7 Q So climate change is not only directly a bad thing for  
8 ferruginous hawks; it's also a bad thing for the prey  
9 that ferruginous hawk eat. Is that right?

10 **A Yeah. I'd say the -- the two are linked. Probably**  
11 **the -- the effect of climate change is more profoundly**  
12 **felt on the -- on the habitat and on the prey, and then**  
13 **that's reflected up to the -- the ferruginous hawk and**  
14 **the challenges it has making a living on the landscape.**

15 Q Thanks. That's actually very clear.

16           I'd like to turn to Page 13 of your initial  
17 testimony. And I understand that you're speaking about  
18 animals other than bats here.

19           But it's your opinion here that the application  
20 accurately quantifies the project impact on mammals  
21 generally; is that right?

22 **A Yes, that's correct.**

23 Q And you found that the proposed mitigation measures are  
24 reasonable and likely to be sufficient?

25 **A Yes.**

1 Q And -- okay. So when you say "antelope" in this -- in  
2 this testimony, we're talking about what we've been  
3 referring to as pronghorn; is that correct?

4 **A Yes, that's correct.**

5 Q And this is possibly the most ridiculous question  
6 anybody has ever been asked in an adjudication. But  
7 when we talk about pronghorn, you'd agree that we're  
8 talking about mammals; is that right?

9 **A Yes, I would.**

10 Q I have to say that I -- asking that question, I was a  
11 little out on a tightrope. Because I thought, if I get  
12 this one wrong, that's a big problem.

13 **A I appreciate an easy question periodically. That was a  
14 good one. Thank you.**

15 Q Now, you've noted that before construction begins, the  
16 site should be surveyed for the presence of Townsend's  
17 ground squirrels; is that correct?

18 **A Yes, that's correct.**

19 Q But you've also indicated that that survey, those --  
20 those surveys would be conducted before the site design  
21 is finalized and before construction begins, right?

22 **A Yes. That's correct.**

23 Q Okay. And on Page 15, you note that antelope generally  
24 avoid wind energy facilities?

25 **A Yes, that's what -- that's what the literature**

1 indicates. It's -- it's in -- I believe, Mr. Rahmig  
2 testified to this as well. But it's -- the findings  
3 from the literature are a little bit ambiguous, but the  
4 preponderance of evidence tends to suggest avoidance.

5 I think, again, if there's a qualifying tag to  
6 that statement, it would be that how the animals  
7 respond is likely somewhat dependent on what other  
8 options are available to them.

9 So if -- using this project as an example, if this  
10 project were implemented and the antelope perceived it  
11 as less desirable than some other landscape that's  
12 available to them, they probably would switch to using  
13 that other landscape.

14 If there were no other alternatives and there were  
15 no severe threats, say predation -- which, of course,  
16 we wouldn't expect, but just speaking biologically --  
17 you know, if they did not perceive severe threat like  
18 that, they probably would continue to use the  
19 landscape. But, yes, the literature tends to suggest  
20 avoidance.

21 Q And -- and when you say they would continue to use the  
22 landscape, you mean the landscape around wind  
23 facilities, right?

24 A Yeah. Yes.

25 Q Okay.

1 **A Yes.**

2 Q And you referred to Mr. Rahmig's testimony on  
3 Wednesday.

4 He actually testified that the data is conflicting  
5 regarding whether antelope actually do avoid wind  
6 facilities; isn't that right?

7 **A That's consistent with what I was just trying to say,  
8 yes. Yeah.**

9 Q Okay. I want to talk for a bit about this two-mile  
10 offset.

11 On Page 11 of your testimony, you've taken issue  
12 with Mr. Neutzmann's one-size-fits-all approach to  
13 offset.

14 Do you see that?

15 **A I'm -- I'm aware of that, the statement. I don't see  
16 it right now. But, yeah, I'm aware of that.**

17 Q Let me see if I can -- well, at the first big answer,  
18 the one that is right by the cursor right there.

19 **A Yeah.**

20 Q You actually -- Neutzmann says there should be a  
21 two-mile offset, and you actually initially suggested  
22 that that two-mile offset is somewhat arbitrary; is  
23 that right?

24 **A It is in the -- as I think I explained here, in the  
25 sense that the core areas around which this concept is**

1 based are not a uniform circle. That's not how  
2 ferruginous hawks perceive the landscape. So it's  
3 easy, isn't it, to just draw a circle on the map and  
4 say two miles, we're done.

5 It's not necessarily a reflection of biological  
6 reality and how a hawk may be using the landscape. So  
7 I think that's the point that I was making.

8 And I think it would be possible, if the data are  
9 available, but I think it would be possible to look at  
10 these specific sites and understand a little bit better  
11 how hawk might be using them and to determine  
12 boundaries that are biologically appropriate to the  
13 situation.

14 But my level of understanding of this specific  
15 site is not adequate to go to that place. But I would  
16 hope that that level of understanding exists within  
17 WDFW and probably -- probably some of the West staff or  
18 Tetra Tech staff who have been working on this project  
19 probably have a better understanding of the landscape  
20 specifics.

21 Q I just need to say this because I like saying it. You  
22 don't expect ferruginous hawks to move in circles. You  
23 would expect them to move in something that is more  
24 like an asymmetric -- asymmetrical polygon; is that  
25 right?

1 **A At least not a circle, yes.**

2 Q Okay.

3 **A Something more abstract.**

4 Q That's fair.

5 One of the things that I've -- that I've come  
6 across refers to it actually as an amoeba pattern.

7 **A I like that, yeah. We'll -- we'll work with that.**

8 Q And the answer that you've given is terrific in terms  
9 of -- in terms of the need to tailor offsets to this --  
10 the needs of this specific site.

11 You actually referred to -- you advocate for a  
12 more nuanced and biologically informed approach.

13 Is that what you're talking about?

14 **A Yes.**

15 Q And just -- I want to just nail this down to be clear.

16 The two miles that Mr. Neutzmann talked about,  
17 that refers to the distance around nests, not the  
18 distance around equipment; is that correct?

19 **A That's correct.**

20 Q And your testimony, your initial testimony suggests  
21 that a better approach would be to respond to actual  
22 conditions at the site.

23 That's what we're talking about, isn't it?

24 **A Yes.**

25 Q And that's consistent with the suggestion you made in

1 your supplemental testimony that the buffer should be  
2 tailored to accommodate the project's specific needs,  
3 right?

4 **A Yes.**

5 Q But between your original testimony and this  
6 supplemental testimony, you actually changed your  
7 answer about a two-mile buffer; am I right?

8 **A Yes.**

9 Q And can you explain, please, how you came to make that  
10 change in your testimony?

11 **A Sure.**

12 Q What led to you making the change?

13 **A Sure.**

14 **Well, let's see here. Keep me on track.**

15 **The -- initially when I submitted my first**  
16 **testimony, I was going off of two sources of**  
17 **information. One was the 2004 WDFW recommendations.**  
18 **And we've -- it's in the record. I'm sorry that the**  
19 **exact citation's not coming to mind. But it's long**  
20 **been a discussion here about a source of the offset**  
21 **figures.**

22 **And the other -- other background that I was using**  
23 **was the references from the application indicating that**  
24 **some personal communications had gone on, some**  
25 **consultation with WDFW, over this exact figure, and so**

1 it was my assumption at that time that the smaller  
2 offsets, which have fluctuated a bit in size, were  
3 derived from -- from consultation.

4 So since that time, I've had a chance to review  
5 Mr. Watson's testimony as well as his recent  
6 publications on the ferruginous hawk in Washington and  
7 in this area. And he makes -- he's brought up some new  
8 information that is, I think, very important to  
9 consider and very compelling. And the -- he -- the  
10 two-mile buffer is his recommendation, or maybe I  
11 should say more broadly, coming from WDFW.

12 And I think, first off, it's based -- more than  
13 any of these other numbers that have been put out for  
14 buffer size, it is based in traceable biology. In  
15 other words, the two miles is reflective of his  
16 findings of the size of core areas that ferruginous  
17 hawks use to maintain and occupy their nest  
18 territories. So we can tie that number back to a  
19 biological reality.

20 The second reason I think that the two-mile offset  
21 is valid is -- not quite sure what category to lump  
22 this into. Let's say more of an administrative category  
23 in the sense that WDFW is the agency that is  
24 responsible for managing this bird in the state.  
25 They're the agency that will be responsible for

1 recovering this bird, recovering its populations in the  
2 state.

3 So I would give them significant deference in  
4 identifying what they need, what they believe is  
5 necessary to recover this bird's population within the  
6 state.

7 Q You didn't -- you sort of answered the question but not  
8 quite.

9 A Sorry.

10 Q Can you just tell me sort of mechanically, how did you  
11 come to make that change? Did somebody call you? Did  
12 you call somebody else to say, Hey, I got this wrong; I  
13 need to fix it?

14 How did it come about that you submitted  
15 supplemental testimony?

16 A I read Watson's -- as I said, read Watson's testimony,  
17 read his papers, and concluded that my initial  
18 testimony should be revised, was incorrect. And so I  
19 approached Ms. Reyneveld and said, I -- I think this  
20 needs to change.

21 Q So it was your idea to make the change?

22 A Yes.

23 Q Okay. And the change that you're talking about, that  
24 doesn't change your -- your conclusion that this needs  
25 to be a nuanced -- as you said, a nuanced and

1 biologically informed approach to an offset; is that  
2 right?

3 A That's correct. And if I could adjust a little bit to  
4 that.

5 Mr. Jansen has put forward some information --  
6 which, again, is part of the record -- looking at the  
7 status of hawks in the project area; and specifically,  
8 nesting attempts, nesting territories. He has made a  
9 point through those submittals that there is  
10 encroachment on the site of residential developments.  
11 And some of those residential developments are in close  
12 proximity to historic ferruginous hawk nest sites.

13 So I think that that -- given the biology of the  
14 hawk, I think that's a valid concern. And I think that  
15 there is a logical conversation which should take place  
16 about whether some of those nesting territories in  
17 proximity to residential development are ever going to  
18 be viable again for the ferruginous hawk.

19 And this is a conversation that needs to come  
20 again from the managing agency, from WDFW. So I think  
21 they need to weigh in on that and really do a realistic  
22 assessment of what kind of territory can be maintained.

23 Because one of the things that's -- that's  
24 absolutely critical here with regards to this species  
25 is that even though we have unoccupied territories in

1 proximity to the proposed project, we've got to  
2 maintain enough open territories suitable for  
3 reoccupation, that as the population starts to recover,  
4 it has places to go, it has places to reexpand into.

5 So that's really why it's so important to look at  
6 these historic sites and think about whether or not  
7 they could be repopulated as the -- as the ferruginous  
8 hawk recovers.

9 MS. PERLMUTTER: Your Honor, I'd ask  
10 that that entire response be stricken as nonresponsive.

11 JUDGE TOREM: Ms. Reyneveld.

12 MS. PERLMUTTER: With all respect --  
13 with all respect to Mr. McIvor.

14 JUDGE TOREM: Ms. Reyneveld, any --

15 MS. REYNEVELD: I think it was  
16 responsive to her question.

17 MS. PERLMUTTER: Your Honor, if I  
18 may, it was not. I asked about just the  
19 appropriateness. I asked him if he continued then to  
20 believe that this should be -- the approach to buffers  
21 should be -- continue to be nuanced and biologically  
22 informed.

23 And although it was an interesting discussion and  
24 something that I will revisit in other ways, in terms  
25 of talking about the need to leave habitat open so that

1 maybe these birds will come back someday, that --  
2 that's all nonresponsive to my question.

3 JUDGE TOREM: I agree it was an  
4 interesting answer, but considering the original  
5 question, it was nonresponsive. So we'll strike  
6 anything that didn't go directly to Ms. Perlmutter's  
7 question. I'll work with the court reporter to take a  
8 look at that and strike the appropriate material later.

9 MS. PERLMUTTER: Thank you very  
10 much.

11 Mr. McIvor, again, no -- no disrespect meant.

12 Ms. Masengale, would you be so kind, please, as to  
13 put up Exhibit 3016\_R?

14 Wow. Thank you.

15 Q (By Ms. Perlmutter) Mr. McIvor, we've already started  
16 by talking about Region 6 of Fish -- the U.S. Fish and  
17 Wildlife and your mistake that it's not a two-mile  
18 buffer; it's a one-mile buffer that they recommend. Is  
19 that right?

20 A **That's correct.**

21 Q And they don't -- they don't -- they don't require a  
22 buffer like that. That's just their recommendation; am  
23 I correct?

24 A **I -- I would have to go back and look. My statement in**  
25 **my testimony, as you see, said "requires." I would**

1       **have to go back and double-check as to whether that's a**  
2       **recommendation or a requirement.**

3   Q   If I told you that it was a recommendation, you  
4       wouldn't have any problem with that?

5   A   **No, I wouldn't.**

6   Q   Okay. And various other states also propose buffers  
7       when it comes to ferruginous hawk interaction with wind  
8       facilities; am I right?

9   A   **I'm sure they do. I'm not aware of specifics. I would**  
10       **expect that they do. I am not aware of specifics on**  
11       **this question.**

12   Q   And just to be clear, the ferruginous hawk is not a  
13       federally listed species, is it?

14   A   **That's correct.**

15   Q   And so going back to these other states, Utah and  
16       Colorado, they both recommend narrower buffers, don't  
17       they?

18   A   **I'm sorry. I don't know.**

19   Q   Okay. If I told you they did, you wouldn't have any  
20       reason to disagree?

21   A   **No.**

22   Q   No, you would not disagree?

23   A   **No, I would not disagree.**

24   Q   Thank you.

25               And you would agree with me, please, that there's

1 no published guidance in Washington about what a buffer  
2 should be with regard to a ferruginous hawk territory;  
3 am I right?

4 MS. REYNEVELD: Objection as to the  
5 definition of "published guidance." I think that's  
6 vague and an issue that's in dispute.

7 MS. PERLMUTTER: Okay.  
8 Mr. McIvor -- Your Honor, I'm fine with that. I can  
9 change the question.

10 JUDGE TOREM: Yes, that's fine. Go  
11 ahead.

12 Q (By Ms. Perlmutter) Mr. McIvor, if I talk about  
13 published guidance, what does that mean to you?

14 A **Well, publicly available information that has either**  
15 **appeared in a peer-reviewed journal or been issued by**  
16 **an agency or organization through their own channels.**

17 Q Would you agree with me that Washington's --  
18 Washington's DFW has not published guidance regarding  
19 buffers when it comes to ferruginous hawks and wind  
20 facilities?

21 A **No. I would disagree with you. Because the 2004**  
22 **priority habitats and species guidance does give some**  
23 **buffer recommendations. Not specific, as I recall, to**  
24 **wind energy, but to human disturbance activities. And**  
25 **it also gives some leeway to biologists to assign**

1       **buffer sizes appropriate to the situation at -- at**  
2       **hand. Give some latitude for interpretation. I think**  
3       **that's a better way to say that.**

4   Q   Thanks. That's helpful.

5       Looking at Page 3 of your supplemental testimony.

6   **A Whoops.**

7   Q   You with me? Okay.

8       And, in fact, to go back to this previous answer,  
9       the question was asked whether the recommendation had  
10      been formalized through agency guidance, and you said  
11      that the recommendation was given verbally and/or in  
12      written communications.

13      When you say "verbally," you mean orally?  
14      Somebody said that?

15   **A Yes.**

16   Q   And "in written communications," you mean by letters or  
17      e-mails rather than in a published document; is that  
18      right?

19   **A That's correct.**

20   Q   Okay. On that same page, you say that the two-mile  
21      buffer would permit project implementation while  
22      preserving opportunities for species recovery.

23      What's the basis for that conclusion?

24   **A Yeah, you know, I think a -- I think that's probably**  
25      **overstepping the bounds of my knowledge. I think we**

1 would need some additional analysis to understand  
2 whether or not the project could be implemented in the  
3 presence of the two-mile buffer.

4 Q Okay. And just to be clear, you're not suggesting that  
5 responsibility for recovering the ferruginous hawk  
6 species rests on the applicant's shoulders, right?

7 A Absolutely not, no.

8 Q Okay. Yes, it does not rest on the applicant's  
9 shoulders?

10 A Correct. Correct.

11 Q Okay. And, in fact, there's no requirement that EFSEC  
12 consider the recoveries of species when issuing a  
13 site -- a site certification agreement; am I right?

14 A I -- I can't answer that question. I don't know.

15 Q Okay. If I told you I was right, you wouldn't have any  
16 reason for disagreeing with me?

17 A I would have no basis for arguing with you.

18 Q I love that. Thank you.

19 Can you say how much area would be taken out of  
20 availability if this two-mile buffer were imposed?

21 A No, I can't. Because I think there's insufficient  
22 information in my court for me to answer that question.

23 Q Can you tell me how many of the proposed turbines --  
24 turbines would be eliminated by the two-mile buffer?

25 A No, I cannot.

1 Q Would the two-mile buffer apply to both active and  
2 historical nests?

3 **A Yes. Yes, they would.**

4 Q How many active ferruginous hawk nests are there in  
5 Washington State?

6 **A Active. The last survey found 34 pairs of -- so 34  
7 nesting territories.**

8 Q And that's across the full state?

9 **A Yes.**

10 Q And what was the date of that last survey?

11 **A I believe that was last year.**

12 Q Okay. And how many active nests are there in the  
13 project area?

14 **A There are none currently active as of this year.**

15 Q How many historical nests are there in Washington  
16 State?

17 **A I think it's 284. How's that for specific? That's  
18 what my memory recalls. Put that in the ballpark.**

19 Q Good enough for me.

20 Of those 284, ballpark, how many of those are in  
21 the project area?

22 **A Again, I -- I don't know exactly how many are in the  
23 project area. Historic, ballpark, probably 10, 12.**

24 Q But you don't know that for sure?

25 **A I don't know exactly, no.**

1 Q Okay. And when we talk about historical nests, how far  
2 back are we going?

3 A Yeah, that's a good question.

4 I -- as far as I know, the record includes  
5 anything that's been located or detected since WDFW's  
6 been tracking these birds. I don't know that a  
7 historic nest site ever gets dropped out of the  
8 database.

9 Q So basically going back forever?

10 A Well, decades, yes.

11 Q Okay. Do you know what percentage of the historical  
12 nests in Washington State have never had any documented  
13 ferruginous hawk activity at all?

14 A No. A question for Mr. Watson, I believe. I don't  
15 know.

16 Q And would your answer be the same if I asked you about  
17 historical nests in the project area?

18 A Yes, it would be --

19 Q Okay.

20 A -- the same.

21 Q Is -- when you're talking about this two-mile buffer  
22 for historical nests, is there a cutoff date that we're  
23 looking at?

24 A This harkens back to the comment I made earlier about  
25 examining some of these historic nest sites that are in

1 close proximity to development. Because I do think  
2 there is a rational conversation about what could  
3 constitute a historic nest territory that has some  
4 probability of being reoccupied again in the future.  
5 And I think that there could be a process for  
6 identifying some of these historic sites and coming to  
7 an agreement that their likelihood of reuse would be  
8 slim or none.

9 Q So -- so I think I like where you're heading here, not  
10 that you care whether I like it or not.

11 But we're talking about -- we're going back to  
12 this sort of database nuanced approach; am I right?

13 A Yes. Yes, we are.

14 Q Okay. And would you agree to me that -- well, should  
15 the buffer apply to nests where activity has never ever  
16 been documented?

17 A Potentially, yes.

18 Q Okay. You listed in your -- in your -- let me just  
19 make sure I know which one.

20 In your supplemental testimony, you listed the  
21 materials that you reviewed before submitting that  
22 testimony, right?

23 A Yes.

24 Q Did you review the draft guidance that's currently  
25 under consideration at WDFW?

1 **A No, I did not.**

2 Q Why not?

3 **A I don't believe I have access to that. I have not seen**  
4 **it, as far as I know.**

5 Q Okay. Are you aware of any instance, any other  
6 instance in -- where WDFW adopted a "no new  
7 infrastructure" policy to the historic location of a  
8 species?

9 **A I am not aware of any, no.**

10 Q Okay. And that includes endangered species, right?

11 **A Correct.**

12 Q On Page -- we're nearly there.

13 On Page 4 of your supplemental testimony, you're  
14 advocating for monitoring beyond the industry standard  
15 of two years, right?

16 **A Specific to the ferruginous hawk, yes.**

17 Q That was going to be my next question.

18 And you're talking here about post-construction  
19 fatality monitoring, right?

20 **A That's correct.**

21 Q Are you aware that in addition to that two-year  
22 monitoring, post-construction fatality monitoring, the  
23 applicant has committed to a five-year  
24 post-construction nest monitoring?

25 **A I am aware of that. I think that's an excellent**

1       **proposal.**

2   Q   And, in fact, you specifically reference "adaptive  
3       management context."

4               What does that mean?

5   A   **Adaptive management is being responsive to the**  
6       **conditions recorded or detected on the landscape. So**  
7       **there's an opportunity to learn as one collects data**  
8       **and apply that new -- new evolving body of knowledge to**  
9       **the change management approach to adapt to the**  
10      **situation.**

11   Q   And this would be -- sorry.

12   A   **No. Please cut me off. I was done.**

13   Q   This would be specifically we're talking about  
14       post-construction operational data?

15   A   **Yes. That's correct.**

16   Q   Are we talking -- are you talking really about a  
17       technical advisory committee?

18   A   **That -- they would be an integral part of this, yes.**

19   Q   And do you know whether a technical advisory committee  
20       is planned for this facility?

21   A   **Yes. It is planned.**

22   Q   And you don't really need to turn to this unless you  
23       want to. But on Page 5 of your original testimony, you  
24       also advocated for monitoring bat fatalities, right?

25   A   **Yes, that's correct.**

1 MR. ARAMBURU: Mr. Examiner, may I  
2 be heard on an objection, please?

3 JUDGE TOREM: Yes. Go ahead,  
4 Mr. Aramburu.

5 MR. ARAMBURU: Yesterday I was  
6 questioning Mr. Guthrie -- Ms. Guthrie, and you cut me  
7 off. And you did allow some extra time, I understand.  
8 But you made me adhere to the -- to the amounts of  
9 cross-examination that were found in our schedule.

10 Ms. Perlmutter has greatly exceeded the .5 hours  
11 that I see in the schedule for her, so I do think that  
12 the restrictions on cross-examination and time should  
13 be equally applied.

14 MS. PERLMUTTER: Your Honor, if I  
15 may.

16 JUDGE TOREM: No. I was going to  
17 interrupt you shortly anyhow, because Mr. Aramburu and  
18 I seem to be correct on monitoring the stopwatch. But  
19 since you said a few minutes ago, "We're almost there,"  
20 I refrained from unmuting and was going to allow you to  
21 wrap up with one or two questions.

22 MS. PERLMUTTER: I'm about to wrap  
23 up. I will note, with all respect to Mr. McIvor, he  
24 tends to respond in narratives. I'm very, very close.

25 JUDGE TOREM: Let's not blame it on

1 anybody. We're almost there. Ask the last couple of  
2 questions, please.

3 MS. PERLMUTTER: Okay.

4 Q (By Ms. Perlmutter) A technical advisory committee can  
5 address both bats and ferruginous hawks, right?

6 A Yes.

7 Q It can recommend more than two years of  
8 post-construction fatality monitoring, right?

9 A Yes.

10 Q Curtailment doesn't happen by definition until a  
11 project is in operation, right?

12 A Yes.

13 Q And you would agree that curtailment decisions should  
14 be data-driven?

15 A Yes.

16 Q So you're not saying -- well, it doesn't make sense to  
17 predetermine what a curtailment strategy should be,  
18 correct?

19 A That's correct.

20 Q That goes to the technical advisory committee?

21 A Yes.

22 MS. PERLMUTTER: I have no further  
23 questions.

24 JUDGE TOREM: Ms. Voelckers, can you  
25 give me an estimate of your questions for Mr. McIvor,

1 how long you anticipate, even allowing for long  
2 narrative answers?

3 MS. VOELCKERS: Thank you, Your  
4 Honor. I had only planned on a few questions, but  
5 given the last hour, I think I would -- safe to say I  
6 have at least 15 to 20 minutes of questions for  
7 Mr. McIvor.

8 JUDGE TOREM: All right. What I  
9 would propose is that we take a break now till 10:30,  
10 come back with your questions, and from there,  
11 Ms. Reyneveld, any redirect you would have, and then  
12 we'll go to the Council members.

13 And, Mr. Aramburu, it appears that Flight 82 has  
14 arrived, so you might check with Mr. Simon as he  
15 deplanes.

16 We'll take a break till 10:30. Thank you.

17 (Pause in proceedings from  
18 10:16 a.m. to 10:30 a.m.)

19  
20 JUDGE TOREM: All right. It looks  
21 like we're all back. It's 10:30, and we're going to go  
22 on with Ms. Voelckers' cross-exam testimony here for  
23 Mr. McIvor.

24 And I saw, Ms. Voelckers, that you may be having a  
25 cross-exam exhibit, and I think it's all ready to share

1 either by you or Ms. Masengale, depending.

2 Mr. McIvor, meet Shona Voelckers.

3 **THE WITNESS: Good morning,**  
4 **Ms. Voelckers.**

5 MS. VOELCKERS: Good morning,  
6 Mr. McIvor. I cannot see anyone at right this moment.  
7 Can you see me?

8 **THE WITNESS: I can see you.**

9 MS. VOELCKERS: Okay. Oh. Great.  
10 There you are. Thanks for your patience.

11

12 CROSS-EXAMINATION

13 BY MS. VOELCKERS:

14 Q Good morning. I represent Yakama Nation in this  
15 proceeding. And I'm sure if you have watched earlier  
16 days, I've asked questions of applicant's biologist.

17 So I have some questions for you that I wanted you  
18 to give -- you have the opportunity to answer and that  
19 I've also tried to ask them, and then I have some  
20 follow-up questions to Ms. Perlmutter's  
21 cross-examination.

22 So if we could start with the term of art "best  
23 available science."

24 Can you -- I know everyone has a little bit of  
25 different take on it in the scientific world, but could

1 you put it in your own words, please, how -- how you  
2 understand that phrase?

3 **A Sure.**

4 Typically in the world of science, we recognize a  
5 hierarchy of available information, science, on a  
6 particular topic. And it's generally recognized that a  
7 paper or information being disseminated that has gone  
8 through an external peer review is the gold standard  
9 for best available science.

10 However, not all information, data, findings  
11 generated in the world of research and science goes  
12 through peer review or is even appropriate for  
13 dissemination in a peer-reviewed journal or outlet.

14 So there is another tier of information which is  
15 disseminated typically in the form of reports that  
16 might come from an agency or organization. Those  
17 documents may go through some form of internal review.  
18 Call it peer review. But it's generally recognized  
19 that that form of review can be less rigorous than  
20 external peer review.

21 So in the absence of peer-reviewed scientific  
22 literature, that gray literature, the body of gray  
23 literature -- gray literature can be the best available  
24 science.

25 **Q** And in your experience, when WDFW publishes formal

1 guidelines, meaning something like the priority habitat  
2 species guidelines from 2004, are those generally  
3 considered to reflect or be consistent with best  
4 available science at the time?

5 **A Yes. I would say that's an accurate statement.**

6 Q Do you consider the 2004 priority habitat species  
7 guidelines from WDFW to reflect current best available  
8 science?

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

10 Q And the same question for the 2009 wind turbine  
11 guidelines.

12 Do those reflect current best available science  
13 specific to -- well, you were shaking your head, so  
14 I'll let --

15 **A No.**

16 Q In general.

17 **A I didn't mean to cut you off.**

18 **But, no, in general, I would say they do not**  
19 **reflect the current state of knowledge on this topic.**

20 Q And where I was going with that was specific to  
21 ferruginous hawks.

22 Would it certainly be fair to agree, then, that  
23 they do not reflect best available science?

24 **A I would agree -- I would agree with that, yes, that**  
25 **there's more current information available.**

1 Q Okay. There have been discussions by multiple  
2 biologists, including yourself, this morning about the  
3 wisdom in using perfectly concentric two-mile offsets  
4 or exclusionary zones when -- when siting specific  
5 turbines.

6 And I apologize if my dogs in the background are  
7 coming through.

8 So we've talked about whether or not it should be  
9 a perfect circle. But we know from Mr. Watson's  
10 deposition that he, himself, has been studying the  
11 Horse Heaven Hills specifically for decades, given  
12 their importance to the ferruginous hawks, correct?

13 **A That's my understanding.**

14 Q Before this project was -- was ever proposed?

15 **A Right. That's my understanding, yes.**

16 Q Do you understand, then, WDFW's two-mile exclusionary  
17 zone recommendation to be a compromise given WDFW's  
18 goal of getting the ferruginous hawk off of the  
19 endangered list?

20 **A That's my understanding, as it focuses on the core**  
21 **areas that the birds use but does not encompass their**  
22 **entire home range. So in that sense, it would be**  
23 **something of a compromise.**

24 Q Because the actual home ranges have been demonstrated  
25 in recent peer-review literature to be quite a lot

1 larger, correct?

2 **A Correct. That's my understanding of Mr. Watson's**  
3 **findings, was that they are larger in this region than**  
4 **in other parts of the bird's range.**

5 Q And what is your understanding about why that is?

6 **A It's probably a reflection of prey availability.**  
7 **That's what's likely to drive the movement of the**  
8 **birds, is the search for prey.**

9 So we know that prey in Washington is not as  
10 robust as it should be, and so they're probably having  
11 to range further and wider to get adequate prey to  
12 raise their young.

13 Q So I understand that a two-mile circular exclusion zone  
14 isn't a perfect match perhaps with the exact topography  
15 of each of, I believe it was 16 territories identified  
16 in the project area by WDFW.

17 Could we still consider it, though, the bare  
18 minimum of avoidance necessary for WDFW to pursue  
19 recovery of this endangered species based upon best  
20 available science?

21 **A Well, I think it's -- I think it's a reasonable**  
22 **assertion. Yeah, I think it's reasonable.**

23 Q And you use the term "biological reality" earlier this  
24 morning, and I didn't catch exactly how it was used.

25 But isn't it fair to say that many if not all

1 species listed as endangered at least on the state  
2 endangered list got to that position due to multiple  
3 factors, such as habitat loss, direct mortality, or  
4 loss of prey?

5 **A Sure. I think that's a reasonable statement.**

6 Q So the hawk is not unique in that it's facing different  
7 variety of factors in -- in surviving?

8 **A Correct. No, it's not unique.**

9 Q And is any entity besides WDFW responsible for  
10 determining how best to recover endangered species in  
11 the state of Washington?

12 **A State endangered is the responsibility of WDFW, which**  
13 **is not to say that they don't act in partnership with**  
14 **other entities. But it is ultimately their**  
15 **responsibility. Making the distinction because if it's**  
16 **a species with federal status, then there's another**  
17 **entity that's engaged. But, yes, for state -- state**  
18 **level, it would be WDFW.**

19 Q And the ferruginous hawk is only state-listed, correct?

20 **A That's correct. I -- yes, that's correct.**

21 Q There is a discussion with Ms. Perlmutter about  
22 occupied or active nests versus historic nests. And  
23 trying to understand what I learned from Mr. Watson.  
24 Of course, he could speak to this better.

25 But my understanding is there could be multiple

1 nest sites within one identified territory, correct?

2 **A Yes, that's correct.**

3 Q And active or occupied is just referring to the nest  
4 that's being used by a specific breeding pair in one  
5 season?

6 **A Yes, that's my understanding as well.**

7 Q So and understanding, again based upon his research,  
8 that they -- ferruginous hawks have a high fidelity,  
9 meaning they return to the same general area as a  
10 breeding pair each year. That doesn't mean that they  
11 refer to the same nest, correct?

12 **A Not necessarily. Yes, that's correct. That's...**

13 Q And so could that help explain why we see unoccupied  
14 or histor- -- how do you understand the term "historic  
15 nest site" to be used actually? Could we start there?

16 **A Well, my understanding of the term is that it refers to  
17 a nest that was built and occupied at one time by a  
18 ferruginous hawk and is no longer active or occupied.**

19 Q So we're not necessarily drawing a line, for example,  
20 to say, like, everything a decade, older, is historic  
21 and everything a decade, newer, is active. We're  
22 really just talking about this season versus all  
23 previous breeding seasons.

24 Is that fair to say?

25 **A Well, we may be heading into a level of detail that**

1 exceeds the limits of my knowledge. Mr. Watson would,  
2 of course, be able to address that better than I. I  
3 don't -- I'm not aware if there's a one-year, two-year,  
4 five-year distinction that's made between active and  
5 historic.

6 Q You did see in his deposition testimony, though, how  
7 he -- he declines to focus on necessarily what's  
8 occupied this year and instead focuses on identified  
9 territories that will be included in multiple nest  
10 sites?

11 A Yes, I did see that.

12 Q You talked earlier about perhaps the -- in order to  
13 make more site-specific determinations of how  
14 appropriate a two-mile exclusionary zone would be --  
15 and I'm not trying to put words in your mouth; I'm just  
16 trying to capture where we were in that conversation.

17 So correct me if I'm wrong, but I think you talked  
18 about the wisdom in having WDFW be further engaged in  
19 looking at specific sites and whether or not they were  
20 still viable for reoccupation.

21 A Yeah.

22 Q And you -- you understand from Mr. Watson's testimony  
23 that -- that he -- he did talk about WFW -- WFW's  
24 concern in preserving historic territories for  
25 reoccupation, correct?

1 **A Yes. Correct.**

2 Q Do you know if -- if Mr. Watson or anyone else at WFW  
3 has been able to have a conversation with the applicant  
4 about specific site conditions and specific turbine  
5 locations in terms of which historical territories  
6 could be reoccupied?

7 **A I'm not aware of whether those conversations have taken**  
8 **place or not. Just at least some of the exchanges**  
9 **between the applicant and WDFW are merely cited as**  
10 **personal communications, and therefore, their exact**  
11 **content is not accessible to me. So, yeah, I could not**  
12 **say, could not characterize those conversations.**

13 Q Okay. So you don't know one way or the other if any of  
14 those -- I mean, right. There's a -- there's a summary  
15 in the mitigation plan. But is it fair to say that we  
16 don't know as we sit here whether or not the applicant  
17 has just hypothetically said, Show us the 20 worst  
18 turbines, and we can talk about it or anything like  
19 that?

20 **A Well, I -- I don't know. I won't say we don't know.**  
21 **But I don't know.**

22 Q Okay. Fair enough.

23 We can move on to -- I just have a few questions  
24 about artificial nest platforms.

25 I believe you described them as a helpful

1 experiment.

2 So is it your opinion that we should not consider  
3 them or that the Council should not necessarily  
4 consider them as direct mitigation for any of the  
5 project's identified impacts?

6 **A I -- I think that their opportunity for success is not**  
7 **certain enough that they would be viable as guaranteed**  
8 **mitigation. And they're not -- you know, my**  
9 **understanding is they're not being proposed in that**  
10 **context. It's an add-on. So -- but, yes, I would -- I**  
11 **would encourage the Council to consider the -- the**  
12 **caveats associated with artificial nest platforms in**  
13 **Washington State.**

14 **Q** Based upon what you've learned through our discovery  
15 process, is it fair to say that the portions of the  
16 application authored by the applicant that attribute a  
17 position, a recommendation directly to WFW, should be  
18 confirmed either through direct citation or reference  
19 to WFW's own words and testimony?

20 **A I think that's probably fair to say. Yeah. I think**  
21 **that's fair to say. It's been, for example, very**  
22 **difficult. No, it's been impossible for me to track**  
23 **the conversation around buffer sizes for ferruginous**  
24 **hawk.**

25 I mean, I understand where we are now. But it's

1 changed a number of times through the process. And,  
2 again, because a lot of the guidance seems to have  
3 taken place through personal communication, and I have  
4 not been able to track it and trace how these changes  
5 were made. So certainly my understanding could be  
6 enhanced by such a conversation.

7 Q And I believe you said in your supplemental testimony  
8 that you reviewed a number of the exhibits that were  
9 referenced during Mr. Watson's deposition and admitted  
10 during that deposition.

11 So you reviewed a memo from Tetra Tech responding  
12 to WFW's two-mile exclusionary zone recommendations?

13 A I did. You -- you're going to have to remind me of  
14 details, but I did read through that, yes.

15 Q It was -- well, I'm trying to wrap us up in a few  
16 minutes. So I could pull it up, but it was the memo  
17 that was objecting to any reliance upon what the  
18 applicant was calling novel research by Mr. Watson.

19 Do you recall that memo?

20 A I do generally. I do recall that, yes.

21 Q Okay. You've read it, even if you --

22 A Yes.

23 Q -- don't remember every word? Okay.

24 A Exactly.

25 Q Based upon your memory, though, is it consistent to say

1 that the applicant objected to relying upon  
2 Mr. Watson's research, emerging research, because it  
3 wasn't peer-reviewed or reflected in the formal WDFW  
4 guidelines?

5 **A I would say that's the drift of what I got from it,**  
6 **yes. And -- yes. I'd say that's -- sort of generally**  
7 **characterizes it.**

8 **Q** So in your professional opinion as you are weighing  
9 everything in front of you and you're looking at these  
10 older guidelines and then the new materials coming from  
11 WFW as well as the applicant, how do you in your  
12 professional opinion weigh the emerging and  
13 peer-reviewed research by Mr. Watson and his colleagues  
14 against the applicant's biologist's recently generated  
15 report regarding the project area, itself?

16 **A Well, I would view Mr. Watson as the expert on this**  
17 **topic. Because he has dedicated years of his career to**  
18 **studying this topic in this region and because he**  
19 **represents the agency responsible for management of the**  
20 **bird. Again, I think he gets a lot of deference and a**  
21 **lot of credibility for all of those reasons.**

22 And so I understand the source of frustration for  
23 the applicant, who might feel like the goalposts are  
24 moving, only because the goalposts are moving. But the  
25 information that Mr. Watson has presented us with, both

1 through his testimony and through his published  
2 research, emerging published research, I think does  
3 reflect the best available science. Yeah.

4 MS. VOELCKERS: I just have a few --  
5 few more questions, Your Honor. I know we're -- we're  
6 up on the 20-minute mark.

7 But if Ms. Masengale could please pull up  
8 Exhibit 4015.

9 Q (By Ms. Voelckers) And, Mr. McIvor, I think you just  
10 testified earlier to Ms. Perlmutter that you had not  
11 had a chance to review this, so I'm not going to ask  
12 you to answer questions about the specifics. But if we  
13 could look at this here on the screen.

14 And I'll represent to you that this was provided  
15 through the discovery process but WDFW as the most  
16 updated draft, at the time it was e-mailed to me, of  
17 forthcoming updated updates to that 2004 PHS guideline  
18 document that has been authored by Mr. Watson, and I  
19 believe what he said in his deposition testimony, is --  
20 is kind of a summary or reflects his recent research.

21 And understanding that there is a lot, a lot of  
22 scientific material in front of everyone now, and  
23 understanding that these are not formally adopted, do  
24 you think that there's still value to the Council in  
25 reviewing something like this as a good summary of

1 where we're at and where WDFW thinks we need to go in  
2 terms of recovering this endangered species?

3 MS. PERLMUTTER: Your Honor, I'm  
4 going to object on relevance grounds. What Mr. McIvor  
5 thinks might be -- what he thinks might be helpful to  
6 the -- to the Council in this instance is not relevant.

7 JUDGE TOREM: Ms. Voelckers, I tend  
8 to agree. This has already been admitted as evidence,  
9 hasn't it?

10 MS. VOELCKERS: Yes, it has, Your  
11 Honor. I mean, we can take it off the screen, but I  
12 should be able to ask him about his opinion about it.

13 JUDGE TOREM: Yeah, but not about  
14 his opinion about what the Council should do with it.  
15 It's in evidence. They'll do what they do with it.

16 So let's move on and just ask him about its  
17 credibility or any highlights and limit it to that.

18 MS. VOELCKERS: Okay. We can go to  
19 Page 3, please.

20 Yeah, we could go back up a few pages. Maybe just  
21 a little slower so I -- okay.

22 Sorry. Page 4. I was wrong.

23 Q (By Ms. Voelckers) So maybe a more general question.  
24 Again, I'm not trying to pin you down on the exact  
25 words here, since you haven't had a chance to read it.

1           But for someone who is not as deep into the  
2           publications of Mr. Watson or -- or the discussions and  
3           is trying to understand the species better and what the  
4           species needs, would you in your professional opinion  
5           think that this is a helpful source, even if it's a  
6           draft, to help educate anyone on where we're at right  
7           now in 2023 on what the ferruginous hawk is doing and  
8           what it needs to survive?

9                           MS. PERLMUTTER: I'm going to renew  
10           the objection, Your Honor.

11                          JUDGE TOREM: Overruled. He can  
12           comment on the substance here.

13                          **THE WITNESS: Again, with the caveat**  
14           **that I have not seen this document. Documents of this**  
15           **type, in my experience, are prepared with using the**  
16           **best available current science as the foundation for**  
17           **their descriptions and conclusions. So I would expect**  
18           **this to be a reliable source of information.**

19                          MS. VOELCKERS: Those are my  
20           questions at this time. Thank you.

21                          JUDGE TOREM: Ms. Reyneveld, any  
22           follow-up for this witness before I see if Council has  
23           questions?

24                          MS. REYNEVELD: Yes, I do have  
25           follow-up for this witness. Thank you, Your Honor.

1 REDIRECT EXAMINATION

2 BY MS. REYNEVELD:

3 Q Hi, Mr. McIvor. It's good to see you again.

4 **A (Speaking simultaneously.)**

5 Q Sarah Reyneveld for the record.

6 You were asked some questions about your  
7 responsive testimony pertaining to the two-mile offset  
8 for wind turbine sitings within historic and active  
9 territories for ferruginous hawk.

10 And turning to your responsive testimony, which is  
11 Exhibit 3001, on Page 11, you state that the revised  
12 application proposed a .25-mile offset, a figure  
13 derived in consultation with WDFW, correct?

14 **A That's -- that's correct.**

15 Q And you were speaking in your response to  
16 Ms. Perlmutter's questions about the management  
17 recommendations for Washington's priority species from  
18 Larsen, et al. dated 2004; is that correct?

19 **A Yes, that's correct. I couldn't recall the correct**  
20 **citation, but that is the one. Thank you.**

21 Q And if you can recall, where if anywhere in that study  
22 does that study recommend a .25 wind turbine setback  
23 from occupied ferruginous hawks' territories?

24 **A Yeah, I've -- I've been unable to locate that exact**  
25 **offset within the pages of that document. There are**

1       **some similar numbers, but they -- they're not the same**  
2       **number.**

3       Q   And considering that you've been unable to locate that  
4       specific citation, can you tell me whether it would be  
5       fair to say that you were relying on applicant's  
6       representation that the recommendation was derived in  
7       consultation with WDFW?

8                       MS. PERLMUTTER:   Your Honor, I'm  
9       going to object.   This is leading.   This is  
10      Ms. Reyneveld's witness.

11                      JUDGE TOREM:   In the interest of  
12      time, I recognize, Ms. Reyneveld, you're trying to move  
13      us along.

14                      I'll note the objection, Ms. Perlmutter, and let  
15      her lead us to the end of his testimony.   How about I  
16      put it that way.

17                      So, Ms. Reyneveld, press on.

18                      MS. REYNEVELD:   That's the question.  
19      I'm waiting for the witness to answer.   Thank you, Your  
20      Honor.

21                      **THE WITNESS:   I'm sorry.   Would you**  
22      **restate the question at the risk of --**

23                      MS. REYNEVELD:   Yes.   Absolutely.

24      Q   (By Ms. Reyneveld)   So considering that that .25-mile  
25      offset recommendation was not in those management

1 recommendations, can you tell me whether it's fair to  
2 say that you are relying on applicant's representation  
3 that that recommendation was derived in consultation  
4 with WDFW?

5 **A Yes, as the -- that recommendation was presented in the**  
6 **context of having come from the Larson, et al.,**  
7 **document and from personal communications. So, yes, I**  
8 **had to believe that that's where that figure came from,**  
9 **was personal consultation.**

10 **Q** And just following up on Ms. Voelckers' line of  
11 questioning: You didn't have access to that personal  
12 communication with WDFW; is that correct?

13 **A That's correct.**

14 **Q** You also spoke about additional information that you  
15 obtained through discovery that led to your  
16 supplemental testimony. And you referenced the  
17 discovery deposition of raptor specialist Mr. James  
18 Watson from WDFW.

19 Was there additional information that you learned  
20 through discovery?

21 **A Well, certainly. And I think Mr. Ritter's testimony**  
22 **was also informative. I certainly learned more about**  
23 **the antelope and their use of the site on the landscape**  
24 **through discovery. I'm sure there were other things.**  
25 **Those are probably the major, major points.**

1 Q Thank you.

2 And you were asked some questions by Ms. Voelckers  
3 regarding Exhibit 4015, the management recommendations  
4 for Washington priority species that are in draft form.

5 Knowing that you haven't fully reviewed that  
6 document, in your expert opinion, can you tell me  
7 whether the fact that something hasn't been officially  
8 published but is in draft form makes it a less valid  
9 source of information for an expert like you to  
10 consider, hypothetically speaking?

11 **A No, I don't think it's less valid, particularly coming**  
12 **from a regulatory agency, because it's going to provide**  
13 **their recommended guidance for how management should**  
14 **proceed.**

15 Q And you also stated in response to cross-examination  
16 questions that WDFW was the lead agency with expertise  
17 to manage and recover the ferruginous hawk. And you  
18 stated you'd give them deference.

19 Why is it important for experts like you to give  
20 deference to guidance or recommendation that are coming  
21 out of WDFW?

22 **A Well, simply because it is their responsibility to**  
23 **recover this species. They're the ones who will be**  
24 **staffing the effort, who will be planning it, who will**  
25 **be identifying goals and objectives for recovery. And**

1       **so, yeah, it's -- it's -- it's on their plate. It's**  
2       **their responsibility. They need to get from Point A to**  
3       **Point B.**

4   Q   You also stated in response to a question by, I  
5       believe, Ms. Voelckers that WDFW's current  
6       recommendation to offset wind turbine siting within two  
7       miles from active and historic ferruginous hawks'  
8       nesting territories was best available science.

9       What's the basis of that opinion?

10   A   **The basis is Mr. Watson's research on the ferruginous**  
11       **hawk in this -- in this region. I think the -- the**  
12       **two-mile buffer is, again, based in biological**  
13       **reality -- I think that's where I use that term**  
14       **earlier -- and based on the core area sizes that he's**  
15       **measured within this particular range.**

16   Q   And based on that, do you think it's important for  
17       other experts, such as the applicant's experts in this  
18       matter, Mr. Jansen and Mr. Rahmig, to consider and  
19       incorporate the two-mile offset recommendation in their  
20       analysis of the project?

21   A   **I think it is important to consider that -- that buffer**  
22       **in the design of the project, yes.**

23   Q   And, Mr. McIvor, have you had an opportunity to review  
24       the August 9th, 2023, memo to Amy Moon, which we're  
25       titling the Moon memo, which proposes modifications to

1 the project?

2 **A A very catchy title. Yes, I had reviewed that.**

3 Q Can you tell me whether, if you have knowledge of this,  
4 the Horse Heaven project as currently modified in the  
5 Moon memo incorporates those updated WDFW two-mile  
6 offset recommendations?

7 **A It does not incorporate a two-mile offset. It may**  
8 **around one, the last active nest, but it certainly does**  
9 **not incorporate the two-mile buffer around historic**  
10 **nests.**

11 Q And in your expert opinion, do you think it's important  
12 for the applicant to incorporate those updated two-mile  
13 offset recommendations?

14 MS. PERLMUTTER: Again, Your Honor,  
15 this is leading.

16 JUDGE TOREM: Again, it is. But,  
17 Ms. Reyneveld, if you're wrapping up. Are we close?

18 MS. REYNEVELD: I am trying to get  
19 through my questions as quickly as possible, Your  
20 Honor.

21 **THE WITNESS: Yes.**

22 JUDGE TOREM: Ms. Perlmutter, I'm  
23 just going to allow it because I want to move this  
24 along.

25 MS. PERLMUTTER: I'd just like to

1 note for the record that that's -- with all respect to  
2 both parties, that Ms. Reyneveld is now effectively  
3 testifying, but I won't object again.

4 JUDGE TOREM: Well, to be  
5 consistent, as Mr. Aramburu likes, I think I've allowed  
6 plenty of friendly redirect along the way to create the  
7 record we need, so I'm not going to treat Ms. Reyneveld  
8 today any differently than I've given leave to several  
9 other attorneys.

10 Ms. Reyneveld, let's keep going.

11 Q Did you get that question, Mr. McIvor?

12 **A Again, at the risk of offense, please repeat it, if you**  
13 **would, please, Ms. Reyneveld.**

14 Q My question was whether, in your expert opinion, it  
15 would be important to incorporate the most current  
16 guidance from WDFW.

17 **A Yes, I do -- I do believe it would be important to**  
18 **incorporate the most current guidance.**

19 Q And why is that?

20 **A Well, that's the best available science. It's what our**  
21 **current understanding of the ferruginous hawk reflects.**

22 Q Thank you.

23 And speaking just about the ferruginous hawk and  
24 the Moon memo more generally in addition to that  
25 specific avoidance recommendation, knowing that this is

1 a new document in the context of the adjudication that  
2 isn't reflected in your testimony, do you think that  
3 those modifications in the Moon memo generally  
4 sufficiently either avoid or mitigate the impacts to  
5 ferruginous hawk?

6 **A My sense of it at this point is that it does not**  
7 **adequately avoid potential impacts because of not**  
8 **incorporating the two-mile buffer around historic nest**  
9 **sites.**

10 Q Thank you.

11 You were asked some questions about the  
12 effectiveness of artificial nest platforms, and I just  
13 wanted to turn you to Appendix L of the revised  
14 application -- and I believe it's Page 24 -- that  
15 concludes that successful nesting has occurred at  
16 nesting platforms throughout eastern Washington that  
17 were installed by WDFW and the Washington Department of  
18 Transportation to enhance nesting opportunities.

19 What support does that application provide for  
20 that statement that successful nesting has occurred at  
21 nesting platforms throughout eastern Washington?

22 **A I think the citation led back to the WDFW publication,**  
23 **the recent, I think, 2022 status review of the**  
24 **ferruginous hawk.**

25 And I went through that document, and there is a

1 paragraph in there describing the use of artificial  
2 nest platforms in the state of Washington. And I think  
3 it documents, since the late '80s, the installation of  
4 about 85 platforms. But only the most recent effort,  
5 which I think was 2019, when I think 29 platforms were  
6 installed, only that one effort is there any report of  
7 nest use. And I think I alluded to this earlier this  
8 morning. Two of those 29 platforms were utilized.

9 So the fate of -- of the other -- as Mr. Rahmig  
10 stated, I don't like to do math in public. So the  
11 other platforms outside of the 29 we're talking about,  
12 their fate and their use was not reported in that  
13 document. So I don't know if the, you know, WDFW  
14 performs nest surveys periodically. I don't know if  
15 those platforms are incorporated in the wider surveys,  
16 but it would be very good to know what the use rate has  
17 been for those 85 platforms in total.

18 Q So knowing that gap in knowledge, then, in your opinion  
19 does that statement accurately characterize the nesting  
20 that has occurred at nesting platforms in Eastern  
21 Washington?

22 A I could not have come to the same conclusion, no. I  
23 think it's much more ambiguous.

24 Q Thank you.

25 Just there's been a lot of testimony on this

1 issue, but stepping back and considering kind of the  
2 ambiguities in the research, what is your opinion as to  
3 whether the installation of artificial nesting  
4 platforms has been proven effective?

5 **A In Washington, I don't have any evidence that they have**  
6 **been proven effective. They've been installed.**  
7 **There's some evidence of use. But I just think there's**  
8 **too much information lacking in the public arena. I**  
9 **would hope that WDFW would have data on these platforms**  
10 **and their use, but I -- I have not seen it.**

11 **Q Thank you.**

12 You were asked some questions about bats and  
13 whether the project accurately quantifies bats and also  
14 mitigation measures.

15 Do you think the project as currently designed as  
16 represented in the Moon memo sufficiently avoids or  
17 mitigates impacts to bats, such as the hoary or  
18 silver-haired bats?

19 **A I -- I do. The project will not be without impacts.**  
20 **And no one has represented it in that way. But I think**  
21 **with the -- with the TAC in place and with the**  
22 **monitoring and with the recognition of the fact that**  
23 **there are tools at hand to help, in an adaptive**  
24 **management context, address bat mortalities, I think,**  
25 **yes, it does address my concerns.**

1 Q Thank you.

2 And I'm almost done with my questioning on  
3 redirect. I just have a couple more questions about  
4 the prong- -- pronghorn antelope.

5 It's my understanding you were asked about whether  
6 the project appropriately quantifies the impact on the  
7 pronghorn. And in your direct testimony, you mention  
8 the Yakama Nation's data and kind of answered the  
9 question of whether it was incorporated into the  
10 revised application.

11 And I just wanted to clarify for the record: In  
12 considering impacts on pronghorn antelope, do you think  
13 it would be important to incorporate that data into the  
14 revised application?

15 **A Yes. Now knowing of its existence, it would be**  
16 **important to incorporate it.**

17 Q And why is that?

18 **A Well, in earlier versions of the application and the**  
19 **EIS, the GPS tracking data were not available. And now**  
20 **that they have come to light and have been made**  
21 **available, it's adding to our body of knowledge and our**  
22 **understanding of how antelope may be utilizing this**  
23 **landscape.**

24 So just to give us a complete picture and a  
25 complete understanding. I don't think you can ignore

1       **that body of data.**

2   Q   Mr. McIvor, do you believe that you are able to fully  
3       answer all the questions that were posed by counsel, or  
4       would you like to clarify any of your responses?

5   A   **I've -- we got the memo that I pontificated quite a**  
6       **bit. So I think -- I think my answers are sufficient.**  
7       **Thank you.**

8                               MS. REYNEVELD: Thank you,  
9       Mr. McIvor, for your testimony. I don't have any  
10      further questions for you at this time.

11                              JUDGE TOREM: All right. I'm going  
12      to turn to the Council now.

13                              Chair Drew, Council members, put the hands up  
14      again to get in line to ask questions of Mr. McIvor.

15                              Chair Drew, I have you first.

16                              And, Mr. Livingston, I'll come to you next.

17                              COUNCIL CHAIR DREW: Thank you, Your  
18      Honor.

19                              Thank you, Mr. McIvor. I appreciate your  
20      pontificating. I learned a lot, so I really appreciate  
21      it.

22                              So one of my questions is: The ferruginous hawk  
23      is endangered. And, you know, in my limited history --  
24      I'm not a scientist; I'll admit that publicly -- but  
25      there have been different endangered species that have

1 recovered; the eagle, bald eagle, particularly.

2 But in this case, what would be the impact if  
3 there was one single bird strike on a ferruginous hawk?

4 **THE WITNESS:** Good morning, Chair  
5 Drew. Thank you. A very thoughtful question.

6 This gets to the concept of risk. And depending  
7 on one's field, risk is defined in different ways. But  
8 in the world of biology, it's basically the probability  
9 of an event occurring multiplied by the magnitude of  
10 that event.

11 So the surveys that have been conducted on this  
12 project site indicate relatively low use by ferruginous  
13 hawks. They're there. They've been there this year.  
14 But not very frequent use. Therefore, I think it's a  
15 reasonable conclusion that the probability of a strike  
16 is low. The problem is, with 34 breeding pairs in the  
17 state, the magnitude of such an event is high. So I  
18 think that's where we have a challenge in front of us.

19 If you lose one bird, you've lost -- again, I'm  
20 trying to avoid math in public -- but roughly, say, 2  
21 percent of your population.

22 **COUNCIL CHAIR DREW:** Because, of  
23 course, that one bird represents the ability with  
24 another bird to create a third bird.

25 **THE WITNESS:** That's where I was

1 going next, yes. You've lost not only an individual  
2 but a breeding -- probably a breeding opportunity  
3 for -- for this season. So, yes, that's -- that's the  
4 challenge.

5 COUNCIL CHAIR DREW: Thank you.

6 And then when -- in talking about different ways  
7 to consider managing that option, certainly we've heard  
8 a lot about the amount of buffer. I also you heard you  
9 talk about the encroachment in shrub-steppe by the  
10 housing development allowed by Benton County. So that  
11 certainly is a risk, especially as it comes close to  
12 the nesting sites near the site, so -- but that's not a  
13 risk we manage. That's a risk only the County can  
14 manage.

15 So, then, in considering future options, I know  
16 you also talked about curtailment. But, again, if the  
17 curtailment stops the turbine after the fatality of a  
18 bird, then we haven't managed that risk.

19 I also see that I just was looking at your  
20 exhibit, your revised testimony, 3001, and actually  
21 what I see you saying there is that a type of option  
22 would be to curtail specific tower operation should a  
23 nesting pair choose to have a project site in that home  
24 range.

25 Do you see that as -- and, again, this is --

1 should the project be developed, obviously we would  
2 have a technical advisory committee, which unlike other  
3 types of developments, would not stop with the  
4 operator, since we oversee -- at EFSEC, the Council  
5 oversees the decisions made, not the applicant, not the  
6 project developer.

7 So how do you see that type of risk in this type  
8 of scenario?

9 **THE WITNESS:** Well, these are all  
10 steps that are made in an effort to stack the odds in  
11 favor of the ferruginous hawk. None of them would be  
12 guaranteed to eliminate the risk. And, again, no one  
13 has suggested that. But that's the problem.

14 So taking a step like seasonal or curtailment  
15 during daylight hours when the bird is actively  
16 foraging, all of those could be helpful measures in  
17 reducing risk.

18 Countering that is the fact that these birds have  
19 very large home ranges, as we've discussed, and will  
20 not confine their movements to the two-mile buffer that  
21 we artificially designate. So what I was suggesting in  
22 that testimony was that there could be a situation  
23 where a nesting pair's activity was predominantly  
24 along, say, the western edge, which I think is where  
25 they've more commonly been seen in the recent years,

1 and there might be some opportunity to reduce risk in  
2 that region. But, again, you would not eliminate risk  
3 entirely.

4 COUNCIL CHAIR DREW: Okay. Thank  
5 you. You've been very helpful and have left us with a  
6 very complicated situation to walk through. Thank you.

7 THE WITNESS: I have. Yes, thank  
8 you, Chair Drew.

9 JUDGE TOREM: Mr. Livingston, if  
10 you'll introduce yourself to Mr. McIvor, assuming you  
11 don't already know him, and ask your questions.

12 COUNCIL MEMBER LIVINGSTON: Thank  
13 you, Your Honor.

14 Hi, Mr. McIvor. I'm Mike Livingston, Washington  
15 Department of Fish and Wildlife, and representing the  
16 department on EFSEC here.

17 So I really appreciate the discussion, the  
18 dialogue that's going on today. I mentioned a couple  
19 days ago, the -- the airtime that some of these  
20 less-known species are getting through this hearing has  
21 been really valuable, I think, for everybody to become  
22 aware of some of our imperilled species.

23 The legislature just invested \$23 million in the  
24 department for biodiversity conservation, and this is  
25 one of those species that we're going to be focusing

1 on. We're going to have a new biologist in the  
2 Tri-Cities soon who's going to be able to focus on this  
3 work. We've been way behind in our efforts to be able  
4 to do that.

5 But before we get to ferruginous hawks, just one  
6 thing that we haven't discussed, and I think it's  
7 important to understand, is: Can you explain how bats  
8 are affected by turbines? And what in that interaction  
9 kills the bats?

10 **THE WITNESS: Good morning,**  
11 **Mr. Livingston. Thank you for a challenging question.**

12 **There isn't an easy answer to that, because**  
13 **there's been a number of mechanisms over the years**  
14 **which have been identified. And two of the principal**  
15 **ones are direct strike from encountering moving rotors.**  
16 **Another one, which I think has somewhat moderated as a**  
17 **source, relates to barotrauma.**

18 **So there would appear to be a pressure**  
19 **differential set up by the rotating blades. And bats**  
20 **have -- dead bats have been recovered which show signs**  
21 **of barotrauma. So they seem to encounter this pressure**  
22 **differential, and it causes fatal internal damage.**  
23 **Very strange.**

24 **There also is some evidence that some species of**  
25 **bats are actually attracted to the rotors. And no one,**

1 I think, quite understands why that is, whether it  
2 concentrates insects or gives off some ultrasonic  
3 signal that the rest of us can't hear. We just don't  
4 know. It's quite a -- quite an odd thing.

5 But, anyway, I suspect that most of the  
6 mortalities occur from direct strikes during foraging  
7 attempts by the bats.

8 COUNCIL MEMBER LIVINGSTON: Thank  
9 you. I felt like that one, I hadn't -- years ago, I  
10 was more familiar with that understanding, but I  
11 haven't kept up with the science to see if we've  
12 learned any more. So I appreciate that.

13 Just quickly, regarding the platforms for  
14 ferruginous hawks, the artificial nets platforms, 11  
15 years ago, from 2003 to 2012, I was the district  
16 wildlife biologist in the Tri-Cities. My  
17 responsibility was to keep track of ferruginous hawks  
18 in Benton and Franklin counties.

19 And we had several platforms. Almost all of them  
20 were not used. There were some. They do still hold  
21 some promise, I think. It's really dependent upon the  
22 territory and are there alternative nesting options.

23 I, mean, cliffs, the lone trees, the black locust  
24 trees that are out there, those are really the  
25 preferred nesting platform, but just wanted to get that

1 out there that they are -- they are a tool. They're  
2 not a panacea, I think you mentioned. I would agree  
3 with that.

4 So regarding these buffers that we've been talking  
5 about. Rarely do we have complete data to, you know,  
6 define a individual pair's territory. You know, that  
7 would require a lot of intense study on those  
8 individuals.

9 But in the absence of having that type of data to  
10 define a territory, would you agree that adding some  
11 form of a uniform buffer around a nesting territory may  
12 be the best we can implement in the absence of having  
13 the data?

14 **THE WITNESS: Absolutely. Yes, I**  
15 **would agree with that statement, yeah.**

16 COUNCIL MEMBER LIVINGSTON: Yeah.  
17 And the -- well, I did the math. So 10 kilometers,  
18 which is what the ideal buffer would be, equates to 6.2  
19 miles. And what -- what Mr. Watson has recommended is  
20 two miles, which is about a third of the ideal. Just  
21 wanted to put that in there.

22 So I wanted to talk about -- we haven't talked  
23 about the longevity of ferruginous hawks.

24 Do you know how long they -- you know, their life  
25 span is?

1                   **THE WITNESS:** I have read. I think  
2 20 years would be quite an old bird. I think it's more  
3 typically in the range of five to six years.

4                   **COUNCIL MEMBER LIVINGSTON:** Can you  
5 describe the impact of adding new sources of mortality  
6 to an endangered species that's in steep decline,  
7 especially for those that are, you know longer lived  
8 than, you know, one or two years?

9                   **THE WITNESS:** Yeah. It's --  
10 mortality -- when a population becomes as small as this  
11 one, mortality is generally viewed as being additive.  
12 So on top of everything else the bird is already  
13 experiencing, here's this new mortality event. And so  
14 it -- you know, it becomes a greater event, an event of  
15 greater consequence because it's additive on the small  
16 population.

17                   I'm starting to lose focus. Please let me know if  
18 that didn't answer your question.

19                   **COUNCIL MEMBER LIVINGSTON:** I think  
20 it did. It did. I'm just trying to put into context.

21                   So some of the post-construction monitoring  
22 elsewhere has -- I can't remember if it's Washington  
23 and Oregon, but there was up to eight mortalities that  
24 have been detected due to direct, you know, collision  
25 with wind turbines for ferruginous hawks.

1           And so I'm trying to put in perspective -- and  
2           hopefully you can help me. With a -- with a species  
3           that's low in numbers, lives fairly long, how does, you  
4           know, that number of eight mortalities contribute to  
5           population declines?

6                           **THE WITNESS:** Yeah, you know,  
7           it's -- I can't -- I can't say specifically. I think  
8           what's maybe interesting in the context of your  
9           question is Mr. Jansen's paper, which I think came out  
10          last year, in which he did some population viability  
11          analysis on the ferruginous hawk.

12          And I have some -- some concerns about the way  
13          that was done that we don't need to get into. I think  
14          the take-home message from that, which is valid, is  
15          that this population is in trouble and cannot bear a  
16          lot more mortality. So, yeah, I think the consequences  
17          of -- of loss are -- are high and difficult to  
18          mitigate.

19                           **COUNCIL MEMBER LIVINGSTON:** Okay.  
20          Something we also haven't talked about too much is  
21          predation. And particularly eggs, young, can be a real  
22          problem for a struggling population.

23          Would you agree?

24                           **THE WITNESS:** I agree. And I think  
25          that some of WDFW's research on the population has

1 specifically identified a bottleneck at the juvenile  
2 stage, so getting birds into the adult population and  
3 breeding is problematic with this -- this group.

4 COUNCIL MEMBER LIVINGSTON: Are  
5 you -- are you familiar with common ravens and great  
6 horned owls and their -- their population numbers these  
7 days?

8 THE WITNESS: Well, you know,  
9 they're -- they're both species that are adapted to  
10 human presence and human disturbance.

11 And, yes, this has long been an issue through my  
12 career as I have moved around the Great Basin and then  
13 now up into Washington. Both common raven and great  
14 horned owl are significant often to many problems,  
15 significant source of mortality on -- on nests and  
16 nestlings.

17 COUNCIL MEMBER LIVINGSTON: And so  
18 you mentioned in human development. So would -- would  
19 this -- this project, as described as proposed  
20 currently, potentially add to increases in raven and  
21 great horn owl numbers?

22 THE WITNESS: Yes. But I would say  
23 the applicant has made an effort to minimize things  
24 like overhead power lines, which give ravens a perch  
25 site to hunt from. But unquestionably there would be

1 more opportunities for the species as a result of the  
2 project.

3 COUNCIL MEMBER LIVINGSTON: Yeah,  
4 certainly something that we -- we'd need to manage  
5 going forward in a way to not augment their  
6 populations, if possible.

7 **THE WITNESS: Mm-hmm. Agreed.**

8 COUNCIL MEMBER LIVINGSTON: So I'm  
9 wrapping up here. I'm pretty close.

10 So with a declining, endangered -- state  
11 endangered species like we have here, would you agree  
12 that we need to exercise as much caution as possible,  
13 unlike we would with a more common species like  
14 red-tail hawk?

15 **THE WITNESS: I'd say that's**  
16 **warranted, yes.**

17 COUNCIL MEMBER LIVINGSTON: And  
18 here's my punch line of ferruginous hawks.

19 So could this project, as designed, contribute to  
20 continued decline of ferruginous hawks in Washington  
21 State?

22 **THE WITNESS: I would say it**  
23 **certainly could. I'd say there are -- there's a lot of**  
24 **thought and a lot of effort going into identifying**  
25 **minimization techniques and mitigation. But**

1 unquestionably it could, and that does need to be  
2 balanced against the fact that this project will  
3 address, to however small a degree, climate change,  
4 which is also impacting the bird. This is -- you have  
5 a difficult task in front of you.

6 COUNCIL MEMBER LIVINGSTON: Appreciate the recognition of that. And I appreciated  
7 the -- the response to Chair Drew about managing risk  
8 in all of its forms that, you know, that we're trying  
9 to do here.

10 So I'm -- I'm done. So I really appreciate your  
11 time, Mr. McIvor.

12 **THE WITNESS: And yours,**  
13 **Mr. Livingston. Thank you.**

14 JUDGE TOREM: All right.  
15 Mr. McIvor, I'm going to introduce Stacey Brewster from  
16 the Utilities/Transportation Council. She has some  
17 questions for you.

18 COUNCIL MEMBER BREWSTER: Hello,  
19 Mr. McIvor. I appreciate all the in-depth conversation  
20 we've had about ferruginous hawks, bats, and pronghorn.

21 One thing we haven't talked about in your  
22 testimony was the impacts on general avian populations.  
23 That's a concern that's come up quite a bit in public  
24 comments that we have received.  
25

1           In your testimony, you mention that the project  
2 wouldn't -- will not have -- oh -- project will have  
3 disproportionate -- excuse me.

4           You don't expect the impact to be  
5 disproportionate. Can you talk a little bit about what  
6 the expected impact is?

7                         **THE WITNESS:** Well, yeah. These --  
8 wind energy projects always impact birds. I mean,  
9 that's -- we've come to learn and understand that  
10 that's one of the tradeoffs that we accept in  
11 implementing these projects. We currently accept -- I  
12 think there's a lot of research going and ongoing in  
13 how to minimize these impacts.

14           The application indicates -- and I -- I would  
15 concur -- that the species that would ordinarily be at  
16 greatest risk -- and, again, this is -- let's exclude  
17 ferruginous hawk from this discussion. The other  
18 species that would be at great risk have behaviors in  
19 the context of the project that either all but  
20 eliminate risk or it certainly minimize the likelihood  
21 that they would be mortality -- be mortalities as a  
22 result of the project.

23           This project is expected to impact primarily  
24 horned lark, which is a common bird in the open  
25 grasslands and even reasonably adapted to farmed lands

1 quite common out on the -- the Columbia Plateau, for  
2 example. And that's -- that's the species that most  
3 frequently shows up in -- in -- in post-construction  
4 mortality surveys. So I -- I don't have any reason to  
5 believe that this project would be any different  
6 from -- from those others.

7 So there would be mortality events, but they would  
8 tend to fall on species that are -- that have robust  
9 populations that very likely could absorb these sorts  
10 of mortalities.

11 COUNCIL MEMBER BREWSTER: Thanks. I  
12 know there's been a lot in the comments regarding  
13 sandhill cranes and snow geese moving through the area.  
14 So what I'm hearing is those populations are robust  
15 enough to withstand some mortality; is that correct?

16 THE WITNESS: Yeah, and for -- for  
17 whatever reason -- I studied sandhill cranes for my  
18 master's degree, so they hold a place for me.

19 For whatever reason, they seem to be very low  
20 mortality risk with wind energy facilities. And in  
21 this particular project, they don't seem to be  
22 utilizing the habitat in the immediate area, certainly  
23 not for breeding. I don't think there'd be suitable  
24 breeding habitat there, nor is that really part of  
25 their breeding range.

1           But it would be during stopovers in migration.  
2           And they -- they seem to be attracted to other areas  
3           for stopover. So, yeah, what's been documented is  
4           high -- high flyovers, and that should put them out of  
5           the rotor-swept range and should be very low risk.

6                           COUNCIL MEMBER BREWSTER: Thank you.

7                           **THE WITNESS:** You're welcome.

8           **Thanks for the questions.**

9                           JUDGE TOREM: Mr. Levitt.

10           You're on "mute," Mr. Levitt.

11           There are you go.

12                           COUNCIL MEMBER LEVITT: Sorry.

13           Hello, Mr. McIvor. I'm Eli Levitt, Ecology's --  
14           Department of Ecology's Council member to EFSEC.

15           I guess, just at a very high level, you know,  
16           there's this concept of leave no trace, but what if we  
17           kind of change that just for a moment to, you know,  
18           let's try to do better?

19           Are there -- you know, assuming you had some  
20           substantial funds and resources, are there restoration  
21           activities that could take place from the greater lease  
22           area that would provide any benefit to all of the  
23           species we've talked about?

24           So I'm putting aside things like the artificial  
25           nests and the two-mile radius for the hawks. But, you

1 know, planting of native species, removal of invasive  
2 species, maybe some sort of very small rotating fire  
3 regimen, any -- anything along those lines that would  
4 have potential positive impact.

5 **THE WITNESS:** Good morning,  
6 Mr. Levitt. You saved the tough question for last, I  
7 guess.

8 Yes, I think given the degradation in shrub-steppe  
9 habitat that's occurred in the state over the last  
10 century and a half, I think there is a significant need  
11 to look at habitat restoration efforts. I'm not  
12 familiar enough with area to say that there's a  
13 specific site, but I think it's an opportunity worth  
14 looking for.

15 I think the -- there's two challenges here. One  
16 is scale. Because the extent of the loss or  
17 degradation of shrub-steppe habitat is so enormous that  
18 it -- it's almost hard to know where to even start, but  
19 start we probably should.

20 And then the other thing I would say about it is  
21 that shrub-steppe habitat has proved to be a very  
22 difficult habitat type to restore. And I believe there  
23 was the illusion in maybe Mr. Ritter, maybe  
24 Mr. Watson's testimony about, in future  
25 recommendations, thinking about function of these

1 habitat types.

2 And I think that's something that's been often  
3 absent from our discussions about how do we not just  
4 create a landscape that looks right to us but actually  
5 functions closer to the fashion of the habitat that's  
6 been lost or being disturbed.

7 So, yes, it certainly -- it's certainly worth  
8 consideration.

9 COUNCIL MEMBER LEVITT: Okay. Thank  
10 you. That was my only question.

11 THE WITNESS: Thank you.

12 JUDGE TOREM: All right. And the  
13 last Council member with a hand up is Lenny Young,  
14 Department of Natural Resources.

15 COUNCIL MEMBER YOUNG: Good morning,  
16 Mr. McIvor. I'm Lenny Young, and I serve as DNR's  
17 representative to EFSEC. I'd like to follow up on one  
18 of Mr. Livingston's questions.

19 Would you support lethal control of ravens and  
20 great horned owls as part of mitigation for this  
21 project? And, if so, how do you think that should be  
22 accomplished?

23 THE WITNESS: Your Honor, you sure  
24 we're not out of time?

25 Good morning, Mr. Young.

1 JUDGE TOREM: Mr. Young has never  
2 quoted Edgar Allan Poe to this point, but we'll go  
3 there.

4 THE WITNESS: Quite a loaded  
5 question, Mr. Young.

6 COUNCIL CHAIR DREW: Might I say no  
7 pun intended. I think --

8 THE WITNESS: Yes.

9 COUNCIL CHAIR DREW: -- we're being  
10 a little silly today.

11 THE WITNESS: Yes. Thank you. I  
12 was going to sidestep that. Thank you.

13 I'm very hesitant to recommend lethal removal. I  
14 have been involved with other projects and conservation  
15 efforts looking at species that are in a very  
16 challenging position, like sage grouse, for example,  
17 which also suffer from predation from ravens.

18 And the managing agencies wanted to go to lethal  
19 control. And it probably has its place. But I see in  
20 this instance, it's a last resort. Because really the  
21 heart of what the problem is, is lack of habitat and  
22 degraded habitat. And it's just so easy to do the  
23 "blame the predators" game and take out our  
24 shortcomings, collectively our shortcomings as land  
25 stewards, on the predators.

1           So that said, in something like the nest platform  
2           situation, I think there's a valid question on the  
3           table of monitoring those, and if you encountered  
4           ravens using the platform or great horned owls, should  
5           those nests be removed and an opportunity created for  
6           ferruginous hawk to take them over? I think that's a  
7           question that's on the table. I'm not in a position to  
8           answer it.

9                           COUNCIL MEMBER YOUNG: Thank you.

10                          JUDGE TOREM: Chair Drew, Council  
11           members, any additional questions for Mr. McIvor?

12                          All right. I'm not seeing any.

13                          Ms. Reyneveld, does this cause any need for  
14           further redirect?

15                          MS. REYNEVELD: I don't have need  
16           for further redirect in response to the Council's  
17           questions. Thank you, Council.

18                          JUDGE TOREM: Ms. Perlmutter, I'll  
19           come to you and then Ms. Voelckers to see if there's  
20           any additional questions you might have for this  
21           witness before we let him go.

22                          MS. PERLMUTTER: I do, Your Honor.

23           ////

24           ////

25           ////

1 RE CROSS-EXAMINATION

2 BY MS. PERLMUTTER:

3 Q And thanks so much, Mr. McIvor, for your testimony. A  
4 lot of this has been extremely illuminative. And I'm  
5 going to try and work backwards and do this as  
6 efficiently as I can.

7 You just testified in response to Mr. Young, to  
8 Council Member Young, that -- there was an open  
9 question that perhaps if, on the monitoring artificial  
10 nest platform, if we were to encounter, for example,  
11 ravens using the platform or owls using the platform,  
12 that there are ways that might be under consideration  
13 for addressing that further prey risk to ferruginous  
14 hawks; am I right?

15 A **Yes, that's correct. With the caveat added that, at**  
16 **least in terms of the owl, they -- they are -- have**  
17 **some protection under our laws. So --**

18 Q All I'm asking really is there are some things that can  
19 be done.

20 A **Yes.**

21 Q In other words, this is a dynamic situation?

22 A **Yes. Correct.**

23 Q Okay. And it was interesting to me. You just talked  
24 about, again with response -- in response to Council  
25 Member Young, you said that there was a situation with

1 regard to a species like sage grouse where the managing  
2 agencies wanted to go to lethal control and you had  
3 some qualms about that, right?

4 **A Yes. That's true.**

5 Q And so what I'm taking from that, again, at the  
6 72,000-foot level, is that just because a managing  
7 agency says something, that doesn't necessarily mean  
8 that ultimately that -- that reasonable minds can  
9 differ with managing agencies as to what the  
10 appropriate measures are for protecting the species?

11 **A That's true. There's always room for discussion.**

12 Q You've also testified -- now I'm going way back to the  
13 beginning of your testimony, or beginning of your cross  
14 by Ms. Voelckers.

15 You said that the ferruginous hawks' prey in  
16 Washington is not as robust as it should be.

17 Do you remember saying that?

18 **A I do.**

19 Q And you've also indicated, though -- we talked about it  
20 earlier -- that things like planting additional native  
21 grasses at the solar arrays could, in fact, enhance  
22 those prey populations; am I right?

23 **A It's possible.**

24 Q Okay. And you testified -- there's been a lot of talk  
25 about artificial nest platforms. And I am jumping

1 around here.

2 But you testified that -- that the artificial nest  
3 platforms are not being proposed as mitigation, that  
4 they're considered an add-on; am I right?

5 **A That's my understanding, yes.**

6 Q And would you agree with me that -- that the applicant  
7 is actually doing lots of things, has made a number of  
8 suggestions that go above and beyond in order to -- I  
9 don't want to use the word "mitigation," because that's  
10 obviously a term of art. But the applicant's made a  
11 lot of suggestions and proposals and offers that would  
12 enhance species and wildlife protections at the site?

13 **A They are working very hard to accommodate our concerns.**

14 Q Thank you.

15 You also indicated that you would see Mr. Watson  
16 as the expert on the topic of ferruginous hawks.

17 Can I just assume that you are not disparaging  
18 either Mr. Jansen or Mr. Rahmig's conclusions as well?

19 **A No.**

20 Q These are three scientists.

21 **A Yes. Yes. Yes. Correct. I'm not disparaging those  
22 fellows.**

23 Q And as you testified a moment ago, professional  
24 scientists may have disagreements about ways to go on a  
25 particular issue?

1 **A Certainly.**

2 Q Okay. And in response to Ms. Reyneveld's questioning,  
3 you said in your testimony -- and this is with regard  
4 to your initial testimony -- that you expected the --  
5 you expected there would be a 0.25 offset recommended,  
6 right?

7 **A That's initially what I encountered, yes.**

8 Q Okay. And you testified -- you signed that under  
9 penalty of perjury, right?

10 **A Right.**

11 Q That was true to the best of your knowledge and belief  
12 at the time?

13 **A At that time, yes.**

14 Q Okay. With regard to this draft exhibit that was put  
15 up as Exhibit 4015. And that's the August 9th draft of  
16 the guidelines.

17 And you testified that you don't think that draft  
18 is any less valid because it's in draft form, right?

19 **A Yes. Correct.**

20 Q But a draft, by definition, can change, can't it?

21 **A Yes.**

22 Q That draft hasn't -- hasn't been finalized?

23 **A That's correct.**

24 (Simultaneous speaking.)

25 ////

1 MS. PERLMUTTER: Sorry. I'm doing  
2 it again, Mr. McIvor.

3 Q (By Ms. Perlmutter) And, again, that draft was based  
4 on, I believe it's a 2014 study; isn't that right?

5 **A I -- I can't answer that. I'm sorry. I don't know if**  
6 **it is.**

7 Q Okay. But certainly as a draft, it's subject to  
8 change?

9 **A Certainly, yes.**

10 Q And there's no way to know at this point where those  
11 changes are headed?

12 **A No.**

13 Q Yes, there's no way to know where those changes are  
14 headed?

15 **A Yes, there's no way to know where those changes are**  
16 **headed.**

17 Q And you stated the two miles -- that the two-mile  
18 proposed buffer, that's currently best available  
19 science?

20 **A Yes, I would say it is.**

21 Q But that's not actually really true, is it? There --  
22 there are competing reputable data-based  
23 recommendations that are being made by the applicant,  
24 but competing reputable recommendations, right?

25 MS. REYNEVELD: Objection.

1 Argumentative.

2 JUDGE TOREM: Mr. McIvor, do you  
3 feel she's arguing with you?

4 **THE WITNESS: Yes.**

5 JUDGE TOREM: I do too, so I'm going  
6 to sustain the objection.

7 Ms. Perlmutter, let's just make our points as to  
8 what is or isn't within the realm of his expertise and  
9 move along.

10 Q (By Ms. Perlmutter) Would you agree with me that there  
11 are differing viewpoints as to what that buffer should  
12 be?

13 **A Yes.**

14 Q And, in fact, your testimony earlier this morning and  
15 in your -- both your original and supplemental  
16 testimony was that the buffer -- that a one-size-  
17 fits-all -- strike that -- that a buffer should be  
18 based on the available data specific to this project;  
19 am I right?

20 **A Ideally that's correct. There -- there may not be  
21 adequate data to directly address the question, so we  
22 have to use the best that's available, yes.**

23 Q Okay. In response to Chair Drew's questions, you said  
24 that there might be an opportunity -- and she was  
25 asking you -- and, again, a very interesting answer

1 about what "risk" means at your particular scientific  
2 field, and she said that -- that there might be an  
3 opportunity to reduce risk in the region -- and I think  
4 you were talking about the project area -- but you  
5 couldn't eliminate it altogether, right?

6 **A Correct.**

7 Q And isn't that -- not as an argument. This is a real  
8 question.

9 Isn't that what a technical advisory committee is  
10 meant to do?

11 **A Yes.**

12 Q You testified -- let me see who you were answering --  
13 to Mr. Livingston, to Council Member Livingston, that  
14 based on some post-constructive -- construction  
15 monitoring elsewhere, you're aware of up to eight  
16 mortalities that were -- in ferruginous hawks detected  
17 due to direct collisions with wind turbines?

18 **A That's my recollection from the literature, yes.**

19 Q And that's not specifically Washington State, right?  
20 That's the Columbia River basin generally?

21 **A Right. Washington State specifically is four, is my  
22 understanding. Four mortalities.**

23 Q And that's over the last 25 years, roughly?

24 **A Roughly, yes.**

25 Q Okay. And you said that this is -- the take-home

1 message was that this population is in trouble and  
2 can't bear a lot more mortality.

3 Do you remember saying that?

4 **A I do, yes.**

5 Q But you'll agree with me, we've talked about any -- any  
6 number of other mortality threats to the ferruginous  
7 hawk population, right?

8 **A Yes, there are many.**

9 Q Okay. Would you consider climate change or this  
10 project to constitute the greater risk to the  
11 ferruginous hawk?

12 **A I -- boy, I don't -- I don't know that I can answer  
13 that question. It's a very thought-provoking question.  
14 I don't -- I don't --**

15 Q That's what makes us -- go ahead.

16 **A No, I just -- I'm fumbling. I don't think I can answer  
17 that. Very good question.**

18 MS. PERLMUTTER: I have nothing  
19 further.

20 JUDGE TOREM: All right.

21 Ms. Voelckers, anything, last questions for this  
22 witness?

23 All right. I'm not hearing Ms. Voelckers, but I  
24 see Mr. Aramburu. Your mike is off "mute." Did you  
25 have something you wanted to say?

1 MR. ARAMBURU: I would like to ask  
2 two questions, if I may.

3 JUDGE TOREM: Certainly. Go ahead.  
4

5 RECROSS-EXAMINATION

6 BY MR. ARAMBURU:

7 Q Mr. McIvor, I'm Rick Aramburu. I'm the attorney for  
8 Tri-Cities C.A.R.E.S., the local citizens groups, and  
9 we're very interested in the wildlife that's impacted  
10 by the project, including the hawk.

11 The applicant has proposed two different turbine  
12 sizes and two different turbine layouts. One proposal  
13 is 244 more or less smaller turbines, and then there's  
14 a proposal for 150 larger turbines.

15 Do the selection of the turbines have anything to  
16 do with your testimony?

17 A Well, there -- I think there are -- there would be  
18 consequences from either choice.

19 My understanding is that one of the reasons for  
20 the lack of specificity in which towers would be used  
21 is it's somewhat dependent on market availability. And  
22 so having two different types of turbines also gives a  
23 range of potential impacts to be evaluated in the  
24 context of -- of SEPA.

25 Either alternative would result in some amount of

1 rotor-swept area. And I cannot tell you any more,  
2 because the figures are not in my head deeply enough.  
3 But one alternative is going to have a slightly larger  
4 rotor-swept area than the other and therefore  
5 potentially present more risk of collision because  
6 they're affecting a larger air parcel.

7 From the standpoint of something like the  
8 ferruginous hawk where we've been talking about  
9 establishing buffers, I would imagine it would be  
10 easier to fit 150 towers in the landscape and provide  
11 some buffers than it would be to install 240 towers and  
12 still provide buffers.

13 So there's probably a biological preference to be  
14 expressed in -- in having fewer towers. Yeah.

15 Q Okay. Is that -- is that the answer?

16 A That's my answer. I hope it answered your question.

17 Q I didn't have a particular idea in mind.

18 And is -- is the -- is the total swept area of  
19 interest in this regard?

20 A It has an impact on the -- use a different word. It  
21 has an effect on the amount of risk that birds and bats  
22 would be exposed to.

23 Q Okay. One last question, and this is my third one. I  
24 apologize.

25 I'm putting on the screen -- can you see,

1 Mr. McIvor, the photograph on the screen?

2 **A I do see the map, yes.**

3 Q Okay. And do you recognize this is a map of the  
4 project site and an aerial photograph showing other  
5 areas?

6 **A I do recognize it as such, yes.**

7 Q And I have heard, listening this morning to a lot of  
8 questions about individual turbines and individual  
9 sites and individual distances from turbines.

10 Is the cumulative impact of a project that's 25  
11 miles long, is there a cumulative impact beyond  
12 individual impacts for a project of this size?

13 **A Certainly. Certainly there is a cumulative impact,**  
14 **yes.**

15 Q And can you characterize it or quantify it?

16 **A Well, let's -- let's narrow this down to my resource.**  
17 **I assume we're still talking strictly about wildlife.**  
18 **And I think my greatest concern in the cumulative**  
19 **impacts arena is with bats, because we know so little**  
20 **about their population sizes.**

21 And I do think that the applicant has -- you know,  
22 has made the effort to reduce and minimize impacts.  
23 Nonetheless, there would still be impacts on a regional  
24 population of unknown size. So it's adding -- the  
25 project would add cumulatively to mortality on those

1 bat species. And it would certainly add cumulatively  
2 to mortality on bird populations.

3 So then at some point you ask the question of are  
4 the cumulative impacts significant, and that's -- you  
5 know, that's where the details come in. And it's a bit  
6 of an unknown for the bats. Probably not significant  
7 for -- for birds. As I mentioned earlier, it would  
8 appear that most of the impacted bird species have  
9 robust enough populations that they could absorb the  
10 expected degree of mortality.

11 MR. ARAMBURU: Okay. Thank you,  
12 Mr. McIvor. I promised two questions. I did three.  
13 But I want to keep within my limits. Thank you.

14 **THE WITNESS: Thank you.**

15 JUDGE TOREM: I think, Mr. Aramburu,  
16 we were within the double-up-your-questions limit, so  
17 thank you.

18 Any other questions for Mr. McIvor?

19 All right. I see Ms. Reyneveld had her hand up  
20 and then Ms. Voelckers.

21 MS. REYNEVELD: Yeah. Go ahead,  
22 Ms. Voelckers. I can be the last questioner.

23 MS. VOELCKERS: Thank you.

24 ////

25 ////



1 simplified mix of grasses would be planted under the  
2 solar arrays. And by "simplified," I mean relatively  
3 few species compared to what you would find in a native  
4 shrub-steppe ecosystem.

5 And those grasses are selected, in part, to be --  
6 to not interfere with the function of the solar arrays.  
7 So they -- there -- there are priorities in choosing  
8 those species that go ahead of providing wildlife  
9 habitat.

10 That said, those grasses probably would be better  
11 habitat, speaking very broadly, than a dryland wheat  
12 monotype. So in that sense, they could offer better  
13 habitat to species that are tolerant of the solar  
14 arrays and occasional human incursion into those zones.

15 We've seen -- I say "we." It's been documented  
16 through publications that typically the species that  
17 move into these solar arrays are adapted to human  
18 disturbance. They're sort of more generalists. We  
19 tend to lose the habitat specialists. But they're not  
20 entirely without value.

21 But because of their structure, they would also  
22 limit a bird like, say, the ferruginous hawk would  
23 probably not forage within a solar array. It's just  
24 not the habitat they're adapted to, but other species  
25 probably would.

1 MS. VOELCKERS: Okay. I appreciate  
2 the extra explanation and makes sense to me.

3 I don't have any further questions. Thank you.

4 JUDGE TOREM: All right.

5 Ms. Reyneveld, you will be the last. Your witness.

6 MS. REYNEVELD: Yeah, I just --

7 JUDGE TOREM: As you sponsored  
8 him --

9 MS. REYNEVELD: -- have a few.

10 JUDGE TOREM: -- that's appropriate.

11 MS. REYNEVELD: Okay. I just have a  
12 few clarification questions.

13  
14 FURTHER REDIRECT EXAMINATION

15 BY MS. REYNEVELD:

16 Q So Ms. Perlmutter asked you a question about managing  
17 agencies and a case in which you disagreed with a  
18 recommendation of a managing agency, and you also  
19 testified in this case that you deferred to Mr. Watson  
20 and WDFW's most recent two-mile offset recommendation.

21 From your review, can you tell me whether you have  
22 any reason in your expert opinion to disagree with that  
23 recommendation?

24 **A I don't have any reason to disagree with it.**

25 Q Thank you.

1           And do you feel as if you were able to completely  
2           answer all of the questions that were asked of you by  
3           Council and the parties?

4   **A I do. I've said more this morning than I have in the**  
5   **past month. Thank you for your time, everyone.**

6                           MS. REYNEVELD: Okay. Thank you. I  
7           don't have any further questions. Thanks so much,  
8           Mr. McIvor.

9                           JUDGE TOREM: Mr. McIvor, thank you  
10          so much for your time. I want to add to that I think  
11          it was really enlightening. We've had some really  
12          great wildlife testimony, and this was a nice wrap to  
13          it today.

14          Thank you, Ms. Reyneveld, for producing such a  
15          good witness. Not that any of the others weren't  
16          equally -- not equally good, but this was a nice  
17          close-up on our broad brush of, I think the term was  
18          avifauna, right? And everything else, I don't know.  
19          What do you call the ones on the ground? Terra fauna?

20                           **THE WITNESS: Terra fauna. I like**  
21   **that. Yes.**

22                           JUDGE TOREM: All right. It'll  
23          work. All right. You are free to go. Thank you, sir.

24          Ms. Perlmutter, you got two words tonight.

25   (Witness excused.)

1 JUDGE TOREM: Let's turn to some  
2 questions. It's right after noon. Mr. Aramburu, have  
3 you heard from Mr. Simon? I see that both planes have  
4 arrived at the N terminal within the last two hours.

5 (Witness Richard Simon  
6 appearing remotely.)  
7

8 **THE WITNESS: This is Mr. Simon. I**  
9 **am on the phone.**

10 JUDGE TOREM: Excellent. Mr. Simon,  
11 thank you. Welcome back from Alaska.

12 **THE WITNESS: Thanks.**

13 JUDGE TOREM: If you're ready to  
14 testify now, or do you need time to talk to  
15 Mr. Aramburu before you do?

16 **THE WITNESS: I am ready to testify**  
17 **now.**

18 JUDGE TOREM: Mr. Aramburu, would  
19 that be appropriate to shift to Mr. Simon's testimony,  
20 then?

21 MR. ARAMBURU: If he's ready, I'm  
22 ready.

23 I do want to make -- as a matter of record, I do  
24 pose an objection to your following the personal  
25 movements of Mr. Simon here with regard to air -- air

1 travel, that kind of thing. I've never seen that done  
2 before. I think it's at least highly unusual, so I'll  
3 just pose my objection to that.

4 JUDGE TOREM: Just doing you a  
5 favor, Mr. Aramburu. I told you if he wasn't available  
6 today, he wouldn't testify. You made it very clear as  
7 to what flights he would be coming back from and  
8 approximate times. Trying to do you a favor.

9 Mr. Simon, I hope I'm not invading by looking at  
10 publicly available information from Alaska Airlines and  
11 the flight tracker website. But I think we've  
12 established you're here.

13 Ms. Voelckers.

14 MS. VOELCKERS: Thank you, Your  
15 Honor. If I just may real quick on the schedule. We  
16 didn't have much break, so I just want to note that  
17 Mr. Meninick did come to our offices in order to be  
18 available at 11. When I saw five Council member hands  
19 go up at 11:20, we went ahead and let him go for lunch.  
20 But he was asked to come back in order to testify  
21 around 1.

22 And so if that's now changing again, which I  
23 understand. Just, he's back after being out for a  
24 while, and I'd like to not keep asking him to come and  
25 wait in our offices unnecessarily.

1 JUDGE TOREM: Understood. Tell him  
2 to come back at 1. I think Mr. Simon's testimony and  
3 the questions should be relatively quick.

4 MS. VOELCKERS: Okay.

5 JUDGE TOREM: All right. Mr. Simon,  
6 good morning. You are Rich Simon; is that right? Or  
7 do you go by "Richard"?

8 **THE WITNESS: "Richard" is my**  
9 **official name, yes.**

10 JUDGE TOREM: Great.

11 And you're calling in by phone this afternoon,  
12 right?

13 **THE WITNESS: That's correct, yes.**

14 JUDGE TOREM: All right. I don't  
15 know if you have them with you or in front of you. We  
16 have four different exhibits that you sponsored:  
17 Exhibit 5500.

18 Exhibit 5501, which was the subject of a order  
19 striking some of the testimony, but there is a revised  
20 version in the record now with the appropriate  
21 red-lining.

22 Exhibit 5502 and 5503.

23 Mr. Aramburu, is that an accurate listing of this  
24 witness's testimony?

25 MR. ARAMBURU: That's correct. And

1 there's been strike-outs to portions of those  
2 testimonies.

3 JUDGE TOREM: I think that's limited  
4 to 5501. Perhaps there's some other minor ones in the  
5 others. But I know that Tri-Cities C.A.R.E.S. has  
6 taken the time to resubmit, subject to the striking  
7 orders, and I appreciate that.

8 I don't know which parties might have questions  
9 for Mr. Simon. I don't have that part of the schedule  
10 in front of me. Mr. McMahan, I presume it would be  
11 you, but are there any others?

12 I'm not seeing or hearing from any others.

13 Mr. McMahan, you do have some questions for  
14 Mr. Simon?

15 MR. McMAHAN: I do, Your Honor.  
16 Thank you.

17 JUDGE TOREM: All right. So after I  
18 have Mr. Aramburu introduce him, I'll come to you,  
19 Mr. McMahan.

20 MR. ARAMBURU: So, Mr. Simon, you're  
21 available by phone. You have provided testimony  
22 concerning electrical issues. You've also provided  
23 some test- -- also provided testimony concerning the  
24 responses to Mr. Poulos's testimony, which was  
25 yesterday; is that correct?



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**THE WITNESS: Yes, I do swear.**

(Exhibit Nos. 5500,  
5501\_T\_Revised, 5502, and  
5503\_R admitted.)

JUDGE TOREM: Okay. Mr. Aramburu,  
now you may proceed.

MR. ARAMBURU: Okay. And the  
exhibits described will be admitted, then?

JUDGE TOREM: Yes, they are, sir.

MR. ARAMBURU: Thank you.

JUDGE TOREM: As with every other  
witness, by him adopting them, they are admitted.

MR. ARAMBURU: Okay. Thank you.

DIRECT EXAMINATION

BY MR. ARAMBURU:

Q So, Mr. Simon, I previously went through your  
background here, and you indicated that you had  
reviewed the prior written testimony of Mr. Poulos.

But you have not had an opportunity to either  
listen to or review Mr. Poulos's testimony from  
yesterday; is that correct?

**A That is correct.**

Q Okay. And you were otherwise in the state of Alaska

1 yesterday as a part of a pre- -- preplanned trip,  
2 correct?

3 **A Correct.**

4 Q Okay. So, Mr. Simon, Mr. McMahan -- you're not on the  
5 screen Mr. McMahan is.

6 I understand Mr. McMahan, who is the applicant's  
7 attorney, does have some questions for you. And so he  
8 will be going ahead and asking questions, and maybe  
9 other parties will as well. So that will be the next  
10 thing you hear on the telephone. So if you've got any  
11 questions, any problems, please interrupt and let us  
12 know, but next voice you hear is going to be  
13 Mr. McMahan.

14 **A That's fine.**

15

16 CROSS-EXAMINATION

17 BY MR. McMAHAN:

18 Q Okay. Good morning, Mr. Simon. Sorry that the next  
19 voice you have to hear is mine. That's, I suppose, the  
20 way it goes.

21 MR. McMAHAN: And, Your Honor, I am  
22 making some efforts to streamline this, given the hour  
23 and the expectations here. So if you -- if I drag this  
24 down, you just give me a prod and make me do something  
25 different, but I do have some questions.

1 Q (By Mr. McMahan) And I also just want to preface this  
2 by saying, Mr. Simon, that Dr. Poulos did in fact  
3 testify yesterday, and I can represent that I -- and I  
4 said this on the record yesterday -- I cautioned him to  
5 stay within the bounds of areas of testimony that  
6 remain after the strike motion that Mr. Aramburu  
7 referenced, and I cautioned him to not delve into these  
8 so-called off-limit targets or topics. And he did  
9 agree to hear that, and I think that we did have a good  
10 response from Dr. Poulos with regard to that.

11 So -- sorry. Oh, sorry. Just getting my --  
12 sorry. I can't find it right now.

13 All right. So I'm just going to jump in here,  
14 Mr. Simon. Again, I appreciate your being here today.  
15 And, unfortunately, I'm citing to testimony and  
16 exhibits. I understand you're on the phone, which may  
17 be a challenge. But I'm sure Mr. Aramburu can help in  
18 pulling up your testimony as needed, so -- and I'm  
19 looking first at the June 12 testimony, and that's  
20 Exhibit 5201-T.

21 And first question is this: Mr. Simon, you state  
22 on Page 3, Lines 1 through 6 --

23 MR. McMAHAN: And, Rick, if you want  
24 to pull it up, I'm not really prepared to do so, but --  
25 although he's -- he's not on the phone, so we may just

1 need to do our best.

2 **THE WITNESS: Mr. McMahan, I have**  
3 **that file open on a laptop.**

4 MR. McMAHAN: Great. Oh, that's  
5 great. Good to know, Mr. Simon. Thank you. All  
6 right.

7 Q (By Mr. McMahan) You state, Page 5, Lines 1 through 6,  
8 that it is typical practice that, and quote here, all  
9 permits are granted for a specific turbine array plan,  
10 which includes the number and exact locations of the  
11 turbines, and that it is unprecedented -- your word --  
12 for permitting agencies to issue open-ended permits for  
13 Horse Heaven.

14 Do you recall that testimony?

15 **A Yes.**

16 Q All right. So is it your belief that the -- that the  
17 Energy Facility Site Evaluation Council, or EFSEC  
18 henceforth, simply grants permits for a specific  
19 turbine array plan with no regulatory or environmental  
20 review?

21 **A No, that's not my understanding.**

22 Q And is it your belief that EFSEC would -- and these are  
23 your quoted words -- issue open-ended permits for Horse  
24 Heaven?

25 Is that your belief?

1 A Well, to -- to explain what I was saying, my experience  
2 has been that generally construction starts after  
3 permits are granted and there's a notice to proceed for  
4 the construction. And from projects I've worked on  
5 over all these years, by the time you get to that  
6 point, everything is uniquely specified in all these  
7 attributes of the project I have listed in that  
8 testimony.

9 I will say I'm not entirely sure exactly what  
10 EFSEC's role in this is. I did assume that they issued  
11 some sort of final permit. If this -- if they're just  
12 issuing some sort of generic, if that's okay, then  
13 obviously what I wrote there is not appropriate to  
14 EFSEC, but I don't have knowledge.

15 Q Okay. Okay. So just to clarify, then, that testimony  
16 did not actually apply to the rigors of the Washington  
17 Energy Facility Site Evaluation Council. It was more a  
18 generic observation, I gather?

19 A Yes.

20 Q Okay. Thank you.

21 And I assume that you are aware of the  
22 micro-siting concept and practices for permitting wind  
23 energy facilities?

24 A I'm not sure exactly what you're saying.

25 Q The prac- -- sorry. Sorry. I don't mean to interrupt

1       you, Mr. Simon.

2   **A**   **No, I'm not sure -- say that phrase again, and I'll**  
3       **have a question for you.**

4   **Q**   Yeah.

5               Are you aware generally, in the wind energy  
6       industry, of the micro-siting practice for actually the  
7       final location and evaluation of -- of siting wind  
8       energy facilities?

9   **A**   **You know, the -- I think, if I understand your question**  
10       **right, are you saying that a permit's granted and then**  
11       **the developer can then change the array?**

12               Sometimes I've seen that in certain jurisdictions  
13       where there's some flexibility. For example, you can  
14       move a turbine 100 feet without reapplying. And other  
15       cases, it's very specific right down to the foot. So,  
16       yeah, so the --

17   **Q**   Okay.

18   **A**   **There are different ways different jurisdictions handle**  
19       **that issue.**

20   **Q**   Okay. That's fine.

21               But as to EFSEC, sounds like you don't have any  
22       knowledge about that practice with EFSEC?

23   **A**   **That's correct. I don't.**

24   **Q**   Okay. Thank you.

25               You mention -- and I'm just going to skip along

1 here to try to move along quickly here, so that's just  
2 what I'm going to do.

3 So referring to your testimony at -- again, I'm  
4 sorry if you're on the phone, but I'll just do my best.

5 You testified --

6 MR. McMAHAN: And this is for  
7 Mr. Aramburu's benefits: Page 9, Lines 18 through 21,  
8 and Page 10, Lines 1 through 3, of his testimony.

9 Q (By Mr. McMahan) I assume that you are not privy to  
10 any discussions or efforts by Scout clean energy to  
11 discuss and potentially resolve any issues regarding  
12 wake modeling particularly for Nine Canyon.

13 I assume you're not aware of those conversations  
14 one way or the other?

15 A **That's correct. And, again, I have the exact language**  
16 **up on my screen. That's -- and you're correct. I'm**  
17 **not aware of any such discussions.**

18 Q All right. Thank you.

19 And on your rebuttal testimony, Page 4, Lines 1  
20 through 5, you state, and I quote, It is my  
21 understanding that Montana winds are currently higher  
22 priority for the Pacific Northwest investor-owned  
23 utilities than central Washington for adding to their  
24 energy portfolio.

25 And you go on to say, Presumably, these utilities

1 are all considering all associated project development  
2 costs including transmission.

3 So this is your assumption, correct?

4 **A Yes. And based on having worked with many, many**  
5 **utilities over the years, obviously they look at the**  
6 **total cost of a project. Many --**

7 Q Mm-hmm.

8 **A -- (indiscernible) projects have been refused because**  
9 **they just simply don't have transmission access or it's**  
10 **too expensive. So --**

11 Q Sure.

12 **A -- as far as I know, any utility, I've never seen one**  
13 **say, We don't care what the transmission situation is.**  
14 **We want to build the project. (Indiscernible.)**

15 Q Yeah. Great. I appreciate that answer.

16 And on Exhibit 5503-R -- I'll just pause again for  
17 Mr. Aramburu -- Page 3, Lines 18 through 21, you state  
18 the following: Finally, due to the unusual nature of  
19 winds in California, there are few locations where wind  
20 turbines can be economically sited, whereas Washington  
21 is much more suitable land area.

22 Do you recall that testimony?

23 **A Yes.**

24 Q And I assume that remains your belief and testimony?

25 **A Absolutely. I mean, I am very responsible for most of**

1 the original development counciling. There's only  
2 about four locations which are very geographically  
3 bound. With the exception to actually most of these  
4 places, an area of five by ten square miles is sort of  
5 about -- well, more than that. Maybe 10 by 20. But  
6 whereas in Washington, many, many sites have eastern  
7 part of the -- of the state and then on the Columbia  
8 Gorge, places. So there certainly would be many more  
9 areas with, you know, what appear to be suitable winds  
10 because people are, in best of my knowledge, are  
11 rushing to try to build wind farms in eastern  
12 Washington there. So, yes, I would agree with my  
13 statement.

14 Q Okay. And so just to sum up here, then, sounds like  
15 California is particularly constrained, and I  
16 understand that you've been at this for some 40 years,  
17 so you certainly know the conditions in California far  
18 better than I.

19 So California's constrained for additional wind  
20 energy. And you acknowledge that while Montana may be  
21 a fine place to develop because of the robust wind  
22 energy facilities, that substantial high-voltage  
23 long-distance transmission lines would need to be  
24 constructed and acquired over Lord knows how many years  
25 in order to implement that integration of that

1 resource, correct?

2 **A I don't know about the cost, you know, or the size. I**  
3 **have no opinion on that. And obviously what -- all I**  
4 **was stating in the testimony was that I'm aware that,**  
5 **you know, from several parties that they're looking for**  
6 **Montana wind not because it is windier and it's a**  
7 **different profile during the year.**

8 **Q Right. Right. Yep. Got it. Understand that.**

9 All right.

10 MR. McMAHAN: Judge Torem, those are  
11 my abbreviated and accelerated answers to move things  
12 along. I have more, but I think -- I think that's all  
13 I really am looking for in this discussion with  
14 Mr. Simon.

15 And, Mr. Simon, I thank you for your time, and I  
16 appreciate the rush you made off of airplanes to attend  
17 here today. And I appreciate your testimony. Thank  
18 you.

19 **THE WITNESS: My pleasure,**  
20 **Mr. McMahan.**

21 JUDGE TOREM: Let me ask Mr. McMahan  
22 or the other parties if they have any questions. And  
23 then the Council members and then Mr. Aramburu, I'll  
24 come back to you.

25 I don't believe there was any planned cross-exam

1 from the Yakama Nation, counsel for the environment, or  
2 Benton County. But if there is a need for that now,  
3 please speak up.

4 And, Council members, if you'll start to raise  
5 your electronic hands if you have any questions for  
6 Mr. Simon.

7 All right. I'm not seeing any. So, Mr. Aramburu,  
8 I'll let you see if there's any follow-up you'd like  
9 with Mr. Simon.

10 MR. ARAMBURU: No follow-up  
11 required. Thank you.

12 JUDGE TOREM: All right. Mr. Simon,  
13 safe travels to you. Thank you very much for being  
14 here. We've got your exhibits and testimony admitted  
15 to the record.

16 (Witness excused.)

17  
18 JUDGE TOREM: Ms. Voelckers, if you  
19 would tell Mr. Meninick 1:15. I propose that we come  
20 back at 1:15, take his testimony, and then Mr. Kobus,  
21 and that should wrap up the evidentiary portion of  
22 today's hearing.

23 Parties will then come back and talk a little bit  
24 about post-hearing briefs and get you the deadlines for  
25 those.

1 My understanding that will be -- that the  
2 transcripts, per the contract that B & A Litigation has  
3 with EFSEC, are going to come in ten business days  
4 after each different hearing date, so they are going to  
5 be stacked and sequenced. That means you'll start  
6 seeing transcripts on a sequential basis as early as  
7 next week.

8 So with that, we'll come back in 55 minutes at  
9 1:15. Thank you.

10 (Pause in proceedings from  
11 12:20 p.m. to 1:15 p.m.)

12  
13 JUDGE TOREM: All right. Good  
14 afternoon, everyone. We're just going to do a quick  
15 survey to make sure it looks like everybody's back on  
16 our participants list.

17 I think it looks that way.

18 Ms. Voelckers, do we have Jerry Meninick?

19 You're on "mute."

20 MS. VOELCKERS: Thank you. And  
21 apologies. It's quite a week.

22 Your Honor, I believe we do have him in Mr. Jones'  
23 office.

24 (Witness Jerry Meninick  
25 appearing remotely.)

1 JUDGE TOREM: And I think I just saw  
2 him on the screen.

3 Mr. Meninick, good afternoon. I'm Adam Torem.  
4 I'm the administrative law judge helping run this  
5 hearing. And I appreciate you being available today to  
6 give your testimony.

7 Do you have any questions about the process, or  
8 has Mr. Jones made you aware?

9 **THE WITNESS: No questions.**

10 JUDGE TOREM: All right, sir. I  
11 understand you had submitted some prefiled testimony.  
12 Exhibit 4004 is how it's been marked.

13 And, Ms. Voelckers, if you can confirm that's the  
14 one exhibit, both the confidential and a redacted  
15 version.

16 MS. VOELCKERS: Yes, Your Honor.  
17 That is correct.

18 JUDGE TOREM: All right.  
19 Mr. Meninick, I'm going to swear you in and have you  
20 take the oath of witness for this tribunal before the  
21 Energy Siting Council, and then you'll adopt the  
22 testimony by doing so. And Ms. Voelckers will indicate  
23 whether any of the questions that you might ask or  
24 testimony you might share might need to be taken in a  
25 closed-record session to preserve any confidentiality

1 and out of respect for the tradition of the Yakama  
2 Nation and the confederated bands and the rest of your  
3 people.

4 So if you raise your right hand.

5  
6 JERRY MENINICK, appearing remotely, was duly  
7 sworn by the Administrative  
8 Law Judge as follows:

9  
10 JUDGE TOREM: Do you, Jerry  
11 Meninick, solemnly swear or affirm that all the  
12 testimony contained in Exhibit 4004 and any testimony  
13 you provide today will be the truth, the whole truth,  
14 and nothing but the truth?

15 **THE WITNESS: I do.**

16 (Exhibit Nos.  
17 4004\_T\_Confidential and  
18 4004\_T\_Redacted admitted.)

19  
20 JUDGE TOREM: Thank you.

21 Ms. Voelckers, if you'd please introduce Jerry  
22 Meninick to the Council and the rest of the parties  
23 present today.

24 MS. VOELCKERS: Thank you, Your  
25 Honor and Siting Council.

1 Mr. Meninick is a former chairman and elected  
2 leader of the Yakama Nation. He's a Yakama elder, and  
3 he's currently the deputy director of the cultural  
4 resource program, cultural services program at the  
5 Yakama Nation.

6 I'm going to ask that we go into closed session  
7 before I ask Mr. Meninick any questions.

8 JUDGE TOREM: All right. Thank you,  
9 Ms. Voelckers.

10 Council members, you know the drill here. This  
11 will be our last confidential session, I think, of the  
12 administrative proceeding.

13 Members of the public that might not be familiar,  
14 we have some confidential and sensitive information  
15 that's being conveyed by a witness, and in this case,  
16 Mr. Meninick from the Yakama Nation. We're going to  
17 move to a place where only those participants that have  
18 signed confidentiality agreements can participate, out  
19 of respect for the sensitive nature of the testimony.

20 Ms. Voelckers, do we anticipate more than about 15  
21 minutes, or how long?

22 MS. VOELCKERS: I would guess long,  
23 Your Honor, just based upon how long Mr. Selam's  
24 testimony went on Monday, which I believe was an hour,  
25 including Council member questions. So I would ask

1 that we stay in closed session the same way for  
2 Mr. Meninick today so that he can feel comfortable  
3 answering those questions from the Council.

4 JUDGE TOREM: All right. I'll have  
5 the Council put up a slide that -- for staff that we'll  
6 be back shortly after 2:00, maybe a little bit longer,  
7 that should give us what we need. They can change the  
8 time if we continue to run past 2:00.

9 So let's move into closed session. Ms. Grantham  
10 will have the machines do their magic.

11 (Closed-record session  
12 begins.)

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(Closed-record session  
concluded.)

JUDGE TOREM: All right. We're back  
in the open-record session. We just heard from Jerry  
Meninick, a tribal elder with the Yakama Nation, and we  
have completed his testimony, and he's been released.

Parties, I think that takes us now to Dave Kobus

1 and any very limited cross-examination that might be  
2 related to his deposition that was submitted. Council  
3 members may have questions about that.

4 And there was a supplemental piece of testimony to  
5 which Mr. Aramburu and other parties have objected to  
6 the ability to supplement. I think it's a very limited  
7 item. And it's been admitted, I believe, but I'm going  
8 to ask that, if Ms. Masengale has that, we had a bit of  
9 an exchange yesterday as to how that was submitted and  
10 making sure it wasn't submitted particularly,  
11 Mr. McMahan, as an exhibit but as an attachment  
12 supporting documentation for the motion you had to  
13 supplement the record.

14 And I think Ms. Masengale and I managed to  
15 exchange that document. She may be able to  
16 screen-share it so we can let the Council members know  
17 the very limited subject of cross-examination that  
18 might be coming up for Mr. Kobus.

19 And, by the way, I'm going to ask if Mr. Kobus is  
20 here. We can get him cued up on my screen.

21 Ms. Masengale, I'm not looking for the deposition,  
22 itself, but for that motion to supplement the  
23 deposition that had a few pages submitted by  
24 Mr. McMahan.

25 All right. She's looking for that.

1 (Witness David Kobus  
2 appearing remotely.)  
3

4 JUDGE TOREM: Mr. Kobus, while we're  
5 waiting for that, I will go ahead and give you the oath  
6 of witness that any of the questions you might answer  
7 today would be under oath.

8 The deposition's already been submitted under  
9 oath. And, Mr. McMahan, would you like him to adopt  
10 that supplemental testimony as well? The deposition  
11 was already submitted into evidence, and that was done  
12 under oath, I'm sure. So...

13 MR. McMAHAN: Yes, please, Your  
14 Honor.

15 JUDGE TOREM: All right. Mr. Kobus,  
16 nice to meet you, again on a screen. I think I first  
17 met you on a screen when you introduced the project to  
18 the Council and at the informational meeting two and a  
19 half years ago. Nice to see you again.

20 If you'll raise your right hand.

21  
22 DAVID KOBUS, appearing remotely, was duly  
23 sworn by the Administrative  
24 Law Judge as follows:

25 ////

1 JUDGE TOREM: Do you, Dave Kobus,  
2 solemnly swear or affirm that all the testimony in the  
3 form of answers you'll give today to any questions, as  
4 well as the supplement to your deposition testimony, is  
5 the truth, the whole truth, and nothing but the truth?

6 **THE WITNESS: I do, sir.**

7 JUDGE TOREM: All right. Thank you.  
8 All right. Ms. Masengale's informed me she does  
9 have that.

10 Mr. McMahan, I'm going to ask that Ms. Masengale  
11 display those pages that were the quick supplemental  
12 testimony that's been adopted now just so the Council  
13 members can see it. I don't think it had been  
14 previously uploaded to a folder, but I just want them  
15 to see the limited nature of it and have you introduce  
16 Mr. Kobus, and then I'll turn to Mr. Aramburu.

17 So this document, Ms. Masengale, if you just  
18 scroll through it slowly. It won't take but a few  
19 minutes for Council members to read what's on their  
20 screen. And this document will be made available to  
21 Council members as part of the evidence they review as  
22 you make your recommendations.

23 There we go. Thank you for scrolling in a very  
24 humane speed, Ms. Masengale.

25 All right. Council members, does anybody need

1 more time to review this supplement to the Kobus  
2 deposition? Just raise your hand if you do, and we can  
3 direct Ms. Masengale back to whichever page.

4 All right. Not seeing any hands.

5 Mr. McMahan, I'm going to turn it over to you. If  
6 there's anything you want called to attention, we can  
7 put it back on the screen, but I think hopefully  
8 everybody's had a chance to review it.

9 I'd like you to introduce Mr. Kobus, maybe give  
10 some background on the supplement, and if needed, to go  
11 into any other areas before we have Mr. Aramburu ask  
12 his questions. The more you ask, the more he'll ask.

13 MR. McMAHAN: I've learned that over  
14 the last two weeks.

15 Thank you, Your Honor. And I think a little  
16 context here is going to be important. But first of  
17 all, I think that the exhibit is Exhibit 1064. And I  
18 hope Ms. Masengale agrees with that. If she doesn't,  
19 then I'm not sure what I'll do, but -- so we would ask  
20 that that be admitted.

21 JUDGE TOREM: I'll state that the  
22 current state of the exhibit list does not have a 1064,  
23 but I'll ask her to extract that from the motion and  
24 mark that as such so we can keep track of that on the  
25 exhibit page.

1 (Exhibit No. 1064 admitted.)

2  
3 MR. McMAHAN: That's great. All  
4 right. Thank you, Your Honor.

5 So as at least the parties are aware, Mr. Aramburu  
6 deposed Mr. Kobus some time ago. And one of the lines  
7 of questioning had to do with the battery energy  
8 storage facility, or BESS, and specifically there was  
9 testimony in that deposition about how, in the unlikely  
10 event of fires at the battery energy storage facility,  
11 how fires would be extinguished.

12 And at that time -- and this was a month or so  
13 ago, I think. At that time, the methodology for fire  
14 suppression that Scout understood -- and, frankly, most  
15 of the industry, I think, understood -- was a water  
16 suppression system. A water suppression system that  
17 would deal with any potential unlikely fires.

18 Since then, there's been a fair amount of movement  
19 in the industry and some adoption of some and  
20 additional standards that indicate that fire  
21 suppression is not a good idea at battery energy  
22 storage facilities. And, in fact -- and these  
23 facilities, by the way, are separate containers. And  
24 if there's a fire, it's not like everything catches  
25 fire. It's a contained situation within containers,

1 just for background. That's incredibly nontechnical  
2 summary of it from somebody who's -- couldn't be less  
3 of an engineer.

4 So -- so the new standard in the industry that's  
5 been reviewed and suggested by -- by agencies and  
6 entities that regulate this sort of thing indicates  
7 that in the event --

8 MR. ARAMBURU: Mr. Examiner, there's  
9 testimony going on here.

10 MR. McMAHAN: Yes.

11 MR. ARAMBURU: Not the introduction  
12 of the --

13 MR. McMAHAN: This is --

14 MR. ARAMBURU: -- of the exhibit.  
15 So that's -- not here to listen to Mr. McMahan's  
16 testimony about this. So I object to this.

17 MR. McMAHAN: Your Honor, I'm not  
18 testifying to the facts of anything. I'm just trying  
19 to set the stage here. And as I recall, it was the  
20 Council really that asked for this -- for some  
21 explanation of this information, so I'm just simply  
22 trying to set the stage here, Your Honor. And I'm --

23 JUDGE TOREM: It may be --

24 MR. McMAHAN: -- just about done.

25 JUDGE TOREM: I figured you would

1 be. I was having some of the same feelings that  
2 Mr. Aramburu had but not -- not quite as strongly. And  
3 the Council, I think, has learned by this point in the  
4 proceeding that what the attorneys say is not the  
5 testimony and the evidence. So -- but with all due  
6 respect, maybe we could hear a little bit more from  
7 Mr. Kobus on how he understands --

8 MR. McMAHAN: Yes.

9 JUDGE TOREM: -- and why he  
10 submitted this.

11 So I think Mr. Aramburu's point is well-taken.  
12 Much as I like the mellifluous tones of Tim McMahan,  
13 let's hear from Mr. Kobus.

14 MR. McMAHAN: Yes. His tones will  
15 be better than my tones.

16  
17 DIRECT EXAMINATION

18 BY MR. McMAHAN:

19 Q So, Mr. Kobus, would you please go ahead and introduce  
20 yourself and -- and your role with the facility and  
21 explain kind of what's going on for the good of the  
22 Council? And with that, I will go on "mute."

23 MR. ARAMBURU: Judge Torem, we are  
24 here. I don't know quite what phase of this proceeding  
25 we're in. There was -- Mr. Kobus was to come --

1 JUDGE TOREM: Mr. Aramburu, we're in  
2 the last couple hours. Just wait, please. Let  
3 Mr. Kobus state what he's doing. And I swear you're  
4 going to get to ask him questions. Just wait.

5 MR. ARAMBURU: I want my --

6 JUDGE TOREM: Mr. Kobus --

7 MR. ARAMBURU: -- objection to be on  
8 the record.

9 JUDGE TOREM: It is clear already.  
10 I'll ask staff to mute you if you won't mute yourself.

11 Mr. Kobus --

12 MR. ARAMBURU: I want my --

13 JUDGE TOREM: -- please introduce  
14 yourself and ask the questions.

15 And mute Mr. Aramburu. Something bad has now  
16 happened.

17 **THE WITNESS: Sure. Thank you, Your**  
18 **Honor. I'm Dave Kobus. I'm the resident project**  
19 **manager for the Horse Heaven Clean Energy Center. I've**  
20 **been involved in the project since the early days, was**  
21 **integral with the development of the application for**  
22 **site certification.**

23 And, you know, I -- I have a strong bench at Scout  
24 of experts in every aspect of project development. You  
25 know, in fact, you know, we are the ones responsible to

1 make sure we're intending to design something that  
2 meets all of the criteria as well as is, you know,  
3 optimal design and environmentally safe and sited in a  
4 proper manner and all stakeholders and agencies that  
5 work with us get the best we can offer them as to how  
6 to handle these facilities once they're constructed.

7 So I was deposed recently, and I was deposed on  
8 initially the content of the application that was  
9 created back in February of 2021. And the questioning,  
10 you know, went through the process of what's in our  
11 application. We established that, you know, the -- the  
12 fire suppression design that was included was a water  
13 suppression system.

14 Since that application was filed, we've been  
15 following the industry both in fire protection  
16 standards as well as UL standards as well as design  
17 related to battery energy storage systems. In fact,  
18 Scout hired an expert recently, Craig Gustafson, who's  
19 been assisting me with the specifics of this facility.

20 Well, to shorten the story a bit, we started  
21 straying with questions away from what was in the ASC  
22 to where -- where are we going to get the water for the  
23 fire suppression, are these facilities safe, are you  
24 aware of what's happening in the world and in the  
25 industry related to lithium ion storage batteries.

1           And so I started responding with what was in the  
2 document, knowing full well that I had efforts ongoing  
3 within Scout to be able to assure that the design that  
4 we ultimately procure and have not done so yet. So we  
5 have to specify what we want. We have to procure the  
6 design. So, you know, we're -- that's a work in  
7 progress.

8           And so I was responding to questions related to  
9 what was in the ASC and, you know, indicated it says  
10 that we intend to have water fire suppression. And I  
11 knew in the back of my mind that there's a parallel  
12 effort ongoing within Scout to make sure we have the  
13 safest type of suppression system.

14           So immediately after I was questioned, I contacted  
15 my legal counsel and indicated I -- I knew we had  
16 efforts ongoing and, in fact, found out that we  
17 recently had an interface with a fire marshal in  
18 California for a facility we're developing there and  
19 had, in fact, evolved what Scout is intending to  
20 require in our procurement to make sure these systems  
21 are safe.

22           And so I felt compelled to ask my attorney to get  
23 EFSEC the best available information on what we've  
24 learned in very recent times and understand there's an  
25 NFPA standard now, a 2023 edition, that specifically

1 addresses these types of facilities, and there's also  
2 UL standards that we have now evolved that we can  
3 require of the designers and contract- -- or the  
4 manufacturers of these facilities that we intend to  
5 contract.

6 JUDGE TOREM: And, Mr. Kobus, UL is  
7 the Underwriters Laboratory; is that right?

8 **THE WITNESS: That is correct.**

9 JUDGE TOREM: I think with that  
10 introduction, that covers the scope of what was in and  
11 the background.

12 The Council does have your deposition and may have  
13 had a chance to review it already. They may have some  
14 separate questions about the scope of that.  
15 Mr. Aramburu will ask you questions based on the scope  
16 of what Mr. McMahan was introducing, what you've just  
17 said, and what was in the supplemental testimony that  
18 will be Exhibit 1064.

19 Mr. Aramburu, please come off "mute," and now it's  
20 your turn.

21 MR. ARAMBURU: I want to continue to  
22 object to the process. We had a deposition. The  
23 request is to supplement the deposition. It is not a  
24 supplement to the deposition. It is adding brand-new  
25 material. It's improper to supplement the deposition

1 in that -- in that fashion.

2 And my second objection to the supplementation of  
3 the testimony is that the deposition of which he stated  
4 and agreed with the application -- the updated  
5 application, by the way -- was that water was going to  
6 be used as one of the fire suppressant elements was on  
7 July 21st.

8 And we were not -- it was not brought to our  
9 attention that that testimony was -- was wrong or  
10 incorrect or needed to be supplemented until August --  
11 I believe it was August 9th, about -- more than two  
12 weeks after the testimony in the middle of these  
13 proceedings.

14 So part of my objection is that we have been  
15 surprised with the material. We have not had an  
16 opportunity to review it. We have not had an  
17 opportunity to bring experts together on -- on this  
18 subject matter. So that is part of our objection, and  
19 we continue our request to supplement the record.

20 Now, with respect to Mr. Kobus's testimony, let me  
21 ask him this question:

22

23 CROSS-EXAMINATION

24 BY MR. ARAMBURU:

25 Q You appeared at the deposition, and you indicated that

1 the method -- one of the methods of fire suppression  
2 was sprinklers, did you not?

3 **A Yes, I did.**

4 Q And you were well aware at the time that there were --  
5 there were other considerations that were ongoing at  
6 Scout as to fire suppression for the lithium ion  
7 batteries, weren't you?

8 **A That's correct.**

9 Q And you did not say anything about that during the  
10 course of the deposition, did you?

11 **A My responses were to your questions, which asked**  
12 **does -- does our -- is our design safe. And at the**  
13 **time we submitted our application that had the**  
14 **capability for water fire suppression was considered**  
15 **safe.**

16 I -- I then, you know, became concerned, because I  
17 was saying that we will install a safe system; we will  
18 require it of our vendors; that I needed to follow up  
19 with the expert at Scout to -- to understand if we can  
20 still live with our design in the ASC.

21 I mean, you can't revise this on the fly. All of  
22 this takes a considerable team effort. And changing  
23 the application is -- is -- could involve an amendment.  
24 You don't do that in the middle of an adjudication  
25 unless there is a compelling reason to correct

1 something in this case that we feel was not adequate  
2 level of -- of design safety.

3 Q You knew all of this well before July 21st, didn't you?

4 A No, I didn't.

5 Q In your deposition, at Page 124, I ask you whether  
6 automatic sprinkler systems would be installed, asking  
7 if you saw that question: "And so it is the intention  
8 of Scout to put automatic sprinklers in the BESS  
9 operations?"

10 And you answer, "Yes," and, "I mean, that's our  
11 statement."

12 Is that what you said?

13 A That was what was in the ASC. We had not made a  
14 change -- at that moment I answered that question, we  
15 had not made a change to the Horse Heaven design to  
16 provide -- well, to say literally that, no, we are not  
17 going to use that suppression. These are modular  
18 facilities --

19 Q You've answered my question. Mr. Kobus, you've  
20 answered my question. Okay?

21 A Okay.

22 Q Okay. Now, and when did you become aware that there  
23 was going to be a change?

24 A When I followed up after the deposition with Craig  
25 Gustafson and he provided me this information related

1 to what we had recently -- what he had recently  
2 negotiated with the fire marshal in California.

3 Q Why did it take until August 8th or 9th to inform us  
4 that the deposition testimony was incorrect?

5 MR. McMAHAN: Your Honor, I'm going  
6 to object to this. We filed a motion to supplement the  
7 testimony. We -- and Your Honor ruled in favor of that  
8 motion to supplement the testimony. So we've been  
9 through this already. And I would ask that  
10 Mr. Aramburu be directed to move on to something else  
11 other than the time it took to get it or the rationale  
12 for asking for the supplement. Because Your Honor  
13 ruled on this.

14 JUDGE TOREM: Mr. Aramburu, I did.  
15 Do you want to be heard?

16 MR. ARAMBURU: No. My request has  
17 been continuously: This -- this was sprung on us just  
18 a few days before the hearing was to start. We were in  
19 the midst of hearing preparation. And we get this as a  
20 last-minute surprise without a real opportunity to  
21 investigate the circumstances.

22 I've indicated continuously that we need some  
23 opportunity to -- to examine this more carefully  
24 without the press of time with day-long hearings. So  
25 that's been our request.

1 MR. McMAHAN: Your Honor, if I may  
2 respond. Mr. Aramburu has had, since then -- the  
3 deposition till today -- ample opportunity to secure  
4 another witness or to otherwise challenge his  
5 testimony. His testimony is about nothing more than  
6 providing this Siting Council with the best information  
7 for the safest possible facility that we can provide as  
8 part of the -- as part of the -- as part of the design.  
9 Nothing more.

10 JUDGE TOREM: And, I think,  
11 Mr. McMahan and Mr. Aramburu, every other person  
12 watching today is very clear about what's going on  
13 here, what limited supplementation has gone on, and  
14 they've learned about the application process, the need  
15 to file an updated amended ASC before and after the  
16 adjudication, and that things change.

17 Mr. Aramburu, fearing to tread where angels go and  
18 acknowledging Proverbs 17:28, do you have any further  
19 questions?

20 MR. ARAMBURU: Our objection is on  
21 the record. Our request for additional time is on the  
22 record. We have no further questions.

23 JUDGE TOREM: All right. Thank you.

24 Mr. McMahan, I'm going to ask if Chair Drew or the  
25 Council members have anything for Mr. Kobus based on

1 the deposition or what we've heard today.

2 There's a couple hands going up.

3 Chair Drew, I'm going to come to you, and then  
4 we'll come back to Ms. Osborne and Lenny Young.

5 COUNCIL CHAIR DREW: Hi, Mr. Kobus.  
6 Thank you for joining us today. I for one am very  
7 happy that we're going to continue to look at what is  
8 the safest possible installation and fire suppression  
9 system that we can have.

10 I guess my question is: Do you think that could  
11 change further in the future?

12 Because, as you know, even once should the  
13 application -- let's start with that -- be approved,  
14 that there still is lag time in -- in terms of even  
15 securing and then beginning construction. But this is  
16 a relatively new area of development in the world. So  
17 I guess my question to you is:

18 Do you have ideas about how we can -- until we get  
19 to that point where we absolutely, should this be  
20 approved, have to move forward, how will we proceed  
21 in -- in making sure we have the safest option?

22 **THE WITNESS: Thank you, Chair Drew.**  
23 **Appreciate the question. You're recognizing I'm -- I'm**  
24 **not an expert on these systems. What I am expert at is**  
25 **assuring that we demand of our vendors and**

1 manufacturers that they meet the standards that we  
2 require at the time we procure equipment.

3 You know, at the time of our original ASC filing,  
4 water suppression systems were a standard component of  
5 the designs. And, you know, as I've stated previously,  
6 the technology's evolving. And, you know, at this  
7 point it's becoming more understood what causes fires  
8 in lithium ion batteries and what -- what can assist in  
9 suppressing them.

10 We're finding that copious volumes of water, even  
11 if this were available, in fact could increase the  
12 hazard associated with thermal runaway. It's not an  
13 oxygen-fed fire, so gaseous type of suppression systems  
14 aren't going to work. And so those are the -- the --  
15 the two weights. You know, the technology associated  
16 with this extinguishing agent and the firefighting  
17 techniques are, you know, the only conceivable ways  
18 that I've been informed of or read that are being  
19 considered. And so I -- I think we're at the -- the  
20 peak of the evolution now where the NFPA society is  
21 very engaged. And --

22 COUNCIL CHAIR DREW: Can you say  
23 what the NFPA is?

24 THE WITNESS: National Fire  
25 Protection Association.

1 JUDGE TOREM: Thank you.

2 THE WITNESS: Is very engaged. They  
3 have a standards committee. In fact, Craig Gustafson  
4 is on the NFPA standards committee that's developing  
5 these new standards. And --

6 COUNCIL CHAIR DREW: Just for  
7 people's knowledge, who is Craig Gustafson?

8 THE WITNESS: Craig Gustafson is our  
9 Scout design expert that we hired several months ago  
10 and leads up this procurement activity and vendor  
11 interface and design interface and project development  
12 interface at Scout for installing these systems.

13 COUNCIL CHAIR DREW: Thank you.

14 THE WITNESS: So I don't see  
15 anything better on the horizon. I see what we've found  
16 is quite an achievement. I wish I could have had this  
17 at my tip of my tongue when Mr. Aramburu was  
18 questioning me. But I sure felt I needed to follow up  
19 and get it to him as soon as we could, ask that was as  
20 soon as we could.

21 COUNCIL CHAIR DREW: Thank you. I  
22 agree with you, setting the standards and the  
23 procurement. So if the standards do change before that  
24 time, we would then have the opportunity to make sure  
25 we have the safest system. So I agree with that

1 approach. Thank you.

2 JUDGE TOREM: All right. Let's come  
3 to Elizabeth Osborne next.

4 And, Lenny Young, I'll get you after that.

5 COUNCIL MEMBER OSBORNE: Thank you,  
6 Your Honor.

7 Hi, Mr. Kobus. My name is Elizabeth Osborne. I  
8 am the Council member from the Department of Commerce.  
9 And I have some questions about these technologies that  
10 I hope you can help clarify for me. You did just  
11 mention that you're not an expert directly on the  
12 technology, so I'll understand if you can't.

13 But am I right in understanding from your  
14 testimony that it's safer to simply let a fire burn  
15 itself out? Is that a fair but simplistic  
16 characterization?

17 THE WITNESS: Yeah. What we've  
18 found is that the designs are evolving, where they're  
19 basically containerized equipment modules. And there  
20 is no need for personnel entry, so there is no life-  
21 safety fire suppression need, which was the origination  
22 of the water fire suppression design with these units.

23 And so the new strategy is you containerize it.  
24 You contain it. If there's a fire, you -- you let it  
25 burn itself out. And if the container gets hot, you

1 make sure it just doesn't ignite vegetation and other  
2 combustible materials around it, and so it's a very  
3 minimal use of water.

4 COUNCIL MEMBER OSBORNE: That's  
5 helpful. I have just a couple follow-ups, if you don't  
6 mind.

7 Is the containment technology, itself, what goes  
8 around the battery system, is that new, or has that  
9 been a part of these battery configurations up till  
10 now, but it doesn't represent any kind of physical  
11 configuration change to the battery system?

12 THE WITNESS: No, it's -- it's an  
13 evolution. I mean, in the earlier days, and still now,  
14 they're designing battery storage that are in  
15 buildings. So they're in big buildings like at Moss  
16 Landing in California where they have all of these  
17 modularized batteries, but they're within a building.  
18 And people go in and do maintenance.

19 The evolution has been now to plan to have them in  
20 these containerized units. And I'm sure that the  
21 design of these containers is evolving relative to this  
22 experience that's been gained in doing the postmortem  
23 evaluation of battery problems that have occurred.

24 COUNCIL MEMBER OSBORNE: That's  
25 helpful.

1           And you mentioned the project in California. Are  
2 there other applications of this approach to fire  
3 suppression going on at other projects in the region or  
4 in the country, to your knowledge?

5                           **THE WITNESS:** Good question.

6 What -- what I'm hearing -- and, again, Craig Gustafson  
7 is on this standards committee. And this -- this is  
8 the front of the sphere in determining how to combat  
9 potential problems with all the environment --  
10 environmental hazards that are involved while this  
11 container burns. And so this is the latest technology,  
12 and I believe it is being adopted industrywide.

13                           COUNCIL MEMBER OSBORNE: Thank you.  
14 That concludes my question.

15                           JUDGE TOREM: Lenny Young.

16                           COUNCIL MEMBER YOUNG: Thank you,  
17 Your Honor.

18           Mr. Kobus, my name is Lenny Young, and I'm  
19 representing the State Department of Natural Resources  
20 on EFSEC.

21           Could you be a little more specific what safety  
22 aspects this change in methods is intended to go for?  
23 Are we talking it's safer for a firefighter? Is this  
24 for firefighter safety? Is it to reduce the risk of a  
25 catastrophic explosion?

1           Beyond the general idea of safety, what specific  
2 safety elements is this change in methods intended to  
3 get at?

4                           **THE WITNESS:** Yes, appreciate the  
5 question, Lenny. I'm starting to get to know you by  
6 voice, so no need for introductions.

7           The material that we submitted was intended to put  
8 this all in perspective. It's not only the design of  
9 the equipment, which is the UL 9540 listing; it's the  
10 full-scale fire testing of that equipment, which is the  
11 UL 9540 Alpha regulation.

12           And then the NFPA 855 is the full accompaniment of  
13 design elements and training elements and fire  
14 suppression elements that are involved with the  
15 installation of these systems.

16           And I might also add that part of this new  
17 criteria is that you do a hazard mitigation analysis of  
18 the installation that you intend to procure at the  
19 point in time that it can do you some good when you're  
20 specifying and procuring the equipment.

21           So it trickles down all the way to the local fire  
22 department that we intend to support over the life of  
23 the project.

24                           **COUNCIL MEMBER YOUNG:** I think I  
25 might have made my question a little too complicated.

1 I was just trying to find out if it's safer to let the  
2 fire burn itself out than to put water on it.

3 Well, how is it safer? Does it reduce firefighter  
4 risk? Does it reduce the risk of a catastrophic  
5 explosion? Why and how is it safer to use one  
6 technique than the other?

7 **THE WITNESS: Appreciate that**  
8 **distinction. My understanding is that it has to do**  
9 **with improved safety of the fire responders when it's**  
10 **one of these internal-type faults that can occur in the**  
11 **battery.**

12 And we're seeing evidence that there are actually  
13 fires that are caused by these internal faults that  
14 have gone on longer than necessary -- in some case,  
15 days longer -- when fire -- water is continually  
16 applied to it. And so we believe this will shorten the  
17 time of a contained fire, shorten the need for  
18 firefighter response, and therefore, you know, reduce  
19 the risk to those responders.

20 **COUNCIL MEMBER YOUNG: Okay.**  
21 Thanks. That's exactly what I was -- was hoping to  
22 hear.

23 And are all the combustion products -- when the  
24 fire is allowed to burn, are all the combustion  
25 products contained within the container for the entire

1 duration of the fire?

2 **THE WITNESS:** That's -- that's a  
3 great question. My understanding is these new designs  
4 have evolved, and that is an important consideration.  
5 But I -- I can't respond any further about what venting  
6 might have to occur to -- to assure there isn't an  
7 explosive hazard. And so that's -- that's the extent  
8 of the response I can provide.

9 COUNCIL MEMBER YOUNG: Okay. And in  
10 your answer to one of the previous questions, you said  
11 a consideration is to make sure the container doesn't  
12 get so hot that it ignites vegetation or combustible  
13 materials in the immediate vicinity of the container.

14 Wouldn't it be prudent to ensure that there was no  
15 such vegetation or combustibles around the container to  
16 doubly prevent that kind of a thing from happening?

17 **THE WITNESS:** Great point, Lenny. I  
18 appreciate you asking it. That, in fact, is the main  
19 reason for the fence that goes around these facilities.  
20 And there will be setback and vegetation-free zones and  
21 fire break areas, not only from the fence to the  
22 containers, but between the containers within the  
23 fenced area.

24 COUNCIL MEMBER YOUNG: And I have  
25 just one final question, and that is simply: Is there

1 any downside?

2 As the experts have looked into, researched, and  
3 recommended this change in firefighting methods, it  
4 sounds like it's on track for bringing safety. But is  
5 there any downside, is there any tradeoff that you get  
6 something else that you don't want as a result of  
7 making this change in methods?

8 **THE WITNESS:** I appreciate the  
9 question. And there -- there possibly is, and that's  
10 why I'm not saying it's absolutely safe. I'm saying  
11 this hazard mitigation analysis that will be performed  
12 by experts in this field will be able to certify that  
13 for us.

14 **COUNCIL MEMBER YOUNG:** Thank you. I  
15 appreciate your answers.

16 **JUDGE TOREM:** All right. I see that  
17 Eli Levitt, Department of Ecology, has some questions  
18 for you as well. You might know his voice.

19 **COUNCIL MEMBER LEVITT:** Hello,  
20 Mr. Kobus. My name's Eli Levitt. I'm the Department  
21 of Ecology's EFSEC Council member.

22 I guess I'll just offer very briefly that my  
23 agency has some experience with responding to lithium  
24 ion battery fires, and there has been a lot of new  
25 research and change in this field just in the past six

1 months or year, including an interagency group. So,  
2 anyways, I know just a bit about it.

3 But one thing I'd quickly ask is that, has the  
4 applicant or your vendors done any research on how the  
5 batteries will be decommissioned at the end of life or  
6 what you would do with them if there were a fire?

7 **THE WITNESS: Great question,**  
8 **Council Member Levitt. We -- we are anticipating that**  
9 **the vast majority of these battery facilities will be**  
10 **recyclable. In fact, there's, you know, industry**  
11 **information available to the public that shows how**  
12 **they're -- the recycling techniques are improving. And**  
13 **so, you know, our intention is that we will recycle to**  
14 **the maximum extent practical. And, of course, our**  
15 **decommissioning plans have to restore us to, you know,**  
16 **the greenfield that it was prior to building the**  
17 **project.**

18 And so as I say, in that endeavor, we will -- we  
19 will attempt to recycle and salvage as much as  
20 possible.

21 COUNCIL MEMBER LEVITT: Yeah, I  
22 guess in the case when they do burn, they become a  
23 different type of waste, so I assume you would need a  
24 different type of plan in the case of a fire. But --

25 **THE WITNESS: And I can't speak to**

1 that, but I can speak to the fact that, you know, I --  
2 I know our -- the way we manage Scout projects, we will  
3 find the absolute optimal way to dispose of whatever  
4 does occur, but I can't say I've seen it personally,  
5 myself.

6 COUNCIL MEMBER LEVITT: Okay. Thank  
7 you. That's it.

8 JUDGE TOREM: Council members, any  
9 other questions for Mr. Kobus?

10 Seeing none.

11 Other parties?

12 Ms. Voelckers, I saw your hand go up.

13 MS. VOELCKERS: Thank you, Your  
14 Honor. And good afternoon, Mr. Kobus.

15 I don't have a question for Mr. Kobus, but I do  
16 want to make an objection on the record when it's  
17 appropriate, Your Honor.

18 JUDGE TOREM: Now is fine.

19 MS. VOELCKERS: We've heard from a  
20 number of witnesses over the last couple of weeks that  
21 sponsored significant portions of the ASC and did not  
22 write them. I would like to make or, I suppose, maybe  
23 renew a general due-process objection that allowed  
24 applicant to withhold Mr. Kobus from examination by all  
25 parties either through direct testimony or deposition

1 until less than a month before this hearing.

2 I understand that we are not being allowed time to  
3 rebut what we're hearing today. And, unfortunately, we  
4 have not heard directly from the fire chief, which I  
5 certainly would have questions for, myself.

6 You know, I just at this point renew our objection  
7 and ask that the Council rely only upon representations  
8 by any witness, including ours, that are supported by  
9 credible citations at this point. Thank you.

10 JUDGE TOREM: Thanks, Ms. Voelckers.  
11 Your objection's noted for the record. I think the  
12 Council is aware that Mr. Kobus presented things  
13 starting at February of 2021 and perhaps before; that  
14 he was the representative for this applicant; that the  
15 statements contained in the application and the  
16 amendments come in with multiple authors and are  
17 presented for the Council as part of the application  
18 review.

19 So far as you know for this adjudication, your  
20 objection is well-taken. These matters are on a  
21 parallel track with the SEPA process, which we're not  
22 getting into here, as we all know. But the Council's  
23 going to get all of this information and understands  
24 what was presented here under cross-examination for the  
25 adjudication is a different animal than what's going on

1 in SEPA that's being vetted through different processes  
2 than the adjudication.

3 So I understand your objection. Clearly, I'm not  
4 going to grant any additional time or strike witnesses  
5 or grant anything other than what we'll talk about in  
6 the final housekeeping for any supplemental testimony  
7 that parties wish to move to have the Council consider  
8 or be admitted by stipulation or otherwise.

9 Any other party questions before I come back to  
10 Mr. Aramburu to see if he has further questions?

11 All right. Mr. Aramburu, any final questions for  
12 Mr. Kobus, perhaps based on the ones that the Council  
13 asked? And you'll have to come off "mute" to do so.

14

15 CROSS-EXAMINATION

16 BY MR. ARAMBURU:

17 Q The supplemental material that you presented here and  
18 is asked for admission, has that been submitted to the  
19 Benton County Fire District No. 1?

20 A Good question.

21 I haven't, no.

22 Q Okay. So they haven't seen it?

23 A I -- I don't know.

24 MR. ARAMBURU: No further questions.

25 JUDGE TOREM: Mr. McMahan, anything

1 else for this witness?

2 MR. McMAHAN: I don't believe so,  
3 Your Honor, unless any of the Council members wants a  
4 better understanding of the modularization of these  
5 facilities and how that has some bearing on fire. But  
6 I'm guessing that we've had enough for today on this  
7 topic. But if there were further questions about that,  
8 that is a piece that I didn't think was perhaps  
9 developed enough through Council questions.

10 JUDGE TOREM: Council members,  
11 anyone want to take Mr. McMahan up on his invitation on  
12 modular portions of this?

13 Mr. McMahan, I'm not seeing anybody take that  
14 bait, so I imagine they've got what they need.

15 MR. McMAHAN: Thank you, Your Honor.

16 JUDGE TOREM: Mr. Kobus, thanks for  
17 being available today. And we have the deposition. We  
18 have the supplement to the testimony and the rest of  
19 the development of that evidence.

20 (Witness excused.)

21  
22 JUDGE TOREM: Parties, I think that  
23 was the end -- as I go back and look at the schedule  
24 for today -- the end of what we were attempting to do.

25 We still have a question about Caseymac Wallahee's

1 testimony. Council members, if I hadn't said it  
2 already to you, Council Member Wallahee is still in  
3 ceremonies and is not able to be with us today with the  
4 events going on with his family in the Yakama Nation.

5 His testimony prefiled has been stipulated to be  
6 admitted. It doesn't appear that we're going to get to  
7 hear him live, certainly not today, for him to speak to  
8 the Council as the other tribal members have.

9 Mr. McMahan, was there any other evidence that the  
10 applicant intended to present during the adjudication?

11 MR. McMAHAN: I don't believe so,  
12 Your Honor. But I bet late at night I'll think of it.  
13 But no. Thank you.

14 JUDGE TOREM: Yeah. And we did our  
15 housekeeping this morning, and I think all of the  
16 applicant's exhibits have been covered. And so the  
17 final exhibit list as it stands will be going out at  
18 some point in the days ahead from Ms. Masengale.

19 Mr. Harper, good afternoon. Anything further from  
20 the County? Is all evidence that the County wishes to  
21 submit in the record now?

22 MR. HARPER: Nothing further, Your  
23 Honor.

24 JUDGE TOREM: All right. Coming to  
25 counsel for the environment, Ms. Reyneveld: Have you

1 now presented all the evidence that counsel for the  
2 environment wish to have before the Council?

3 MS. REYNEVELD: I have.

4 I did want to follow up on just Yakama Nation's  
5 motion for the two additional WDFW wildlife witnesses  
6 and just confirm that Your Honor was going to be making  
7 a written ruling as a follow-up to your verbal ruling.

8 And I want to just state also on the record that  
9 counsel for the environment agrees with Yakama Nation  
10 that both of these witnesses have very relevant  
11 expertise in wildlife and habitat issues and believe  
12 that their testimony would be helpful in clarifying  
13 testimony given even as late as today.

14 So counsel for the environment would like to  
15 understand, I think, more specifically the specific  
16 legal basis for your denial in writing, specifically as  
17 discovery depositions of both of these witnesses have  
18 been admitted into evidence and the admission of  
19 supplemental and also responsive testimony has been  
20 very liberal in these proceedings, so I think  
21 understanding that specific legal basis for denial  
22 would be helpful for us to consider whether or not we  
23 would like to request reconsideration.

24 JUDGE TOREM: Thank you,  
25 Ms. Reyneveld. But let me clarify, this was not a ALJ

1 ruling. This was a question posed in writing by  
2 Ms. Voelckers to Ms. Bumpus and to the presiding  
3 officer as the Council. I simply relayed the decision  
4 of the presiding officer in this matter as well as the  
5 director of the agency.

6 I do believe that Ms. Bumpus will be reducing that  
7 to writing and responding to Ms. Voelckers with a copy  
8 to all parties. The only legal for that will be  
9 supplied by the assistant attorneys general who advise  
10 the Council. So, again, to be clear, it's not the  
11 administrative law judge's ruling. That letter was not  
12 addressed to me. It came during the course of the  
13 adjudication, and I simply as a courtesy am relaying so  
14 you know now what the decision of the Council was.

15 I hope that helps, Ms. Reyneveld.

16 MS. REYNEVELD: That does help.

17 Still a legal basis in the context of that  
18 response from EFSEC and the attorney general's office  
19 would be helpful.

20 JUDGE TOREM: Yes. And your  
21 colleagues at the attorneys general office are more  
22 than equipped to do that.

23 Aside from that, was there anything else from the  
24 counsel for the environment on what they needed in the  
25 record?

1 MS. REYNEVELD: No. Nothing  
2 further. Thank you.

3 JUDGE TOREM: Ms. Voelckers, I'm  
4 coming to you with the same questions. But does the  
5 Yakama Nation have all the evidence, including the  
6 stipulated testimony of Caseymac Wallahee, that the  
7 Yakama Nation wanted the Council to consider as part of  
8 the adjudication?

9 MS. VOELCKERS: Thank you, Your  
10 Honor. We do not have any additional evidence. I -- I  
11 would, just as a follow-up to what was just discussed,  
12 like to be very clear on the record. I know that  
13 things have been done verbally and in writing the last  
14 couple weeks.

15 Yakama Nation is making a motion to the presiding  
16 officer, and so I just wanted to make that clear and  
17 would -- and as I think I said yesterday, appreciate a  
18 written response from our presiding officer on this  
19 matter, so thank you.

20 JUDGE TOREM: All right.  
21 Mr. Aramburu, I'm coming to you to see what other  
22 evidence. We have Lonnie Click's testimony that's been  
23 stipulated to. We still have a supplement to that  
24 coming when we get Chair Drew's questions answered.  
25 And hopefully that will be an opportunity for Mr. Click

1 in the days ahead.

2 But aside from that pending response, does the  
3 Tri-Cities C.A.R.E.S. group have any other evidence  
4 that they think is not already in the record?

5 MR. ARAMBURU: Judge Torem, we have  
6 continuously through these proceedings indicated our  
7 objections to the hurried and compressed nature of  
8 these proceedings, which have prejudiced us in terms of  
9 preparation of testimony for the -- for the Council.

10 We have made presentations, but they have been  
11 impacted by the shortness of time and the -- the  
12 compressed nature of these, these proceedings.

13 So I cannot say that we have had an opportunity to  
14 present all the evidence we wish to present. I can  
15 tell you now that we think -- well, first of all, the  
16 material presented by Mr. Kobus today, we've not had an  
17 opportunity to thoroughly review that material and form  
18 opinions as to whether a response is necessary.

19 Secondly, we think the Council should have  
20 additional information on view impacts and particularly  
21 on alternatives to that (videoconference technical  
22 difficulties) the project, which would impact views.  
23 We've provided some testimony on that, but we've heard  
24 a number of questions from the Council.

25 We think some additional evidence on that point

1 is -- is appropriate. And in general to the question  
2 of possible alternatives to the project that cannot  
3 only address visual aesthetic issues, but -- and I  
4 won't speak for other counsel, but there have been some  
5 questions raised by the Yakama Nation. There's been  
6 questions raised by the County and others.

7 So we think some opportunity for supplemental  
8 testimony on those points should be allowed to us,  
9 given the compressed nature of these proceedings, and  
10 we'd be ready to go with some supplemental testimony on  
11 either September 11 or 15.

12 JUDGE TOREM: All right. Thank you,  
13 Mr. Aramburu.

14 On the motion for supplemental testimony, I'm  
15 going to allow for all parties, if they wish, to file a  
16 written motion to supplement the record with whatever  
17 testimony and an offer of proof if not the actual  
18 testimony. Those motions will be due no later than  
19 Tuesday, September 5th, at 5:00. Any request to  
20 supplement the record that come in at 5:01 are  
21 summarily denied, and anything thereafter I'm not even  
22 going to look at.

23 Tuesday, September 5th, 5:00. Have a good Labor  
24 Day weekend, but Tuesday, September 5th is the deadline  
25 for those motions. I will immediately look at them on

1 the night of Tuesday, September 5th, and endeavor to  
2 have an order out the next day or -- I'm looking at my  
3 calendar.

4 I've got time on the 5th. I have a hearing on the  
5 7th. So I'll aim for the night of the 5th and the 6th  
6 to get you an order on the supplemental testimony.

7 If we're going to have a supplemental hearing, it  
8 would be on the 11th or the 15th. At this time, I'm  
9 not seeing a need to schedule it formally, but the  
10 Council's been asked to hold that. Based on what I see  
11 in the written motions with identified testimony of  
12 witnesses, I'll be able to quickly make a decision if  
13 we need to change those dates into formal hearing  
14 dates, but make a justification why a written  
15 supplemental testimony won't be sufficient.

16 MR. ARAMBURU: May I -- may I ask,  
17 Judge Torem, would you like on September 5 to have the  
18 request for the testimony or the testimony, itself?

19 JUDGE TOREM: Much as Mr. McMahan  
20 set an example by attaching the proposed supplemental  
21 testimony of Mr. Kobus, I think that would be the  
22 format, given the compressed decision timing we need,  
23 to get that to me. So have the testimony ready. Count  
24 on it being considered as attached.

25 If I think there's a need for other parties to

1 object before I can make a quick ruling and just a  
2 judgment on whether it's within the bounds that we've  
3 set and whether I think it will help the Council, I  
4 want to get this done quickly, particularly if we need  
5 to have a further hearing date on the 11th or the 15th.

6 So submit it. I don't want just the name and the  
7 idea. I want the actual testimony included. That's a  
8 good clarification, Mr. Aramburu.

9 All right. We have all the evidence in, Council  
10 members. I understand there's going to be a quick  
11 meeting of the minds here at 3:00 where we'll talk  
12 about what happens next, perhaps talk about dates for  
13 our ultimate time for deliberations. But, again, it's  
14 not a time to decide anything now. You've had plenty  
15 of the last two weeks' information presented.

16 We'll just talk about what the Council procedure  
17 is once the adjudication is closed, and we'll know  
18 September 6th or thereabouts whether there's going to  
19 be any supplemental hearing dates. And we'll kind of  
20 talk about which of those dates might be preferable for  
21 all Council members when we get together here in 20  
22 minutes.

23 Chair Drew, is there anything else that you want  
24 to put on the record for the adjudication? I have two  
25 other housekeeping items for the parties.

1 COUNCIL CHAIR DREW: No. Thank you,  
2 everyone, for your participation. Thank you, Council,  
3 for your participation. And we look forward to the  
4 next step.

5 JUDGE TOREM: All right. Thank you,  
6 Council members.

7 MR. ARAMBURU: Thank you for your  
8 attention.

9 Thank you for your attention, Chair Drew and the  
10 other Council members, to our presentations.

11 JUDGE TOREM: All right. We're  
12 going to pause for two minutes just to stretch. We'll  
13 come back at 2:45 with the housekeeping session to wrap  
14 things up for the day.

15 (Pause in proceedings from  
16 2:43 p.m. to 2:46 p.m.)  
17

18 JUDGE TOREM: All right. We're back  
19 on the record for our final housekeeping session of the  
20 adjudicative hearing. It's Friday, August 25th, about  
21 quarter to 3.

22 Ms. Masengale is joining us just to talk about  
23 exhibits. We went over those this morning, and I think  
24 the exhibit list is now complete. She was asking some  
25 questions about the depositions, and they're not going

1 to necessarily have an exhibit number, but I think  
2 we'll just have them appended to the exhibit list as  
3 the depositions of the wildlife employees.

4 And then we'll also list Mr. Kobus's deposition.  
5 But, again, the piece that -- piece that came in today  
6 was 1064\_X, or something to that nature, as that was  
7 the supplemental testimony supporting the deposition,  
8 so that was marked as its individual exhibit.

9 Mr. McMahan, maybe Ms. Schimelpfenig, you're in a  
10 position to answer this. We had TCC's witness  
11 Mr. Apostol yesterday, and I allowed in Exhibit 5906.  
12 That was the new map that included various colored  
13 zones. And there was some question in my mind from my  
14 review of notes this morning whether or not there was  
15 the question of Ms. Guthrie submitting any supplemental  
16 testimony or request for supplemental cross-exam of  
17 Mr. Apostol.

18 I would imagine that has been covered now with  
19 what I said at the end of the hearing about  
20 supplemental testimony and deadline for that.

21 So any questions about that outstanding request on  
22 the visual impacts, Ms. Schimelpfenig?

23 MS. SCHIMELPFENIG: No, Judge Torem.  
24 Sorry. Mr. McMahan had to step out for another  
25 pressing matter, so I'll be handling it here from here

1 on out. But we just plan to submit supplemental  
2 testimony of Brynn Guthrie pursuant to your Tuesday  
3 deadline.

4 JUDGE TOREM: Okay. And, again,  
5 there'll be a motion to do that. Nothing's been  
6 admitted at this time yet.

7 MS. SCHIMELPFENIG: Yep.

8 JUDGE TOREM: And if I -- if I feel  
9 that it merits having a chance for objections from  
10 others or just that the supplemental testimony just  
11 didn't appear helpful to the Council, I'll make a  
12 ruling in that way. And if I want to seek -- given any  
13 time allowed -- responses, I'll let people know again  
14 on September 6th and give a deadline to respond if I'm  
15 withholding a ruling until I hear from the affected  
16 party.

17 MS. SCHIMELPFENIG: And you wanted  
18 us -- sorry. My apologies. You wanted us to also  
19 request any supplemental oral testimony that we wanted  
20 to give when we did that, or wanted to ask for when we  
21 file those motions?

22 JUDGE TOREM: Correct. Which should  
23 be in the motions, just the request for supplemental  
24 testimony with the attached proposed testimony, and  
25 then indicate whether or not that would be supplied

1 only in writing or submitted where the witness would  
2 need to appear in front of the Council. If the  
3 sponsoring party is requesting it, and again, if I seek  
4 a response if the potential cross-examining party is  
5 seeking that as well.

6 MS. SCHIMELPFENIG: Thank you for  
7 the clarification.

8 JUDGE TOREM: The other matter that  
9 was pending was the post-hearing briefs. We had some  
10 detailed questions about that first thing this morning.

11 And I'm trying to figure out with Mr. Botelho's  
12 agency just exactly what the process is going to be  
13 given the volume of transcribing and perfecting those  
14 transcripts he's going to have to do.

15 The standard we were talking about this morning,  
16 there may be an exception that EFSEC and B & A are  
17 negotiating, would rather than each day having a  
18 ten-day measurement -- because clearly he's been busy  
19 for the last eight days -- we're looking to have it  
20 perhaps ten business days from today. And my notion of  
21 that would get us out to September 11th or 12th, that  
22 neck of the woods, when the transcripts would be  
23 available.

24 My notion for how long it would take the parties  
25 to digest all that and have the right amount of

1 citations and preferably in footnotes: Probably 30  
2 days, I think, would be sufficient. So if I stretch  
3 that out a little further, maybe the full week after  
4 you get the transcripts and start counting from there.

5 Essentially 30 days takes us to kind of  
6 auspiciously to Friday the 13th, so that seemed  
7 appropriate. And we'll just have the briefs due at  
8 5:00, post-hearing briefs, on Friday the 13th.

9 And if the transcripts are somehow delayed, we can  
10 reengage and extend that date as needed. But for now,  
11 that will give the Council time to receive those and  
12 consider a late October deliberations on the  
13 adjudication. And I think we heard Ms. Bumpus say  
14 that, at the meeting on Wednesday, that perhaps the  
15 FEIS might be coming out toward the end of October or  
16 thereabouts. Of course, that's subject to a different  
17 division than I have any influence over.

18 As to length. As to length, I think for this  
19 matter there are some complicated issues, but 50 pages  
20 was what I was thinking. Does any party think they  
21 need more than 50 pages to make their case?

22 I know, Mr. Aramburu, you were thinking that we  
23 wanted to have some additional maps or larger exhibits  
24 with larger versions available. So those would not  
25 necessarily be counted in the 50 pages. But I, again,

1 want them to be larger versions of the exhibits that  
2 are already handled on the existing master exhibit  
3 list, not new material to sneak in past the 50-page  
4 limit or not any new material added to those exhibits.

5 The exhibits have been admitted as they are. It's  
6 just a question of the size and the pixelation, if you  
7 will, and the level of detail one can see on a  
8 eight-and-a-half-by-eleven or on the screens that  
9 they've been displayed on.

10 Council has let me know that -- or at least staff  
11 has let me know they don't -- really don't want a whole  
12 lot of extra paper records coming in. So if you want  
13 to submit anything as to supplemental exhibits and the  
14 size you desire, send those by mail to EFSEC. We'll  
15 get them distributed to Council members. There's no  
16 need to submit a paper or working copy of your brief.  
17 Everybody on the Council assures me they have access to  
18 a printer either at the office or at home, and a  
19 50-page brief doesn't seem, in these days of  
20 technology, too demanding on any one Council member's  
21 printer.

22 Mr. Aramburu had his hand up first. And then,  
23 Ms. Schimelpfenig, I'll come back to you.

24 MR. ARAMBURU: So we will intend to  
25 provide full-size copies of some of the photography

1 that's here. And we understand the ruling that there  
2 can't be new attachments, new materials, except as may  
3 come in during the supplemental proceedings. And so --  
4 but the parties could provide appendices to their  
5 briefs for some particular matters that we think that  
6 the Council should have before them as they're  
7 reviewing the briefs as long as they're not new  
8 material?

9 JUDGE TOREM: I'm not sure what you  
10 mean, Mr. Aramburu, and I don't want to risk removing  
11 your appendix.

12 MR. ARAMBURU: Well, for example,  
13 the parties may wish to put the, for example, the map  
14 from the Moon memo in just so that Council members  
15 would have that readily available and not have to  
16 search through the record for it as they're reading  
17 briefs. This is typical of appellate briefs as well,  
18 so -- so -- and I -- I don't want to assume anything.  
19 I think I would request that we have an opportunity to  
20 add some of those pertinent materials so the Council  
21 members wouldn't have to go to -- to Page 107534 of the  
22 record to find that document.

23 JUDGE TOREM: All right. In that  
24 context, that makes sense, Mr. Aramburu. Ms. Masengale  
25 and I have been talking about ease of reference to some

1 of the record by having a SharePoint folder file that  
2 would have everything by number. But if you're  
3 suggesting that limited excerpts that are important to  
4 each party's brief could be included, not counted  
5 against the page limit, as appendices, I think in a  
6 limited fashion that would be great, but I certainly  
7 don't want the appendices to dwarf the brief. That'd  
8 seem to defeat the purpose of things.

9 MR. ARAMBURU: I think that would  
10 be --

11 JUDGE TOREM: How many appendices do  
12 you think are anticipated?

13 MR. ARAMBURU: Oh, I don't think  
14 very many. It's just that sometimes you want to  
15 have -- want to have Council members going back and  
16 forth as they're reviewing materials. So we'd attach  
17 it to the brief so they could easily get to it. And  
18 I've written enough appellate briefs to know that --  
19 that large appendices do not help the art of  
20 persuasion. Let's put it that way, so...

21 JUDGE TOREM: All right. And,  
22 again, with the exhibit that came in from the data  
23 request, I don't think we've referred to the Moon memo  
24 enough here since John Kennedy in 1962, so we'll just  
25 press on from there. And if you need to take any

1 excerpts of that large document, that would be  
2 well-taken and save the Council members some money and  
3 time.

4 Ms. Schimelpfenig --

5 MR. ARAMBURU: Thank you.

6 JUDGE TOREM: -- you had your hand  
7 up.

8 MS. SCHIMELPFENIG: Yeah. Your  
9 Honor, you maybe clarified this point, but we were just  
10 wondering if the indices and front matter and similarly  
11 any appendices would be included in that page count,  
12 but it sounds like the answer to that is no.

13 JUDGE TOREM: Right. A tracking  
14 table of contents should be helpful, and if there's a  
15 need for an index at the last page. But it's 50 pages  
16 for the briefing, essentially from the caption until  
17 the signature. And, again, I just don't want the extra  
18 pages to dwarf those 50. So if you've got a 99-page  
19 document at the end, might want to reconsider some of  
20 the other 49.

21 MS. SCHIMELPFENIG: Understood.

22 MR. ARAMBURU: Typically in  
23 Washington appellate practice for briefing, tables of  
24 cases, tables of contents, those kinds of documents are  
25 not counted in the pages. And so I would -- I -- I

1 guess I would request, not assume, but request that the  
2 same practice be here. So as we have tables of  
3 contents, other tables of cases, because there probably  
4 will be cases referred to here, that those not be  
5 counted in the body of the brief, consistent with the  
6 rules of appellate procedure.

7 JUDGE TOREM: And I think that's  
8 essentially the nature of what Ms. Schimelpfenig just  
9 asked. So yes.

10 MR. ARAMBURU: Okay.

11 JUDGE TOREM: All right. Parties,  
12 any other questions on the post-hearing briefs or  
13 requested modifications to page limit, due date, or  
14 otherwise?

15 Ms. Voelckers.

16 MS. VOELCKERS: Thank you, Your  
17 Honor. I know you have a 3:00, so -- but I do have a  
18 few other -- few other points of question or  
19 clarification.

20 And I truly don't mean this to sound facetious.  
21 But what was our discovery deadline exactly?

22 JUDGE TOREM: I'm sorry. I don't  
23 understand the question. Are you asking me to go back  
24 and look at one of the prehearing orders and tell you?

25 MS. VOELCKERS: No, Your Honor.

1 I -- my understanding is that discovery was continuing  
2 up and through to the adjudication hearing, and so I  
3 just wanted to make sure that we were all on the same  
4 page.

5 JUDGE TOREM: Ah. Okay. So you're  
6 asking me to make sure when it's actually cut off?

7 MS. VOELCKERS: What our discovery  
8 cutoff was or is. Just -- I don't know that we had one  
9 identified. And I'm not trying to put you on the spot,  
10 but I would appreciate --

11 JUDGE TOREM: How about 3:00 -- how  
12 about 3:00 today. Did you need to do more discovery?

13 MS. VOELCKERS: We certainly have  
14 many questions. But, no, Your Honor, I'm not asking  
15 for more discovery. I'm just asking for clarity.

16 So 3:00 works for us if it works for the other  
17 parties.

18 JUDGE TOREM: All right. You've got  
19 two minutes to call Mr. McMahan and ask for something.

20 MS. VOELCKERS: So something that I  
21 want to raise and don't have an exact proposal to you  
22 and Ms. Masengale. But the confidentiality of our  
23 briefing. And I truly do appreciate just how quickly  
24 things have been disseminated and put online.

25 I would ask that we, if not today, at some point

1 have a discussion about how to address that in our  
2 briefing. And I'll just share my observation that we,  
3 as we're drafting the prehearing brief, were pretty  
4 careful to be general, and I think that was consistent  
5 with the opening statement directed from you.

6 We need to be able to be pretty specific, I think,  
7 in certain portions of our post-hearing brief. And I  
8 think that the general convention that we use for  
9 exhibits works to a point. I would submit that maybe  
10 rather than going through and gray-shading a brief --  
11 because that makes it kind of hard to read through --  
12 that we would be submitting confidential and redacted  
13 versions and then that there would be some opportunity  
14 for conferral and agreement on the redactions before  
15 they're put online, understanding that this has been a  
16 very transparent process and not disagreeing with that,  
17 but that there would be some sort of, if not meetings  
18 of the minds, ability to flag something before it was  
19 published online as, you know, available to the public.

20 So that's my request that I am trying to think  
21 through today. Just thinking that rather than shading  
22 one brief and then redacting another, that we could  
23 have unshaded briefs and redacted versions and that we  
24 would have some sort of process for agreeing on the  
25 redactions. To the extent that anyone is referring to

1 traditional cultural properties or cultural resource  
2 impacts, I think nesting locations is a lot cleaner  
3 and -- and certainly appreciate Ms. Masengale looking  
4 out to catch those, and so I just want to flag that.

5 And then my last, I guess --

6 JUDGE TOREM: Let me respond to that  
7 quickly.

8 You went exactly where I thought it should be:  
9 Redacted briefs and confidential briefs. And I take  
10 your meaning to be you'll know what you want redacted  
11 in the Yakama Nation's brief, but you want a chance to  
12 work with Ms. Masengale to make sure there's not a  
13 inadvertent disclosure by another party who may not be  
14 quite as sensitive as your staff is.

15 MS. VOELCKERS: Yes, Your Honor.  
16 That --

17 JUDGE TOREM: Yeah.

18 MS. VOELCKERS: With Ms. Masengale  
19 or with the -- the parties. I, you know, certainly  
20 don't think we need to be filing any sort of motions  
21 to --

22 JUDGE TOREM: No, this is a  
23 cooperative effort --

24 MS. VOELCKERS: Yeah.

25 JUDGE TOREM: This is a cooperative

1 effort to stay within the bounds of the protection  
2 order, both in letter and spirit.

3 And you're not aware, but in the background, as  
4 parties were testifying and asking questions, I'm  
5 getting a chat box from Ms. Masengale saying, Okay,  
6 they're getting close.

7 She's paying excellent attention and taking great  
8 care of the confidential information that's been  
9 entrusted to this process and is waving the red flag  
10 consistently, saying, "Judge, Judge, we're getting" --  
11 so she'll continue to do that with the briefs and  
12 anything else before it's posted online, and I think  
13 she'd be happy, Ms. Voelckers, to talk with you and any  
14 other sponsoring party, including Ms. Reyneveld and any  
15 of the other wildlife-type issues, the traditional  
16 cultural properties issues, and those matters.

17 So she's been very much communicating with me  
18 about offering a chance to redact when she sees  
19 something she thinks might need to be and seeks that  
20 clarification. And Ms. Masengale, I'm sure, will  
21 continue to do that.

22 Lisa, if you're listening and you want to add any  
23 reassurances or procedures, I'd love if you speak up  
24 now about exhibits and those concerns as they cross  
25 over to the post-hearing briefs.

1 MS. MASENGALE: Absolutely. I can  
2 certainly offer that I can review all of the  
3 post-hearing briefs for anything that I would flag as  
4 public records officer that should be redacted under  
5 the Public Records Act.

6 But I also would welcome and very much encourage  
7 any feedback from the Yakama Nation, from Shona, any of  
8 the other parties and counsel as to anything else that  
9 you flag, that you see subsequently that you think  
10 should be redacted as well or that you would request be  
11 redacted.

12 And then I'll review all those. And all our  
13 review will certainly happen before we post anything  
14 online.

15 JUDGE TOREM: All right.

16 Ms. Voelckers, you had one more item.

17 Thank you --

18 MS. VOELCKERS: Yes. And --

19 JUDGE TOREM: -- Ms. Masengale.

20 MS. VOELCKERS: Thank you, both.  
21 And really appreciate all the EFSEC staff, especially  
22 Ms. Masengale's just really being on top of this and  
23 great communicator through all this, so it's been  
24 really helpful.

25 The last thing I -- I hesitated bringing this up

1 in terms of -- I don't bring it up to suggest any  
2 criticism of the Department of Ag representative, but I  
3 would like a little more clarity -- if you are able to  
4 share, Your Honor, since you communicated directly with  
5 him -- if -- if he -- understand that his participation  
6 was more limited than the other Council members, if --  
7 if he -- you know, especially on the terms of asking  
8 questions, and I know some Council members were less  
9 inquisitive in -- in their questions than others, but  
10 it's kind of unclear if he didn't get a chance to  
11 engage directly with our witnesses or if, you know,  
12 kind of where that's at.

13 So I'll stop there. But I just wanted to just  
14 flag it now that we are in housekeeping, 'cause I  
15 really don't mean to try to single someone out, but I  
16 would like a little more clarity on your perspective on  
17 terms of his level of participation and whether it's  
18 consistent with what he was hoping to be able to join  
19 us for.

20 JUDGE TOREM: It's a tough question,  
21 Ms. Voelckers. I -- I had the same discussion, and I  
22 had contact with him right before you raised it that  
23 next day. It was definitely, I think, obvious on the  
24 roll calls who was here and who wasn't.

25 There's reasons for many of the absences that are

1 well out of anything I can speak to. Ideally we'd have  
2 a full panel of eight Council members, the Chair plus  
3 seven, every day.

4 I've taken a look at the statute, though, and the  
5 statute -- I think it's 80.50.030 or .040. I could  
6 pull it up if you want. All it says about the  
7 Department of Agriculture's role here is that they had  
8 to actively petition to have a member on the Council  
9 within 60 days of the application. And they did. So  
10 now we have Derek Sandison as the Agriculture  
11 secretary, a high cabinet-level position sitting as a  
12 Council member.

13 I looked to see if there was anything that said,  
14 once they're in, they have an obligation or can they  
15 step out. Doesn't say. The statute's silent, as far  
16 as I could read, and the statute doesn't seem to  
17 indicate, once you get in, what your obligations are.  
18 Again, I think for appearances -- and I don't mean this  
19 in the sense of appearance of fairness. I just think  
20 for appearances of full participation, the roll call is  
21 what it is.

22 I don't know what will happen with the Department  
23 of Agriculture's representative. But if the Department  
24 of Agriculture intends to have a vote on the  
25 recommendation, I assure you I will make my best

1 efforts and enlist those of the Chair and the attorneys  
2 general assigned to this matter to make sure any vote  
3 is fully informed by a full review of the record. And  
4 that would go for any Council member, but I think for  
5 this particular matter with Mr. Sandison, we got to  
6 discuss what there is and what there is not.

7 So I think that's far enough. But I've been doing  
8 the research on this. I feel kind of the same concerns  
9 that you do, and I hope the other parties would echo  
10 what you do, that if you got a jury member that doesn't  
11 show up or falls asleep, you got real concerns in a  
12 trial. And if we had an alternate from Agriculture  
13 sitting in, in the back seat of the courtroom, this  
14 might be easy. But there's no alternate. And  
15 appointing an alternate at this point, if Mr. Sandison  
16 was to withdraw, doesn't help us. Puts us back in the  
17 same position or perhaps worse.

18 I've done the homework. I've alerted Mr. Thompson  
19 as the AG and the Chair. We're kind of rolling around  
20 all possibilities. I hope that's a well-thought-out  
21 response, but it's not been something that's a surprise  
22 to me either.

23 MS. VOELCKERS: Thank you, Your  
24 Honor. And I -- yeah, and I certainly am not  
25 suggesting that he can't get caught up. I just -- to

1 the extent that he did have questions for any of our  
2 witnesses, I just wanted to flag that concern.

3 So that's what I have today. Thank you, Your  
4 Honor.

5 JUDGE TOREM: All right. Well, if  
6 he sends out a data request, please, let's not call it  
7 the Sandison memo.

8 All right. Any other housekeeping from any other  
9 party for the record before we close out today?

10 MR. ARAMBURU: Judge Torem, you  
11 spoke earlier about the date of the FEIS, and I recall  
12 you saying that it's expected by the end of October.  
13 The last e-mail that I have from Ms. Bumpus is sometime  
14 this fall.

15 Do you have new information?

16 JUDGE TOREM: No. I thought -- I  
17 maybe had heard "fall" and thought October and gone  
18 immediately to the idea of pumpkins. But if she said a  
19 specific date, I don't know. And I thought I heard  
20 something at the EFSEC Council meeting when the FEIS  
21 was requested, but I can't say any more than if what  
22 she said was in the fall.

23 MR. ARAMBURU: Okay.

24 JUDGE TOREM: I know the -- the  
25 intention is to have everything in front of the Council

1 so a timely recommendation under the current extension  
2 request that expires January 31st of next year, that  
3 the governor will have the recommendation, which  
4 certainly implies somewhere in the fall we would have  
5 the FEIS in order to not extend that. That's the  
6 intent as we sit.

7 MR. ARAMBURU: Okay. I just wanted  
8 to clarify whether there was some new information on  
9 that subject. So thank you.

10 JUDGE TOREM: No. And if there --  
11 if there was, they probably wouldn't tell me either,  
12 Rick.

13 All right. Thanks, all. I appreciate, despite  
14 some of the friction we could have at times and a  
15 little bit of fun, most of it well received, that we  
16 have a good record here for what we've been able to  
17 create in the limited time since we, last December,  
18 gave the order about starting the adjudication.

19 I'll keep you posted on when the Council will be  
20 deliberating and what sessions will be closed --  
21 deliberative sessions, as you might expect, and then  
22 any open on-the-record discussions that might be  
23 scheduled as well. That's happened in the past, I  
24 think more as a pro forma for a chance for the  
25 announcement of a recommendation. But processes

1 continue to evolve. If anything like that, I'll check  
2 with the parties to make sure you're fully informed of  
3 what's going on and timing going forward.

4 But I will hear from you on September 5th, and  
5 then I'll hear from you again with briefs October 13th,  
6 and you'll hear from me on September 6th.

7 All right. Thank you, all. At about ten after 3,  
8 we're adjourned. Have a good weekend. I know you've  
9 all earned it.

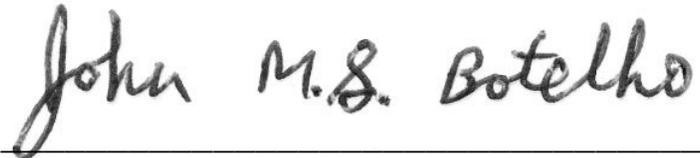
10 (Proceedings adjourned at  
11 3:09 p.m.)  
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1 STATE OF WASHINGTON ) I, John M.S. Botelho, CCR, RPR,  
2 ) ss a certified court reporter  
3 County of Pierce ) in the State of Washington, do  
4 hereby certify:

5 That the foregoing proceedings were taken in my  
6 presence and were adjourned on August 25, 2023, and  
7 thereafter were transcribed under my direction; that the  
8 transcript is a full, true and complete transcript of the  
9 said proceedings and was transcribed to the best of my  
10 ability;

11 That I am not a relative, employee, attorney or counsel  
12 of any party to this action or relative or employee of any  
13 such attorney or counsel and that I am not financially  
14 interested in the said action or the outcome thereof;

15 IN WITNESS WHEREOF, I have hereunto set my hand  
16 this 12th day of September, 2023.

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John M.S. Botelho, CCR, RPR  
Certified Court Reporter No. 2976  
(Certification expires 5/26/2024.)

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|   | <b>1056</b> 1532:15,16,18 1533:13   | <b>20-minute</b> 1620:6  |
| <hr/> <b>\$</b> <hr/>   | <b>1056_X</b> 1533:2,24 1542:7  | <b>2003</b> 1640:15  |
| <b>\$23</b> 1638:23   | <b>1057</b> 1532:15   | <b>2004</b> 1590:17 1597:21 1610:2,6<br>1620:17 1623:18                                  |
| <hr/> <b>-</b> <hr/>  | <b>1058</b> 1532:16   | <b>2008</b> 1569:16  |
|   | <b>1058_X</b> 1534:15 1535:17   | <b>2009</b> 1610:10  |
| <b>-10</b> 1559:15  | <b>1060</b> 1532:16 1534:18 1535:7<br>1537:16   | <b>2010</b> 1569:16  |
| <b>-14</b> 1559:16  | <b>1064</b> 1708:17,22 1709:1 1715:18   | <b>2012</b> 1640:15  |
| <b>-15</b> 1559:16  | <b>1064_X</b> 1745:6  | <b>2014</b> 1658:4   |
| <b>-50</b> 1537:4   | <b>107534</b> 1750:21   | <b>2019</b> 1571:22 1631:5   |
| <b>-52</b> 1537:6   | <b>10:16</b> 1607:18  | <b>2021</b> 1713:9 1733:13   |
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| <b>-54</b> 1532:14 1537:7   | <b>11</b> 1527:25 1554:13 1559:15<br>1581:18 1587:11 1623:11 1640:14<br>1671:18 1741:11 | <b>2023</b> 1526:2 1622:7 1627:24<br>1714:25   |
| <b>-55</b> 1533:25  | <b>11:20</b> 1671:19  | <b>21</b> 1544:15 1681:7 1682:17   |
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| <b>-57</b> 1533:25 1534:10  | <b>12</b> 1559:15 1600:23 1677:19   | <b>22</b> 1544:16  |
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