BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITING EVALUATION COUNCIL

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

APPLICANT'S POST-HEARING BRIEF

REDACTED
References Confidential Information Submitted by TYN

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STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

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760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

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760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

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Main 503.224.3380 Fax 503.220.2480

I. INTRODUCTION

"We are the first generation to feel the impact of climate change and the last generation that can do something about it." Barack Obama

"I've dedicated my life in public service to defeating climate change." Governor Inslee

In the past several years, Washington State has considered and rejected large-scale energy projects due chiefly to concerns regarding climate change. Each of these projects—the Millennial Coal Facility in Longview, the Kalama Methanol project at the Port of Kalama, and the Tesoro oil terminal in Vancouver—was a regional facility considered by members of the public and agencies to be too large, with too many unmitigated environmental impacts. At around the same time, in Oregon, permitting agencies denied the Pembina Propane Terminal and the Jordan Cove LNG export terminal. The common factor leading to the demise of these facilities was the failure to address climate change.

Large-scale energy facilities are complex, challenging to site, and hard to permit due to multiple competing concerns. Projects aimed at meaningfully mitigating climate change cannot be hidden from public view. Like all energy facilities, they will naturally have impacts. The question is not whether all impacts must be avoided. They cannot be. Instead, the question is whether an applicant has, to the maximum extent feasible, proposed all reasonable measures to mitigate and minimize them, with the full understanding of the tradeoffs and benefits of the project. Most important is the furtherance of policy objectives and meeting legislative mandates to deliver zero carbon emission power.

The key question for the Washington Energy Site Evaluation Council ("EFSEC" or "Council") to answer is this: Is Washington capable of authorizing an ambitious, utility-scale renewable energy project, that will essentially displace a large fossil fuel plant, with 100% clean energy delivered to "load" with hybrid wind, solar, and battery storage technologies?

Though the Horse Heaven Energy Project ("Project") is large, its actual footprint is relatively small, touching very little sensitive habitat, proposing turbines away from residential areas, and sited almost entirely on farmlands hosted by willing farmers. The Applicant has heard the concerns of Native American Tribes and has taken action to avoid, minimize, and mitigate impacts they identified, offering sustained efforts to fund and invest in responsive programs. Finally, the Project breathes new life into a struggling agricultural economy and will create hundreds of new jobs.

This is the right project, in the right location, at the right time. Throughout the adjudication, Project opponents sought to prove that the Project is "too large" and proposed in the "wrong" location. In fact, the opposite is true. The Project is an ambitious effort to push forward Washington's Clean Energy Policy. It is hard to imagine a better location from a siting standpoint than this one: dominated by compatible agricultural uses, and away from generally remote and scattered sprawling residential development. Responding to questions from the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), Scout Clean Energy, LLC ("Scout") Project Manager Dave Kobus explained that the Project was designed to have the "lowest environmental impact" at a site "specifically chosen for its low relative environmental impact," adding that Scout has "done everything practical to design the site to minimize that impact, avoid where necessary, and, in fact, provide mitigation for where it can't be avoided."[1] Finally, time is running out for the State to meet its clean energy goals, and this Project takes a necessary and substantial step towards their achievement.

The Applicant has evaluated potential impacts of the Project, commissioned some of the most robust multi-year studies and surveys ever undertaken for land-based renewable energy projects, and worked with EFSEC staff to ensure that every impact is evaluated and that potential impacts are minimized and mitigated. The Applicant has prepared a substantial application and funded a multi-year environmental review, undertaken separately by EFSEC

[1] Deposition of Dave Kobus, July 21, 2023 ("Kobus Dep.") at 158:16-22 to 159:1-6.

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staff. The analysis of impacts below documents these efforts and makes clear that the Project is responsibly sited and mitigated to ensure protection of the natural and built environment while still supplying the State meaningful renewable energy it desperately needs.

II. BACKGROUND

A. The Proposed Project was strategically sited to avoid and minimize impacts.

Applicant submitted its initial Application for Site Certification on February 8, 2021. The Project proposes a wind energy micrositing corridor encompassing 11,850 acres and three solar siting areas.[2] By combining wind, solar, and battery energy storage systems, the Project will provide a nameplate generating capacity of up to 1,150 MW. The Applicant planned the Project to maximize flexibility, including two different turbine options, a different solar module selection, and the opportunity to update and provide final solar array layout options. That flexibility allows Applicant to ensure an efficient, stable power source with capacity to substantially displace the need for utility-scale fossil fuel generation while minimizing impacts. As WAC 463-60-116(2) requires, at least 30 days before the adjudication began, Applicant submitted an updated Application for Site Certification in December 2022 ("ASC"), which did not alter facility components but incorporated information from data requests and responses and additional studies completed after the initial Application was submitted.[3]

The Project is strategically sited in an agricultural but rapidly urbanizing locale, where the existing environment will partially obscure and therefore partially minimize impacts from the turbine views for most of the 200,000 people living in the Tri-Cities area. Most of the Project is sited on privately owned, non-irrigated land managed for dryland agriculture or under the conservation reserve program.[4] With their lease payments, farmers can protect their family legacies and continue farming right up to the turbines. The Project is

[2] December 2022 Updated Application for Site Certification ("ASC") at 2-1.
[3] ASC Cover Letter at 1 (June 15, 2022).
[4] *See* ASC at 2-7, 3-101, Table 3.4-1.

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close to the existing Nine Canyon Wind Project—a project that verifies the ability to maintain farms within a wind facility. Finally, rather than having to disturb additional habitat unnecessarily by running transmission lines, the Project site is already set up to access the regional transmission system through two Bonneville Power Administration high-voltage transmission lines.

B. The Council in Order 883 determined the Project is consistent with the County land use plan and zoning ordinances.

On March 30, 2021, the Council conducted a public hearing on the Project's land use consistency. On May 17, 2022, the Council issued Land Use Consistency Order 883 ("Order 883"), holding that under the applicable Benton County Code in effect when the initial Application was filed, the Project is a conditionally permitted use within Benton County's ("County") agricultural zone and thus consistent with the Code and Comprehensive Plan.[5]

C. A full Adjudication was held, facilitating discussion of all relevant issues.

Per RCW 80.50.090(4), the Council, with the help of an administrative law judge ("ALJ"), held adjudicative proceedings. Three entities filed requests for party status (Benton County (the "County"), Council for the Environment ("CFE"), and Scout), and two parties (Tri-Cities C.A.R.E.S. ("TCC") and Yakama Nation (together, "intervenors")) (collectively, the "Parties") intervened.

In spring 2023, the ALJ held a series of pre-hearing conferences to discuss procedure and identify disputed issues.[6] Over the summer, the Parties submitted three rounds of written testimony and had the opportunity to submit a pre-hearing brief.[7] Finally, the adjudication

[5] Order 883 at 4.

[6] *See* WAC 463-30-270; Second Pre-Hearing Conference Order at 2-5 (May 19, 2023); Order Overruling Parties' Objections to Second Prehearing Conference Order at 4 (June 12, 2023); Scout Clean Energy's Prehearing Brief at 4-5 (for full discussion of disputed issues).

[7] The ALJ also dispensed with several motions requesting a stay of the proceedings until issuance of the Final Environmental Impact Statement, Objections to the Second Prehearing Conference Order, Motions to Strike Testimony, Motions to Compel, and a Motion for Reconsideration. The ALJ also declined to dismiss the ASC, rejecting TCC's motion to dismiss for failure to comply with WAC 463-60-165 regarding water supply, holding TCC "fail[ed] to cite to any statutory provision allowing an ASC to be dismissed from

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concluded with an eight-day virtual hearing involving live testimony, questions from the Parties, Council members, and the ALJ, and another opportunity for public comment.

III. EFSEC REVIEW CRITERIA

The Energy Facility Site Locations Act ("EFSLA") authorizes EFSEC to administer Washington's energy facility siting process and identifies the Council's criteria for reviewing and making recommendations to the governor on applications for site certification of potential energy facilities.[8] The primary purpose of the EFSLA is

> to reduce dependence on fossil fuels by recognizing the need for clean energy in order to strengthen the state's economy, meet the state's greenhouse gas reduction obligations, and mitigate the significant near-term and long-term impacts from climate change while conducting a public process that is transparent and inclusive to all with particular attention to overburdened communities.[9]

The law's policy is to "seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public."[10]

Though the legislators used the term "balance," the statute does not impose a balancing test or require weighing project needs against project benefits. Instead, it provides several "premises," or factors, the Council must weigh when determining whether impacts can be mitigated, including "development and integration of clean energy sources" and provision of "abundant clean energy at reasonable cost," along with protection of environmental quality and environmental justice.[11] That is, the EFSLA does not task EFSEC with weighing the need for clean energy against potential impacts from a given facility;

EFSEC's application review process. There is no such authority…WAC 463-60-010 makes it clear that the Council determines whether the information submitted by an applicant is sufficient to allow EFSEC review." *See* Order Denying TCC Motion to Dismiss Application Due to Water Supply Issue at 2 (Aug. 7, 2023).

[8] RCW ch. 80.50.

[9] RCW 80.50.010.

[10] RCW 80.50.010; *see also Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 340, 310 P.3d 780 (2013) (policy of EFSLA is to "balance the need for new energy production with environmental and societal considerations").

[11] RCW 80.50.010(1)-(6).

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rather, it declares the "pressing need" for such facilities and sets forth premises to guide the Council's determination of whether the proposed mitigation adequately addresses the Project's environmental impacts.[12]

EFSEC's own regulations support this interpretation.[13] Indeed, the Council is tasked with this overarching goal when applying the application review criteria in WAC Chapter 463-60, and construction and operating standards in WAC Chapter 463-62.

IV. ARGUMENT

A. The Project implements state climate law and policy.

EFSEC has always considered state climate law and policy a key part of its considerations. For example, in its Report to the Governor on the Vancouver Energy Terminal, a crude oil terminal facility, EFSEC stated: "[state statutes, policies, and plans] inform the Council that Washington State energy policies include the objectives of reducing dependence on fossil fuels and transitioning to a clean energy economy, with these goals balanced against the need to maintain the availability of energy at competitive prices for consumers and businesses."[14]

In 2022, the legislature made this consideration explicit by focusing EFSEC's mission "to reduce dependence on fossil fuels by recognizing the need for clean energy" to achieve the State's goals.[15] Due to the "pressing need for energy facilities," EFSEC's role is to ensure "through available and reasonable methods that the location and operation of all energy facilities … will produce minimal adverse effects on the environment, ecology of the

[12] *See* WAC 463-60-021 (Council required to "recognize the pressing need" for increased energy facilities"); *Friends of Columbia Gorge*, 178 Wn.2d at 344 (explaining that petitioners, who were represented by the same counsel that represents TCC in this matter, "misunderst[ood] EFSEC's role in balancing competing interests," which is to determine mitigation "measures [] sufficient to show compliance" with RCW 80.50.010, not whether impacts outweigh net benefit of the project as a whole).

[13] *See* WAC 463-14-020 (confirming foremost "the pressing need for increased energy facilities" and specifying that when "acting upon any application for certification, the council action will be based on the policies and premises set forth in RCW 80.50.010").

[14] EFSEC, Report to the Governor on Application No. 2013-01 (Dec. 19, 2017).

[15] H.B. 1812, 67th Leg., Reg. Sess. (Wash. 2022) (enacted); *see also* RCW 80.50.010.

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land and its wildlife, and the ecology of state waters and their aquatic life."[16] Among the State's economic and climate goals is the Clean Energy Transformation Act ("CETA"), which requires all electric utilities serving retail customers in Washington to be greenhouse gas neutral by 2030.[17] By 2045, utilities cannot use offsets anymore and must supply Washington customers with electricity that is 100% renewable or non-emitting. Reaching this goal requires "at least 3,500 megawatts of renewable resources by 2027" and will require "adding more renewables as a means of displacing emissions both within their portfolio and in the broader market."[18]

That directive has been incorporated into these proceedings. As the ALJ noted, the Council cannot "ignore or second guess RCW 80.50.010's premise of encouraging the development and integration of clean energy sources, or the various other state laws mandating the transition to alternative energy resources, most significantly the Climate Commitment Act's cap-and-invest program, designed to eliminate [] all greenhouse gas emissions in Washington by 2050."[19]

CETA is not self-executing. Washington utilities must acquire power from utility-scale projects capable of supplying a robust supply, and those projects must secure site certification. The Horse Heaven Project's use of integrated wind, solar, and battery energy resources will not only help utilities meet CETA's requirements by developing a robust energy supply but will deliver that supply when it is needed most.

B. The Project takes advantage of uniquely favorable weather and transmission infrastructure for wind energy and is optimally scaled and configured to provide a meaningful amount of energy with the fewest impacts.

The Project's scale, location, and hybrid generation mix offer the quantity of energy demanded by utilities and provide opportunities to take advantage of strong "winter peaking" winds, enabling robust power to Washington to serve winter power needs. In his rebuttal

[16] RCW 80.50.010.
[17] S.B. 5116, 66th Leg., Reg. Sess. (Wash 2019) (enacted).
[18] Northwest Power and Conservation Council, Northwest Power Plan, 46 (2021).
[19] Order Overruling Parties' Objections to Second Prehearing Conference Order at 4.

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testimony, industry expert Dr. Greg Poulos explained the complexity of site selection and the rigorous analyses needed to consider a major utility renewable energy facility like Horse Heaven.[20] Dr. Poulos confirmed that the Project size is "consistent with the trend toward larger wind farms as the desire to transition to clean electricity production accelerates."[21]

As discussed, utilities must satisfy publicly demanded and statutorily required clean power, at large utility scale. This Project aims to meet this demand. Dave Kobus testified that the Project is favorable for regional utilities as it is coincident with peak loading demand.[22] Questioned about regional utilities' demand for the facility, Mr. Kobus testified that "all utilities in the region" are interested in the Project, including "Avista, Puget Sound Energy, Portland General."[23] When asked how many utilities are interested in buying the Project's output, Mr. Kobus answered:

> All of them, [p]lus - plus C&Is [commercial and industrial offtakers]. There's a high demand right now for clean energy. There's going to be shortages in the very near future. There's going to be slim pickings as to what's available to meet those demands. And the closer, the better. The closer we are to the load, the desired market, the better. They all want it. They're clamoring for it, [further confirming that] there's not enough to meet the demand.[24]

In the Pacific Northwest, that demand is particularly high in winter. Mr. Kobus explained:

> So there are peak winter loading demands. This region is a storm-driven climate. So when the winter storms come in and when the spring storms come in as the seasons change, that's when we get our peak generation. You know, as opposed to a gorge project per se, is more predominantly summer, summer peaking. This is winter peaking, and that's when the utilities' loads peak the largest. So the generation profile of this project is a very good match for the load profile that the utilities have to serve.
>
> Q. [Mr. Aramburu] Well, is it not the case that particularly wind during cold times in the Tri-Cities doesn't blow for days and days?
>
> A. There are times it doesn't blow for days and days, that's right.
>
> Q. So that's not coincident with peak loading demand, is it?

[20] EXH-1031_R at 3:21-25 to 6:1-24.
[21] EXH-1031_R at 8:2-4.
[22] Kobus Dep. at 89:20-25.
[23] Kobus Dep. at 90:3-5.
[24] Kobus Dep. at 91:6-16.

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> A. Sure is. Because when it does blow, there's a lot of it available. It's an intermittent resource. It generates when the wind blows, correct.[25]

This testimony further confirms Dr. Poulos's observation that "with batteries and solar energy, the Project energy production will project a much different annual energy generation profile than if it were only wind."[26]

Not only will the Project deliver winter-peaking utility power load at a substantial scale; it also includes "hybrid" wind, solar and battery technologies designed to optimize the power to best serve demand. Mr. Kobus explained,

> The intent is to optimize it so when you've got solar, when you've got that excess solar that's there and able to generate, you can divert it to charge the battery without using the transmission system. And so all of these things work together to optimize the project for the eventual offtaker.[27]

To optimize the Project and "meet evolving demand," the solar and battery resources are "clustered by the interconnection to minimize the amount of wires to make it as cost effective as possible."[28] Optimization also includes the "lowest environmental impact. [The project] has to be minimized to the extent practical related to the SEPA criteria."[29] The Applicant's intent is "to remain as nimble as possible to be able to eventually sell the maximum extent of the energy from this project" with the most mitigated impacts.[30]

C. The proposed Project satisfies the applicable CUP criteria with conditions to mitigate impacts from fire.

Any and all potential land use-related conflicts and local concerns can—and should—be mitigated through conditions imposed in the Site Certificate Agreement. In Order 883, the

[25] Kobus Dep. at 92:16-25 to 93:1-14.
[26] Poulos Rebuttal at 10:7-9. Dr. Poulos testified that meteorological measurements are taken, "and those guide the energy part of the process, and then there are constraints that come from a lot of different quarters, environmental, private landowners, and then ultimately the turbine models and various other construction costs are taken into account...." Day 7 Tr. at 1495:5-14 (Poulos).
[27] Kobus Dep. at 44:12-20.
[28] Kobus Dep. at 57:4-8.
[29] Kobus Dep. at 158:16-22.
[30] Kobus Dep. at 157:3-7.

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Council determined that the Project is "consistent and in compliance" with Benton County's zoning ordinance and land use plans.[31] Thus, the sole issue for consideration here is whether, informed by the Conditional Use Permit ("CUP") criteria, the Council should impose conditions akin to those the County would impose in its local permit process.

Under the Benton County Code ("BCC") in effect at the time the ASC was submitted, a CUP must be granted "if … *as conditioned*, the proposed use:"

> (1) Is compatible with other uses in the surrounding area …;
> (2) Will not materially endanger the health, safety, and welfare of the surrounding community …;
> (3) Would not cause the pedestrian and vehicular traffic associated with the use to conflict with existing and anticipated traffic in the neighborhood …;
> (4) Will be supported by adequate service facilities and would not adversely affect public services to the surrounding area; and
> (5) Would not hinder or discourage the development of permitted uses on neighboring properties ….[32]

Section 2.23.3.1 of the ASC analyzes these criteria, explaining how the Project complies with the BCC and mitigates potential impacts.[33] In rebuttal testimony, land use expert Leslie McClain responded to each of the County's primary concerns, point by point.[34] There appears to be little dispute as to the third criterion involving pedestrian traffic because the Project's traffic impacts will be minimal.[35] The remaining criteria are discussed below.

1. The County is trying to relitigate Order 883, rather than offer proposed conditions to address actual local concerns.

The County did not suggest any conditions to mitigate Project impacts because it continues to assert Order 833's "consistent and compatible" finding does not address whether a CUP would be issued in the first instance, even with conditions. The exchange between Council Chair Drew and County planner Greg Wendt during the hearing demonstrates the County's failure to help the Council evaluate potential conditions in relation to the

[31] EFSEC Order 883 at 9.
[32] Benton County Code ("BCC") 11.50.040(d) (emphasis added).
[33] ASC at 2-152 to 2-159.
[34] EXH-1023_R at 8-12.
[35] *See* ASC at 2-157 to 2-158.

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CUP criteria. Mr. Wendt admitted to not having considered (1) whether there were local concerns which could be addressed through conditions or (2) whether the CUP conditions imposed on the Nine Canyon project permitted by Benton County were applicable or useful here.[36]

By contrast, Scout emphasizes that the most logical starting point for CUP conditions is the CUP granted to the Nine Canyon project, another utility-scale wind farm "next door" to the Project site.[37] Scout further anticipates EFSEC will impose appropriate conditions to address local and Project-specific concerns. Ms. McClain has suggested such conditions, including the example conditions, to address fire risk and other concerns based on the requirements for other wind and solar facilities in the Northwest.[38]

2. The Project is compatible with existing uses because farmers will be able to continue farming around the turbines and invest lease payments into their long-term agricultural operations.

The record is replete with evidence that the Project's proposed use meets the County's first CUP criterion: it is compatible with other uses in the surrounding area. "Compatibility" is defined as "the congruent arrangement of land uses and/or project elements to avoid, mitigate, or minimize (to the greatest extent reasonable) conflicts."[39] Nor does it discourage development of permitted uses on neighboring properties under the last criterion. The Project is compatible with surrounding uses because it will allow for continued agricultural operations and discourage conversion of farmland to residential use.

Chris Wiley, representing a multi-generational Horse Heaven farming family, is resolute: "Absolutely I think [the Project] is compatible with dryland wheat farming."[40] Mr. Wiley "ran the numbers" and determined that "over 99 percent of our farmland will continue

[36] EXH-2002 at 3, 6, 11; EXH-2004_R at 6.
[37] *See* EXH-1023_R at 25. The Nine Canyon conditions are provided in EXH-1024_R through EXH-1030_R.
[38] EXH-1040_R at 14-17.
[39] BCC 11.03.010.
[40] Day 6 Tr. at 1095:23-25.

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to be normal operating farmland" after Project construction.[41] Moreover, some of the development, for example roads, "isn't really lost acreage" because for a dryland wheat farmer "having a gravel field road is a luxury."[42] Indeed, farming will continue for the vast majority of the lease area; the Project's permanent footprint would occupy just roughly 1% of the existing agricultural acreage in the County.[43]

The Project is also financially compatible with surrounding agricultural operations. In response to Council Chair Drew's questions about what landowners might do with lease revenues from the Project,[44] Mr. Wiley stated the payments will "incentivize[] [farmers] … to continue farming for years to come"[45] as they reinvest "the lease money with Scout … into their farm operations."[46] He spoke enthusiastically of a "miniature agricultural renaissance" enabled by the Project, allowing farmers to pay off debts, upgrade farming equipment, replace dilapidated facilities, and invest in new technologies.[47] Without the Project, Mr. Wiley justifiably fears the continued "bleeding" of farmland to housing development, calling urban sprawl the "biggest threat" to the agricultural character of the Horse Heaven Hills.[48]

The County's opposition to the Project's compatibility with surrounding land uses is undisciplined and out of touch with reality. Assistant County Planner Cooke conceded the County never reached out to local agricultural landowners to solicit their opinions on the Project,[49] instead, retroactively searching tax assessor's data for which participating landowners actually live in the Horse Heaven Hills,[50] without determining whether those landowners are in fact "absentee."[51] The County was also undisciplined in considering the

[41] Day 6 Tr. at 1098:8-13.
[42] Day 6 Tr. at 1099:23-1100:3.
[43] ASC at 4.2.1.2.
[44] Day 3 Tr. at 433:10-435:4.
[45] Day 6 Tr. at 1104:12-15, 1107:20-23.
[46] Day 6 Tr. at 1107-09.
[47] Day 6 Tr. at 1107:23-25-1109:14.
[48] Day 6 Tr. at 1118:23-25; *id.*, at 1104:7-11.
[49] Day 2 Tr. at 303:7-103.
[50] Day 6 Tr. at 1125:20-25, 1134:20-1135:25.
[51] Day 6 Tr. at 1134:20-1135:25.

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economic impacts of the Project on the surrounding community[52] and in its preference toward certain types of landowners in the region.[53] Remarkably, Ms. Cooke also went as far as to compare the Project to the Hanford Nuclear Reservation,[54] speculating the Project will "snowball" into the type of "energy reservation as Hanford is today."[55] Such hyperbole showcases the utterly subjective opinions of the County's planners. This is not a situation in which the federal government is asserting its eminent domain authority to develop nuclear reactors and plutonium processing facilities. Here, willing farmers are participating in the Project and will continue farming their land while receiving lease payments, in a complimentary, compatible relationship.

Ms. McClain corroborates Mr. Wiley's testimony. She explained, "the Nine Canyon wind farm [i]s a great example [of] where agriculture can coexist with wind farms, and many other wind projects across the Northwest where farmers are able to farm right up to the wind turbine pads."[56] She confirmed "the wind farms actually bring benefits to these ranches and wheat farmers by improving their access roads, reducing erosion and dust issues off their roads, and [providing] lease payments [to help] the farmers … reinvest in their farms and upgrade their equipment."[57] Ms. McClain's analysis found that "dryland wheat farming is compatible with wind projects and … there's plenty of examples to show that objectively."[58]

The County also expressed concerns that the Project would be incompatible with the local shrub-steppe ecosystem.[59] Ms. McClain pointed out the hypocrisy in these concerns "given the decades of County approvals of rural subdivisions and home sites which have massively degraded and diminished the shrub-steppe ecosystem and habitat, with little regard

[52] Day 2 Tr. at 335:8-337:9; Day 6 Tr. at 1124:1-20, 1125:17-25.
[53] Day 6 Tr. at 1126:2-20; 1138:6-18.
[54] Day 6 Tr. at 1129:12-1130:8.
[55] Day 6 Tr. at 1129:12-1130:8.
[56] Day 1 Tr. at 62:7-20.
[57] Day 1 Tr. at 62:7-20.
[58] Day 1 Tr. at 62:7-20.
[59] Day 2 Tr. at 340:10-19.

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for ecology or efforts to manage growth."[60] Nor would the Project, as Ms. Cooke implied, destroy "thousands and thousands of acres" of critical habitat;[61] in reality, it would permanently impact less than one hundred acres of grassland/shrubland and just two acres of sagebrush shrub-steppe habitat.[62]

Based on the compelling testimony from Mr. Wiley and Ms. McClain, and the proven track record of successful farming among wind turbines throughout the Northwest, the Project is clearly compatible with surrounding land uses in the Horse Heaven Hills.

3. Conditions proposed by Applicant adequately mitigate fire concerns and ensure that the Project will not endanger the health, safety and welfare of the surrounding community.

The County CUP criteria also include whether the project will endanger the "health, safety, and welfare of the surrounding community to an extent greater than that associated with any other permitted uses in the applicable zoning district."[63] The Project's potential fire risks received significant attention throughout the adjudication. TCC witness Fire Chief Lonnie Click expressed concerns about aerial firefighting around turbines.[64] TCC also expressed concern about the battery energy storage system ("BESS") facilities and how a BESS fire will be extinguished.[65]

These concerns are overstated. ASC Section 4.1.2 evaluates the risk of fire and explosion during construction and operation of the Project, noting the site has "little vegetation cover and few trees, presenting little to no inherent risk of fire or explosion."[66] While there may be some risk from combustible materials, the temporary use of diesel generators, and the BESS, these risks can be mitigated through precautionary measures and appropriate conditions. Ms. McClain testified that a fire caused by a wind turbine is an

[60] EXH-1023_R at 9.
[61] Day 2 Tr. at 340:17-19.
[62] Final ASC, Table 3.4-14 & 3-169.
[63] BCC 11.50.040(d)(2).
[64] *See* EXH-5912_S at 2.
[65] TCC Pre-hearing Brief at 4-5.
[66] ASC at 4-33.

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"extremely rare event"; she was "only aware of one [wind turbine-caused fire] occurring in the Northwest, and there are hundreds of turbines operating in the Northwest."[67]

With regard to aerial firefighting concerns, Mr. Click said he has only "local knowledge and experience"[68] and that the County fire district "does not own any aerial resources of its own,"[69] providing no evidence to rebut testimony that "aerial firefighting equipment … would be able to operate in the vicinity of the wind turbines safely."[70]

Finally, Applicant provided additional information regarding the proposed measures to mitigate a BESS fire. As Mr. Kobus testified, the National Fire Protection Association ("NFPA") recently updated its safety standards because it found that using water suppression during a BESS facility fire can actually "increase the fire associated with thermal runaway."[71] According to the NFPA, the safest designs of BESS facilities are modular, like the Project's,[72] designed to contain fires and to let them burn out on their own, without the need for high volumes of water or dangerous personnel involvement.[73]

It is common mitigation practice for permitting agencies to impose conditions on renewable energy projects to address fire risks.[74] Ms. McClain provided numerous examples of conditions aimed at the "extremely rare event" of a fire associated with renewable energy facilities, including requiring a fire management plan (that would include a plan for addressing a BESS fire) and emergency response plans that are submitted to EFSEC for approval prior to construction.[75] These plans are routine, imposed through conditions.

[67] Day 1 Tr. at 107:10-13.
[68] EXH-5912_S at 2.
[69] EXH-5631_R at 2.
[70] Day 1 Tr. at 112:6-22.
[71] Day 8 Tr. at 1722:10-12.
[72] Day 8 Tr. at 1718:17-18.
[73] Day 8 Tr. at 1724:17-1725:3.
[74] EXH-1040_R at 3.
[75] EXH-1040_R at 3-17.

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4. The Applicant proposed conditions to ensure that public services to the surrounding area will not be affected.

The Project's anticipated impact on local services is detailed in the ASC.[76] Of foremost concern to the County and TCC seems to be the possible effect on Benton County Fire District 1.

Again, emphasizing that the risk of fire is low, Scout proposes comprehensive mitigation measures aimed at improving the safety and reducing any burden the Project might otherwise impose on public agencies like Benton County Fire District 1.[77] A Draft Emergency Response Plan that addresses fire and other emergency procedures is included in ASC Appendix P. Scout is committed to coordinating with the Benton County Fire Marshal and other agencies to finalize the emergency response plans identified in ASC, Section 4.1.2.5, and will submit them to EFSEC for approval prior to construction. Scout is ready to coordinate with and train local emergency services personnel. Further, the Project is expected to generate significant increases in real estate taxes for the local area, increasing revenues that can support essential services.[78] Thus, the Project will not negatively impact public service providers in the area but rather may increase their capacity.

Ultimately, the Council should impose conditions akin to those created through local permitting processes by counties and siting councils throughout the region, like those for the Nine Canyon Project and discussed by Leslie McClain in her written and live testimony.[79]

D. The Project presents no risk of negative socioeconomic impacts and, in fact, could support important gains in energy justice.

1. Both academic literature and a site-specific analysis show the Project will not negatively affect property values.

Scout presented testimony from Washington economist Morgan Shook and real estate appraiser Andrew Lines from CohnReznick proving both that it is highly unlikely the Project

[76] ASC at 2-158.
[77] *See* ASC at 1-11.
[78] EXH-1039_R at 23; ASC Sec. 4.4.2.
[79] *See* EXH-1040_R at 14-17.

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will harm neighboring property values, and that the local community is ultimately well-positioned to benefit from the Project's improvements to climate resiliency.

Mr. Shook submitted and opined on literature which illustrates that after decades of research, experts found that wind and solar facilities generally have no effect on nearby real estate values.[80] The best research on the impact of renewable energy development on property values utilizes peer review and incorporates comprehensive literature review, large amounts of data, boots-on-the-ground home visits, multiple statistical models (primarily hedonic models), and analysis of the stigmas potentially associated with wind and solar facilities.[81] The research from authors at the Lawrence Berkeley National Laboratory is particularly reputable[82] because those authors "are credible sources and the cumulative weight of their findings provides an emerging scientific consensus on the impact of facilities like the Project on property values."[83]

To provide site-specific analysis and corroborate the scientific consensus, Scout engaged Mr. Lines to develop local, original research on the potential property value impacts from the Project.[84] His report, which also contains a comprehensive literature review, synthesized interviews with market participants and analysis of local home sales data. The report also analyzed Project design in relation to existing homes, finding the Project's energy facilities "will be generally 3 miles away from any adjacent residential property owner."[85] The report concludes that the Project will not negatively impact nearby property values[86] and notes that renewable energy projects generate significant increases in real estate tax revenue for the local area, feeding back into essential services and schools.[87]

[80] EXH-1008 to EXH-1020.
[81] Day 3 Tr. at 494:24-496:6.
[82] *See* EXH-1010 to EXH-1015; EXH-1017 to EXH-1020.
[83] EXH-1051_R at 3.
[84] *See* EXH-1039_R; *see also* EXH-1038_R.
[85] EXH-1039_R at 23.
[86] EXH-1037_R at 3; EXH-1039_R at 5, 7, 23.
[87] EXH-1037_R at 3; EXH-1039_R at 5, 7, 23.

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No party offered compelling criticism of these studies. Efforts to undermine this overarching conclusion are unsupported by data and rest on overblown stigmas about the impacts of renewable energy development.[88] For instance, TCC witness Richard Hagar, who has no relevant professional experience, testified that Scout's property value analyses were not accurate because they did not include interviews with local real estate professionals or account for the fact that limited housing supplies may have skewed recent purchase data. Mr. Hagar did not even acknowledge the CohnReznick's site-specific analysis and his comments on the Berkeley Lab hedonic models "take the results out of context to insinuate a conclusion that the researchers do not find."[89]

Opposition to Scout's property value analyses attempts to impose subjective or politicized perspectives onto what should be an objective exercise. As Mr. Shook testified, the "studies are trying to find consistent measurable impacts. It does not necessarily mean … that a single property or single property buyer may be impacted … [s]ome people obviously would have a strong preference one way or the other. And this is why, when you look at the totality of those perspectives with respect to the revealed decisions that people make … in terms of how much they are paying for property … the analys[es] don't find any of those measurable impacts."[90] The limited negative "perceptions don't actually turn into … material effects."[91]

Finally, as Mr. Shook explained to Councilmember Levitt, communities that develop with an eye toward climate resiliency stand to benefit economically, including with respect to real estate values.[92] *Not* building energy system infrastructure to reduce carbon emissions is costly, as property values can decrease due to the effects of climate change.[93] At bottom, the

[88] EXH-1008; EXH-1051_R; Day 3 Tr. at 502-05 (M. Shook testifying on probative weight of various studies due to their methodological rigor and peer review).
[89] EXH-1051_R at 5.
[90] Day 3 Tr. at 500.
[91] Day 3 Tr. at 502.
[92] Day 3 Tr. at 513-14.
[93] Day 3 Tr. at 512.

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Project presents a tremendous opportunity for the economic benefit of the Horse Heaven community and, based on the scholarship and data, it is highly unlikely that the Project will harm neighboring property values.

2. The Project promotes environmental justice and does not disproportionally impact overburdened communities.

One of the Council's key site certification premises under the EFSLA is "to promote environmental justice for overburdened communities."[94] Washington law defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, rules, and policies."[95]

The Project promotes environmental justice in multiple ways. First, Scout has focused on ensuring the meaningful involvement of those affected by the Project. Based on information from Scout's local outreach and the Washington Environmental Health Disparities Map[96] and U.S. Environmental Protection Agency's (EPA) EJScreen,[97] Scout learned that the Project area and vicinity is home to a demographic population with higher than state average rates of limited English (with Spanish as the predominant language) and people of color (predominantly Latinx). Accordingly, Scout pursued media strategies to ensure that Project information was available to minority communities, including on bilingual radio networks and newspapers.[98] Second, the Project does not appear to pose a risk of disproportionate impact to overburdened communities. For example, the state disparities map shows that although the Project vicinity has slightly higher rates (compared to state averages) of unemployment, poverty and unaffordable housing rates are average to low. As detailed in ASC Sections 2.15.1 and 4.4.2.2 and testimony from Benton City

[94] RCW 80.50.010(2).
[95] RCW 70A.02.010(8).
[96] Available at https://doh.wa.gov/data-and-statistical-reports/washington-tracking-network-wtn/washington-environmental-health-disparities-map (last visited Oct. 12, 2023).
[97] Available at https://ejscreen.epa.gov/mapper/ (last visited Oct. 12, 2023).
[98] *See* ASC Sec. 1.12.3.

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Commissioner and labor leader Jessica Wadsworth,[99] the Project would bring additional well-paying jobs, improving unemployment in the area. The state mapping tool shows all other area "environmental effects" to be average or low when compared to state averages, except for slightly elevated rates of proximity to risk management plan facilities[100] and wastewater discharge. The Project will not contribute to either because it is not a risk management plan facility,[101] and will not generate significant wastewater discharges.[102] Finally, a key component of environmental justice is combatting climate change, the effects of which often fall disproportionately on already overburdened populations. The clean energy provided by the Project, and its investment in climate resiliency infrastructure, represent an important step toward reducing those effects.[103]

E. Scout has surpassed EFSEC's historic and cultural preservation requirements to ensure the long-term protection and perpetuation of Tribal resources.

Under the relevant EFSEC standard, applicants for site certificates must "coordinate with and provide a list of all historical and archaeological sites within the area affected by construction and operation of the facility to the Washington State office of archaeology and historic preservation[("DAHP"),] and interested Tribe(s)" and in their application:

> (a) Provide evidence of this coordination;
> (b) Describe how each site will be impacted by construction and operation; and
> (c) Identify what mitigation will be required.[104]

"Archeological" sites are undefined in EFSEC's statutes and rules, but DAHP's authorities define an "archaeological site" as "a geographic locality in Washington, … that contains archaeological objects,"[105] in turn defined as objects comprising "physical evidence of an

[99] EXH-1034_R.
[100] Risk management plan facilities are those that use extremely hazardous substances under EPA regulations.
[101] ASC at 4.1.2.2 and 4.1.2.5
[102] ASC Sec. 3.3.2
[103] Day 3 Tr. at 513:24-514:18 (economist Morgan Shook testifying that investing in clean energy infrastructure improves community resiliency).
[104] WAC 463-60-362(5).
[105] RCW 27.53.030(3).

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indigenous and subsequent culture, including material remains of past human life, including monuments, symbols, tools, facilities, and technological by-products."[106]

Distinct from that framework is the concept of traditional cultural property ("TCP"). In a policy memorandum, DAHP defines TCP as "a property or a place that is inventoried, or determined eligible for inclusion on the National Register of Historic Places [("NRHP")] or the Washington Heritage Register because of its association with cultural practices and beliefs that are (1) rooted in the community's history, and (2) are important to maintaining the continuing cultural identity of the community's traditional beliefs and practices."[107] These concepts may overlap: an archeological site may *also* be or contribute to a TCP; but not all TCPs are archeological sites.[108] But per DAHP guidance, a site is a TCP under Washington law only if it has formally been inventoried or deemed eligible for inclusion on state or federal historic registers.[109]

Notably, nothing in state or federal law—including in EFSLA—necessarily "protects" or renders off-limits archeological resources or TCPs from disturbance or development,[110] though under Washington law, an Archeological Excavation and Removal Permit from DAHP is required if activity will disturb any "historic or prehistoric archaeological resource or site."[111]

1. After its coordination and analysis HRA found, and DAHP concurred, that the Project could impact four precontact resources, all of which Applicant proposes to avoid.

With Historical Research Associates, Inc. ("HRA"), Scout engaged in more than five years of outreach and coordination with relevant agencies and affected Tribes, including

[106] RCW 27.53.030(2).
[107] DAHP Policy Number 12.1.2017, Traditional Cultural Properties at 1 (Dec. 1, 2017).
[108] Day 4 Tr. at 604:12-606:6 (Ragsdale).
[109] DAHP Policy Number 12.1.2017, *supra*. However, nothing in state or federal law requires that precontact archeological sites, including those comprising TCPs, be evaluated for NRHP eligibility, unless the relevant project involves some federal nexus (*see* National Historic Preservation Act), which this Project does not.
[110] Day 4 Tr. 607:20-609:13 (Ragsdale).
[111] RCW 27.53.060(1); Day 4 Tr. at 607:20-608:2, 608:22-609:8.

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Washington's Department of Natural Resources and DAHP, and the Yakama Nation and Confederated Tribes of the Umatilla Indian Reservation ("CTUIR").[112] Scout and HRA provided the cultural resource findings to DAHP and affected Tribes at multiple points throughout the analyses, seeking and incorporating their feedback into the final reports.[113] Scout also offered the Tribes the opportunity to meet to discuss the Project and potential concerns, attend site visits, exchange information about TCPs, fund additional studies into traditional Tribal use or import of the area, review and comment on HRA reports and project layout, attend and monitor the archeological field surveys, staff (with funding) field archeological technician positions during the field surveys, receive the field schedule prior to each field survey effort, and receive post-field survey summaries.[114]

Based on their outreach and analysis, Scout and HRA identified 41 archeological resources in total: 29 sites and 12 isolates.[115] Only four are from the precontact era (Nos. 45BN261, 45BN2090; 45BN2092, 45BN2146, and a single component of No. 45BN2153).[116] HRA recommended, and Scout proposes, to avoid all of those resources entirely, with no ground disturbance.[117] If it turns out that a resource cannot be avoided, then in accordance with state law, Scout would obtain a disturbance permit from DAHP, develop a research design in coordination with DAHP and any affected Tribe, and conduct research on the resource to get more information and determine its listing eligibility.[118]

DAHP reviewed and concurred with all HRA findings and recommendations.[119] Because all identified historical and archeological resources are proposed to be avoided, no

[112] *See* ASC Sec. 1.12.2.
[113] Day 4 Tr. at 600:2-25.
[114] *See* ASC Table 1.12.2; Day 4 Tr. at 602:17-604:4.
[115] ASC at 4-145 (see detailed description of resources at 4-145 through 4-151); *see generally* ASC Secs. 4.9.2 and 4.9.3; Day 4 Tr. at 587:3-20.
[116] ASC at 4-155 through 4-157.
[117] ASC at 4-154 through 158; Day 4 Tr. at 587:10-16, 598:22-599:19 (Ragsdale). This goes beyond the legal requirements, given that under state law, isolates need not be avoided. Day 4 Tr. at 587:16-20 (Ragsdale).
[118] Day 4 Tr. at 590:15-591:13; *see also* ASC at 4-154.
[119] Day 4 Tr. at 616:23-617:2.

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impacts are expected, and thus no specific mitigation measures were proposed in the ASC. Nevertheless, to *ensure* no impacts will occur, Scout proposes to engage a professional archeologist to:

- Develop and implement a Cultural Resource Preconstruction Survey and Avoidance Plan to provide protocols for preconstruction surveys of areas not previously surveyed (e.g., during final design and construction) and to outline cultural resource avoidance measures,[120] including that for precontact resources, avoidance buffers will measure 20 meters around the two 9 sites (45BN261 and 45BN2090) and 10 meters around the two 9 (45BN2092 and 45BN2146) and the multicomponent site (45BN2153);

- Develop an Inadvertent Discovery Plan and avoidance procedures under which, should subsurface archaeological resources be discovered, all activity in the vicinity will stop and a qualified archaeologist asked to evaluate the resource for listing or to conduct other appropriate investigations and to obtain relevant DAHP permits; and

- Develop and train workers on cultural resource protection, including regional context and archeological sensitivity education to ensure project workers stop construction and respond appropriately if a cultural resource is inadvertently discovered.[121]

Tribe-specific mitigation measures are discussed below.

2. Scout has conducted extensive Tribal coordination and incorporated feedback from the CTUIR and Yakama Nation.

a. After productive coordination, Scout and CTUIR have executed a mitigation agreement to protect and support CTUIR's natural and cultural resources and traditions.

Approximately 80 percent of the Project area—the entire eastern and central portion of the site—is located on lands ceded[122] and traditionally used by the CTUIR.[123] The CTUIR

[120] *See also* Day 4 Tr. at 589:20-590:3, 590:3-14.
[121] *See* ASC at 4-158 and 4-159 for more detail.
[122] Yakama Nation incorrectly represented in its Petition to Intervene in this adjudication that the entire Project area is located within Yakama Nation treaty-ceded lands. *See* Yakama Nation Petition to Intervene at 2 (Feb. 23, 2023).
[123] *See* EXH-1061_X (ASC Figure 2.1-1); EXH-1062_X (Washington Geospatial Open Data Portal Tribal Lands map); EXH-1063_X (Demonstrative Map showing project area with Tribal lands GIS map). These ceded lands represent areas where the CTUIR ceded title to their historic area of use to the U.S. Government under the Walla Walla Treaty of Camp Stevens, June 9, 1855.

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have been actively and productively engaged with Scout since early 2020, when the company first reached out to the Tribes about the Project and Scout's cultural resource investigations.[124] The CTUIR participated in HRA's field surveys, including staffing a CTUIR representative as a field archeological technician on the team. Through the CTUIR Cultural Resources Protection Program, it conducted an ethnobotanical survey and traditional use study of the Project to identify properties of religious and cultural significance to the CTUIR in the Project area and to assess impacts of the Project on the traditional uses of the area by the Imatalamłáma (Umatilla), Weyíiletpu (Cayuse) and Walúulapam (Walla Walla) people, who comprise the CTUIR.[125] The traditional use study is confidential to the CTUIR, but Scout understands that the executive summary has been submitted to the Council for review.

Specifically, as documented in the study, the CTUIR noted that the Project could adversely affect two significant cultural and religious sites, led to loss of access to First Foods procurement areas, and led to the inadvertent discovery of other Tribally significant resources. To address these impacts, the CTUIR proposed multiple mitigation measures, including access for Tribal members, off-site mitigation including education and outreach to ensure legends and stories associated with the land are perpetuated, and post-Project restoration agreements to restore the landscape and viewshed after the life of the Project.

The findings of the traditional use study informed initial mitigation proposals from the CTUIR.[126] After additional discussions with CTUIR Cultural Resources Protection Program and Tribal leadership, Scout and CTUIR have executed a mutual agreement to mitigate and resolve any effects of the Project on CTUIR cultural resources and historic property of religious and cultural significance.[127]

[124] ASC Table 1.12.2.
[125] *See* ASC at 1-66 and 1-67; Day 4 Tr. at 610:11-611:19.
[126] *See* ASC at 1-66.
[127] *See* October 10, 2023 Letter from N. Kathryn Brigham, CTUIR Board of Trustees, to Amy Moon, EFSEC.

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b. Scout has voluntarily committed to specific mitigation measures to respond to Yakama Nation's stated concerns.

Most of the remaining portion of the Project area, approximately 15-20 percent in the northwestern corner of the site, lies on lands ceded by Yakama Nation.[128] For more than five years, Scout has been engaging with the Yakama Nation, through direct communications with representatives of the Nation's Cultural Resource Program, Tribal members, and through coordination with DAHP.[129]

Despite these engagement efforts, Scout received only limited responses and information from Yakama Nation. Yakama Nation provided some comment to HRA on Scout's cultural resource reports and DAHP permit application materials, which was incorporated into HRA reports.[130] But Yakama Nation withheld information about most of its TCPs it claims are in the vicinity of the Project.[131]

In written direct testimony, Yakama Nation Cultural Resource Program ("CRP") Archeologist Jessica Lally submitted a TCP study containing generalized, high-level descriptions of purported TCPs near and within the Project area.[132] No specific geographic description or boundaries were provided. This information had never before been presented to Scout or HRA in the five years of coordination with the Tribe.[133]

During live testimony, Ms. Lally also presented "demonstrative evidence" showing large shaded areas (with no specific boundaries) purportedly associated with the TCPs described in the pre-filed report.[134] [redacted] with whom Scout has successfully

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[128] EXH-1063_X; [redacted] ASC Table 1.12.2.
[130] Day 4 Tr. at 606:11-607:18, 611:20-612:13 (Ragsdale testifying that J. Lally provided limited information on TCPs).
[131] Day 4 Tr. at 612:15-613:4 (Ragsdale testifying she had never seen the TCP information J. Lally submitted during adjudication).
[132] *See* EXH-4003_Confidential.
[133] Day 4 Tr. at 612:15-613:4, 615:23-616:22.
[134] Day 4 Tr. at 637:14-25.

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resolved cultural resource concerns and with whom Yakama Nation has not communicated about the Project.[135] Yakama Nation shared this information with Chair Drew and Director Bumpus,[136] but not with Scout or HRA. As explained above, neither Scout nor HRA had seen the Yakama Nation TCP information until the live hearing and even then, no substantiating evidence was proffered.

[redacted]9[redacted].[137] **Importantly, these idiosyncratic definitions are completely distinct from and do not meet the TCP criteria under state law or administrative guidance**.[138] The generalized descriptions and classifications contained in Ms. Lally's TCP study are inconsistent with EFSEC's and even DAHP's cultural resource and TCP framework. Moreover, they lack sufficient detail to discern which, if any, of the features described are in fact TCPs or "archeological sites" that must be assessed and considered when developing mitigation under Council rules.

To be sure, it may seem counterintuitive to use western legal and academic constructs to describe or classify indigenous traditions or sites. But Yakama Nation's CRP is staffed by professional archeologists experienced in project planning and commercial development processes and therefore versed in both classification systems and more than capable of connecting the two to establish and protect valid TCPs and archeological sites.[139] No effort was made to do so, despite ample opportunity.

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[135] Day 4 Tr. at 675:8-10.
[136] Day 4 Tr. at 637:19-638:5.
[137] EXH-4003_Confidential at 3-7; Day 4 Tr. at 638:25-639:13.
[138] *See* DAHP Policy Number 12.1.2017, *supra*; *see also* National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1992), https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completeweb.pdf.
[139] Day 4 Tr. at 653:23-654:22 (J. Lally testifying about professional knowledge and experience in preparing surveys for commercial projects by AT&T and PacifiCorp, among others).

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With all respect to the Tribe, its members and CRP, Yakama Nation's TCP claims must be considered in context and under the applicable regulatory criteria. *First*, [redacted] These areas are far from pristine. The vast majority are developed for agricultural production, industrial use, residential development, and large-scale energy infrastructure including transmission lines and the existing Nine Canyon Wind Project. Thus, even taking Yakama Nation's extensive TCP assertions as true, the area has already been impacted in substantial ways, far more substantially than as posed by this Project.[142] Moreover, [redacted].[143]

Second, Yakama Nation members' access to these areas is already significantly compromised. All the land within the Project Lease Boundary is privately owned, as is most of the surrounding land. Yakama Nation's treaty-reserved hunting, gathering, and pasturing rights extend only to "open and unclaimed land,"[144] which the Washington Supreme Court has held does not include private property.[145] Therefore, Yakama Nation Tribal members do

[140] EXH-4003_Confidential at 4.
[141] Day 4 Hearing Video, File "Confidential Hearing-20230821_103117-Meeting Recording" at 20:45-21:40.
[142] *See, e.g.*, [redacted]
Yakama Treaty of Camp Stevens, June 9, 1855.
[145] *State v. Chambers*, 81 Wn.2d 929, 935-36 (1973).

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not currently have physical or legal access to most of these areas.

Third, [redacted][146] According to the foremost administrative authority on TCPs, the National Park Service's National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties, a TCP eligible for the National Register (and therefore considered a TCP under Washington law, per DAHP Policy Number 12.1.2017) "must be a tangible property" like "a district, site, building [or] structure."[147] [redacted] Yakama Nation provides no evidence or legal authority to suggest otherwise. Though these resources may be important to the Tribe, they are not TCPs as defined by law to be assessed and considered under WAC 463-60-362(5).

Fourth, [redacted]

[146] EXH-4003_Confidential at 7-8.
[147] National Register Bulletin 38, *supra*, at 9.
[148] [redacted]

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Even taking all of Yakama Nation's contentions as true, [redacted], the vast majority of that area is now in private ownership and has already been significantly impacted by development, including adjacent wind energy development, which Yakama Nation does not appear to have opposed. Scout is not required, nor would it be appropriate, to mitigate for impacts already occurring on the land. And though Yakama Nation CRP and Tribal member witnesses claim Project impacts are unmitigable, the specific testimony suggests otherwise. Finally, nothing in EFSLA or state law necessarily restricts these TCP areas from further development.

Even so, Scout has heard Yakama Nation's concerns[149] and is committed to ensuring the protection of Tribal resources and sites. Based on Yakama Nation's feedback on the Project to date, including live testimony from Ms. Lally and Tribal members, Scout has voluntarily proposed to remove:

- [redacted]
- [redacted]

Though these turbine locations are highly valuable for wind energy generation, Scout has committed to removing these turbines to further avoid sensitive areas and the potential for interference with the Yakama Nation's tangible TCPs.

[149] [redacted] Day 4 Tr. at 692:25-693:18. The inclusion of these towers will have negligible ground disturbance and visual impact at the site, given their much shorter relative height (30 to 120 feet) and co-location with more dominant existing features at the site. More important, they will result in a net *reduction* of potential impacts to TCPs by allowing for reduced nighttime light interference, facilitating turbine lighting only when needed to ensure passing aircraft safety. *See* Final ASC Sec. 2.3.9.

[150] [redacted]

[151] *See* Sept. 26, 2023 Letter from Michael Rucker, Scout, to Sonia Bumpus, EFSEC re: Project Update Responding to Adjudication Concerns and Atts.

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F. The Applicant's visual analysis provides a worst-case scenario of the visual impacts and proposes mitigation of the worst visual impacts of the Project.

Under EFSEC's aesthetics standards, applicants must use an *objective* approach to:

> describe the aesthetic impact of the proposed energy facility and associated facilities and any alteration of surrounding terrain. The presentation will show the location and design of the facilities relative to the physical features of the site in a way that will show how the installation will appear relative to its surroundings.[152]

An applicant must also "summarize ... the means to be utilized to minimize or mitigate possible adverse impacts during construction, operation, and decommissioning."[153] Accordingly, Applicant prepared an objective visual impact analysis and developed proposed mitigation measures to satisfy this standard.

1. Scout's objective analysis accurately describes the aesthetic impact of the Project relative to its surroundings.

Uncontroverted evidence shows that the Project will have a low to moderate visual impact in some areas and a moderate to high impact in others.[154] Two experienced visual assessment firms, TetraTech and SWCA, each prepared Visual Impact Assessments ("VIA") (one for the ASC and one under SEPA). Each used different methodologies, but they reached the same result, corroborating the accuracy of both assessments.

a. Applicant used a robust analysis to describe the degree of aesthetic impact proposed by the Project.

As required by the BLM VRM Methodology, the Applicant's VIA weighs the existing scenic quality (visual quality and viewer sensitivity), describes the contrast (change in visual scenery) created by the Project, and identifies the distance of the turbines to develop an overall visual impact rating for each representative viewpoint.[155] The VIA represents an industry standard approach that takes into account varied interests and multiple visual

[152] WAC 463-60-362(3).
[153] WAC 463-60-085(1).
[154] ASC at 4-89, Table 4.2.3-2.
[155] ASC at 4-89 to -90.

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conditions. Applicant created a project description and applied management goals from the Benton County Comprehensive Plan when determining the level of sensitivity of the Horse Heaven Hills and the overall impact.[156] Applicant then consulted with stakeholders, including the Benton County Planning Department, Benton City, and Yakama Nation, to identify Known Observation Points ("KOPs") representing cultural resources, residential, occupational, and recreational views.[157] Over several visits (to represent different environmental conditions), Applicant took numerous photos from the KOPs using a DSLR camera, following industry best practices, and developed them into the visual simulations in ASC, Appendix Q.[158]

The VIA completed by the Applicant is a "conservative" analysis that presents the "worst case" scenario.[159] To be sure, there are parts of the Horse Heaven Hills that are undeveloped, like the BLM land pictured heavily in the cross examination of Ms. Brynn Guthrie.[160] However, natural conditions in the Tri-Cities areas will reduce the visual impact on those areas, as portrayed in the VIA. For example, Applicant applied a dehazing filter, which simulates a clear day with no clouds or fog, to some of its simulations to present the "most visually impactful viewing conditions."[161] Dehazing was used after numerous trips to the KOPs at different times of the year.[162] Natural conditions, like humidity, can create hazy conditions that mitigate the visual context even in arid environments.[163] In other words, the Project's impact on the viewscape may at times be less significant than the VIA suggests.

[156] EXH-1036_R at 4.
[157] EXH-1021_R at 6-7.
[158] EXH-1021_R at 3.
[159] Day 7 Tr. at 1357:17-20 (B. Guthrie testifying about how the bare earth viewshed analysis is a conservative figure); EXH-1021_R at 4 (B. Guthrie rebuttal testimony noting that dehazing was undertaken to present the "worst-case" visibility for the project).
[160] Day 7 Tr. at 1343:20-1344:21 (testimony of B. Guthrie highlighting an area of viewpoint 10 that is BLM land).
[161] EXH-1021_R at 3.
[162] EXH-1021_R at 3-4.
[163] EXH-1021_R at 3-4.

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Applicant acknowledges that as objectively assessed in the VIA, the impact from most viewpoints would be "moderate to high."[164] But what the VIA does not do—nor should it—is assess whether that impact is positive or negative, or how a viewer will subjectively receive it. As Mr. Shook testified, social and economic research tries "to find consistent measurable impacts…. Some people obviously have a strong preference one way or the other. Some people may have a preference for [seeing turbines].... Some people may be completely agnostic or ambivalent to those views."[165] The purpose of the methodology and the VIA is an objective assessment of the *degree of change* without assigning subjective value judgments to that analysis.[166]

b. Applicant's analysis accurately describes viewshed impacts for most people in the Tri-Cities.

TCC raised several concerns about the VIA's conclusions but provided no objective analysis that supports those concerns.

First, TCC claims the Project will "impact more than 100,000 residents in the rural and urban areas of the Tri-Cities."[167] But TCC provides no analysis that explains how it reached this number. Applicant's VIA developed simulations for the most exposed viewpoints of the Project for the Tri-Cities and concluded that the impact from these locations would be moderate to high.[168]

TCC also argued that the turbines' proximity to urban areas necessarily renders the visual impact high. That ignores the actual visual impact of the turbines. The distance between the turbines and the Tri-Cities area ensures that for most viewers, the turbines will

[164] EXH-1021_R at 3-4; EXH-1036_R at 4; *see also* ASC, Appendix Q.
[165] Day 3 Tr. at 500:4:22 (Shook); *see also* Day 3 Tr. at 507:18-508:14.
[166] *See* BLM Handbook Manual 8400 at 6 (1984) ("The VRM system is designed to separate the existing landscape and the proposed project into their features and elements and to compare each part against the other in order to identify those parts which are not in harmony. … The decision on the amount of visual change that is acceptable is made by the field manager.").
[167] TCC's Prehearing Brief at 1.
[168] *See* ASC, Appendix Q, Fig. 13 Representative Viewpoint 9 (visual simulation from Benton City); ASC, Appendix Q, Fig. 11-12 Representative Viewpoints 8a & 8b (visual simulation from Kennewick); ASC at 4-89-90, Table 4.2.3-2.

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be in the far background. For example, the turbines are located at least four miles south of Kennewick and the Tri-Cities urban area.[169] As noted in the Kittitas Valley Wind, an object ceases to dominate the view when it is at a distance of 4x turbine tip height from the viewer.[170] The closest turbines are at least 31x turbine tip height from the nearest part of the Tri-Cities area and therefore will not loom over the Tri-Cities.

TCC also asserts, without evidence, that most viewers have an unobstructed view of the Horse Heaven Hills. First, the Horse Heaven Hills are not pristine, undeveloped hillsides. Of course there are areas that are and will remain undeveloped, like the adjacent BLM land pictured in TCC's cross examination of Ms. Guthrie.[171] However, existing transmission lines and roads traverse the Horse Heaven Hills and residential development.[172] Second, almost all views of the Horse Heaven Hills are obstructed in some form.[173] For most people in the Tri-Cities area, the area is not a rural, pristine undeveloped viewshed, but rather a developing environment with man-made structures and other visual obstructions.

2. Applicant has mitigated visual impacts by voluntarily using a 4x turbine height setback for virtually all turbines and removing some of the most visually impactful turbines.

RCW 80.50.010(2) directs the Council to take action that considers "the increasing demands for energy facility location and operation in conjunction with the broad interests of the public." In doing so, the Council is "not obligated to eliminate all negative impacts."[174] Applicant's carefully crafted Project layout and proposed mitigation measures effectively balance these considerations and comply with existing precedent.

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[169] *See* ASC at 2-1.
[170] Order No. 826 at 30-31, *In the Matter of Kittitas Valley Wind Power Project*.
[171] *See* Day 7 Tr. at 1343:20-1344:21 (B. Guthrie).
[172] ASC at 4-42 & Appendix Q, Fig. 8-1b Representative Viewpoint 5 (showing residential development on the Horse Heaven Hills); Day 7 Tr. at 1340:4-8 (B. Guthrie answering whether the Horse Heaven Hills contains development, stating, "It does contain some development. There are, as we saw, communication towers. In some cases, there's residential development[.]").
[173] *See* Day 7 Tr. at 1341:13-17 (Testimony of B. Guthrie, stating, "for all the viewpoints that we identified and used for our study, there are signs of development…. So it's just a part of the character of the area that [is] developed and developing[.]").
[174] Order No. 826 at 30, *In the Matter of Kittitas Valley Wind Power Project*.

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As discussed in ASC Section 4.2.3.4 and pages 1-12 and 1-13, Scout proposes measures to mitigate aesthetic impacts, including but not limited to providing and maintaining a clean facility free of debris and unused or broken equipment, using a uniform design for turbines, restoring vegetated areas after construction, and complete decommissioning and removal at the completion of the Project.[175]

Applicant also proposes to comply voluntarily with (at least) the 4x turbine tip height setback from residences adopted in the Kittitas Valley Wind project.[176] Applicant has located all but two turbines at least 2,684 feet, more than the 4x turbine tip height, from all non-participating residences.[177] This also complies with the County's 1,000-foot setback for wind turbines.[178] At a distance of 2,684 feet, the turbines will not "dominate a person's normal field of view," further mitigating impacts.[179]

Moreover, Applicant's turbine siting process used the industry standard targeted, objective approach that includes aesthetic mitigation. As Ms. Guthrie explained, the industry standard practice for deciding where to site and remove turbines requires a turbine-specific analysis to ensure that removed turbines have a direct and meaningful reduction of visual impacts.[180] The drastic measure of turbine removal from the micrositing corridors must also be balanced with other factors and Project benefits.[181]

Throughout the siting process, the Applicant used the VIA, among other factors, to make turbine placement decisions.[182] Recently, Applicant removed 13 turbines from the Project, including some of the most visually impactful,[183] which was reflected in the

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[175] ASC at 4-96.
[176] *See* Order No. 826 at 31, *In the Matter of Kittitas Valley Wind Power Project*.
[177] *See* ASC at 2-142.
[178] ASC at 2-142.
[179] ASC at 2-142; s*ee* Order No. 826 at 31, *In the Matter of Kittitas Valley Wind Power Project*.
[180] *See* EXH-1065_S_REVISED at 3.
[181] EXH-1065_S_REVISED at 3.
[182] EXH-1065_S_REVISED at 3.
[183] EXH-4014_X at 12.

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September 2023 Final Application for Site Certification ("Final ASC").[184] In subsequent correspondence, Scout proposes removing an additional nine turbines from the ridges near Webber Canyon.[185]

In contrast to Scout's established, surgical approach, TCC visual witness Dean Apostol's proposed approach is subjective, undisciplined, and untethered from any known or accepted methodology. Mr. Apostol's map and visual area reduction chart advocates for mitigation setbacks based on distances from the turbines to land use categories.[186] As Ms. Guthrie noted, those setbacks are completely arbitrary and irrelevant.[187] Unlike Mr. Apostol's unorthodox approach, Applicant considered actual visual impacts of each turbine, including how that impact is contextualized among surroundings.

For example, Applicant removed turbines 5, 6, 7, and 8,[188] which would have been proximate to the Horse Heaven ridgeline, impacting the viewshed of residences on Badger Road.[189] While these turbines were technically compliant with the Kittitas Valley Wind project setback, Applicant was able to double the distance between the nearest residence and the Project while further mitigating wildlife impacts.[190]

The Project, as currently proposed in the so-called "Moon Memo," responsibly sites turbine locations and mitigates for aesthetic impacts as required under EFSEC standards. Further mitigation or removal of turbines is unnecessary and inappropriate for three reasons. *First*, as explained above, Scout has committed to a 4x turbine tip height setback, which directly reduces visual impacts to surrounding areas. *Second*, for most residents in the Tri-Cities area, the turbines will be at least four miles away and already obstructed by

[184] *See* Final ASC Figures 2.3-1, 2.3-2.
[185] Sept. 26, 2023 Letter from Michael Rucker, Scout, to Sonia Bumpus, EFSEC re: Project Update Responding to Adjudication Concerns and Atts.
[186] *See* EXH-1065_S at 2, ln. 16-25 & 8, ln. 6-22.
[187] *See* EXH-1065_S_REVISED at 3, 8.
[188] EXH-1065_S_REVISED at 3.
[189] Day 7 Tr. at 1363:7-12 (testimony of B. Guthrie discussing the impact of the removal of turbines 5-8).
[190] EXH-1065_S_REVISED at 4; EXH-4014_X.

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development, vegetation, and topography. *Third*, and perhaps most concerning, further removal or a larger setback could set a dangerous precedent based only on the supposition that viewers in urban areas are opposed to these projects rather than any objective analysis of the actual visual impacts of each project.

In short, the Project as presented adequately identifies the visual impacts and, to the greatest extent possible, seeks to minimize those impacts while still developing a project that will meaningfully progress the State towards its clean energy goals.

G. The Applicant has utilized best available science to evaluate potential wildlife impacts and to inform tailored mitigation measures.

Under the EFSLA, facilities are to be sited where there are "minimal adverse effects on … wildlife."[191] To assess whether adverse effects are minimal, an applicant must "describe all existing…wildlife…on and near the project site which might reasonably be affected by construction, operation, decommissioning, or abandonment of the energy facility and any associated facilities" and develop a mitigation plan containing "a detailed discussion of mitigation measures, including avoidance, minimization of impacts, and mitigation through compensation or preservation and restoration of existing habitats and species, proposed to compensate for the impacts that have been identified."[192] The ASC and both the written and oral testimony provided throughout the adjudication make clear that Applicant addressed concerns about potential impacts to wildlife through data-driven measures.

[191] RCW 80.50.010.
[192] WAC 463-60-332(3).

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1. The Project has been carefully developed to avoid impacts to ferruginous hawks, including through siting on agricultural lands that provide only minimal habitat value to the species, and to mitigate for any potential adverse effects.

a. Ferruginous hawk populations have precipitously declined across their range and in the area due to numerous other existing threats, including from long-term conversion of suitable habitat to agricultural uses and more recent unchecked residential sprawl from Tri-Cities into the Horse Heaven Hills.

Of possibly the greatest concern to both the Applicant and the CFE are ferruginous hawks (*Buteo regalis*), a species of raptor whose population has been in steady decline in Washington for the last several decades.[193] To be sure, wind and solar farms in eastern Washington could have some impact on ferruginous hawks. But the reality is that anthropogenic, or man-made threats to the viability of the species, unrelated to the Project, far outweigh any potential negative impacts.[194]

The myriad threats to the continued existence of ferruginous hawks as a species include relatively discrete events like electrocutions on power lines,[195] collisions with vehicles, shootings,[196] poisoning,[197] predation by other species[198] and drought and disease.[199] Those threats are in addition to far more existential danger from the long-term effects of human disturbance[200] and from the greatest threat of all: the loss of habitat necessary for the

[193] *See* WAC 220-610-010; RCW ch. 77.15.
[194] Day 5 Tr. at 960:21-25, 961:1-20 (Erik Jansen ("Jansen")); *see also* Jason Fidorra Deposition, July 20, 2023 ("Fidorra Dep."), at 135-137 (describing various anthropogenic impacts on ferruginous hawk population); Day 6 Tr. at 1252:19-25 (Rahmig).
[195] James Watson Deposition, July 14, 2023 ("Watson Dep."), at 109.
[196] Watson Dep. at 108:23-25, 27:20-28:1.
[197] Day 8 Tr. at 1568:16 (Donald McIvor ("McIvor")); *see also* Watson Dep. at 109:18-110:1.
[198] Day 8 Tr. at 1644 (McIvor) (in response to questions from EFSEC Council Member Livingston); *see also* Watson Dep. at 110:9-14.
[199] Day 8 Tr. at 1644 (McIvor) (in response to questions from EFSEC Council Member Livingston); *see also* Watson Dep. at 111:6-19; Fidorra Dep. at 135:6-13.
[200] *See, e.g.*, Michael Ritter Deposition, May 31, 2023 ("Ritter Dep."), at 159:17-160:22 (urban sprawl and agricultural use have the greatest impact on ferruginous hawk populations in Benton and Franklin Counties).

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survival of both the ferruginous hawks and the species on which the hawks prey.[201]

Moreover, conditions at the ferruginous hawks' wintering grounds – that is, not within the Project footprint – also lead to the decline in the ferruginous hawk population.[202] The ideal habitat for ferruginous hawk is shrub-steppe or native grassland, which best supports its prey species. The reduction in the number of ferruginous hawks was first linked to a decline in prey species, which is directly tied to the loss of optimal habitat through agriculture and agricultural conversions.[203]

Most recently, pervasive and sprawling residential development in the Horse Heaven Hills area continues virtually unchecked,[204] driving off ferruginous hawks and reducing the availability of their prey. Indeed, there are several hundred acres of residential lots currently for sale on shrub-steppe habitat in the Horse Heaven Hills, some in locations where there are records of historical ferruginous hawk nests.[205] In contrast, only two acres of shrub-steppe habitat are proposed to be permanently impacted by the Project.[206]

The Applicant, with the help of its biologists, Troy Rahmig and Erik Jansen, has been studying ferruginous hawks and their use of the Project area since at least 2017, including surveys conducted in 2022 and 2023.[207] The last time a ferruginous hawk was identified using a nest within two miles of the Project site was four years ago, in 2019.[208] Since then, other raptors (owls, ravens, and a Swainson's hawk) have been documented using that

[201] Watson Dep. at 78:23-79:3; *see also id.*, at 101:15-18; Day 6 Tr. at 1252:19-25 (Troy Rahmig ("Rahmig")).
[202] Watson Dep. at 102.
[203] Watson Dep. at 27:9-19; *see also id.* at 85 ("going from a native habitat to an agricultural base has been obviously the main change").
[204] Watson Dep. at 99:10-12 (residential development and wildfires both impact shrub-steppe); *see also id.*, at 86:7-10, 110:4-8, 114.
[205] Day 5 Tr. at 962:5-963:13 (Jansen).
[206] Day 5 Tr. at 962:25-963:12 ("[W]hen you try to place the impacts from project development in context with other sources of anthropogenic disturbance in the Horse Heaven Hills, you can see that there are relatively fewer impacts to habitat compared to let's say upcoming housing development in the Horse Heaven Hills.").
[207] *See* Day 5 Tr. at 954:17-955:13 (Jansen).
[208] *See* Day 5 Tr. at 955:14-21 (Jansen).

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nest.[209] Simply put, while the Project area is part of the species' historical range, the data show that ferruginous hawks are not routinely using the Project location for nesting and, due to current land uses (agriculture) and future residential encroachment, there is no realistic possibility of restoration of habitat or recovery of the species in the area.

2. The Project avoids ferruginous hawk habitat by siting on agricultural land and includes proposed mitigation measures that further minimize anticipated impacts.

In every instance, the hierarchy of impact reduction is first to avoid, then minimize, and finally — if and only if avoidance and minimization cannot be accomplished — to mitigate negative effects to wildlife.[210] The Project has been thoughtfully designed with this hierarchy in mind, to reduce its impact on wildlife, including the ferruginous hawk. As currently proposed, this Project will not significantly contribute to the loss of ferruginous hawk habitat because it is almost completely sited on land that has already been converted to agriculture.[211] Still, acknowledging that even a small loss of habitat could be consequential, the Applicant has proposed mitigation that even District Wildlife Biologist Jason Fidorra agrees could fully compensate for the habitat loss.[212] By contrast, the extensive habitat lost to agriculture and rural suburban development is realistically impossible to reclaim.[213]

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[209] *See* Day 5 Tr. at 850:3-16 (Jansen).
[210] Fidorra Dep. at 90-91; *see also* Day 6 Tr. at 1175:20-1175:8, 1257:19-1258:25 ("[W]hat we're doing now is, it is all about avoidance and minimization and mitigation. … [T]he avoidance and minimization … is outlined in the application. There's additional detail in the habitat mitigation plan about minimization measures specifically for ferruginous hawk that were added in, in response to concerns by WDFW. And then there's a mitigation package proposed in the habitat mitigation plan. So the continuum of avoidance, minimization, and mitigation is … all contemplated during this application process.") (Rahmig).
[211] Fidorra Dep. at 124; *see also* Day 5 Tr. at 980:18-20 ("[M]ost [of] these turbines are getting placed in altered habitat. So there isn't this direct impact on quality shrubsteppe habitat.") (WDFW EFSEC Representative Livingston); Day 6 Tr. at 1251:1-3 (siting the project on agricultural lands is one of the best ways to avoid attracting ferruginous hawks to spots where they might be susceptible to turbine strikes) (Rahmig).
[212] Fidorra Dep. at 27-30; *see also id.*, at 114-15; Day 5 Tr. at 964 (Jansen).
[213] Fidorra Dep. at 121-122.

Scout is proposing several affirmative actions for that purpose. ***One*** is the commitment to protect up to 802 acres of habitat[214] in a historical nest location north of the Project, which includes 678 acres of shrub-steppe and 109 acres of agricultural land that will be restored to shrub-steppe.[215] ***Another*** is to install and maintain artificial nest platforms that, while not an ideal solution, could positively influence the species' population trajectory.[216] ***Third,*** Applicant will plant native grasses beneath the Project's solar arrays, which would encourage the presence of prey species and thereby provide a food source for the hawks, increasing the chance of nearby nesting.[217]

Project opponents contend there is a possibility ferruginous hawks could inadvertently be killed by turbine strikes. Although such an occurrence would be meaningful, the actual likelihood that a ferruginous hawk would be hit by a rotating blade is very low.[218] While any mortality is concerning, fatal collisions between ferruginous hawks and wind turbines are historically rare: in all of Washington State, there have been only four documented over the last 20-plus years.[219] Despite the unlikelihood a turbine would strike a ferruginous hawk, ***fourth***, Scout proposes an unprecedented five-year post-construction raptor nest monitoring effort, allowing for potential adaptive management should any nesting ferruginous hawks be detected within two miles. The Applicant is also proposing two years of post-construction fatality monitoring, consistent with published Washington Department of Fish and Wildlife ("WDFW") management recommendations, which would alert a technical advisory committee ("TAC") and the Project operator to the need to take further

[214] The actual amount will be relative to the applicable corresponding mitigation ratio for disturbed habitat.
[215] EXH-3017_X at 23, Table 5; Final ASC, Appendix L.
[216] Day 5 Tr. at 989:20-24 (Jansen).
[217] *See* Watson Dep. at 32:13-21; Day 8 Tr. at 1579:5-1581:17 (McIvor); *see also id.*, at 1655:19-23 (McIvor).
[218] Day 8 Tr. at 1634:22-1635:16 (McIvor) (in response to questions from EFSEC Chair Drew); *see also* Day 5 Tr. at 872:7-20 (Jansen).
[219] Day 8 Tr. at 1569:5-9, 1660:19-22 (McIvor).

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measures to protect against any additional accidental fatalities. CFE witness Don McIvor called this approach an "excellent proposal."[220]

Fifth, the Applicant has also incorporated no-activity buffers intended to reduce the Project's impacts on nesting ferruginous hawks. These buffers will be consistent with published WDFW management recommendations for the ferruginous hawk.[221] The buffers would be around ferruginous hawk nests, not Project infrastructure.[222] Importantly, although most stakeholders agree that some type of buffer would be appropriate, there remains disagreement as to their appropriate size.[223] Applicant intends to implement published recommendations to avoid impacts to nesting ferruginous hawks during the nesting season.[224] Others suggest that the buffer should be a full two miles, year-round, without regard to the impact that this expanded zone would have on the Project's ultimate viability.[225]

It is abundantly clear that the establishment of buffer zones should be based on the best available science, which the proposed two-mile buffer is not. As an example, the blanket recommendation of a two-mile buffer does not take into account impacts to the ferruginous hawk population from human activity.[226] To have the intended effect, decisions about where any buffers should be placed need to be more nuanced and responsive to individualized circumstances surrounding each nest location.[227]

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[220] Day 8 Tr. at 1603:21-1604:1 (McIvor).
[221] Eric Larsen et al., *Management Recommendations for Washington's Priority Species, Volume IV: Birds*, Washington Dep't of Fish and Wildlife (2004).
[222] Day 8 Tr. at 1589:15-19 (McIvor).
[223] Day 8 Tr. at 1659:10-22 (McIvor).
[224] Final ASC at 3-195, 3-196, Appendix L.
[225] As late as July 5, CFE's witness, Don McIvor, agreed that the Applicant had accurately quantified the project's potential impacts on ferruginous hawks. Day 8 Tr. at 1567:2-8 (McIvor). He subsequently changed his position, apparently for the sole reason that the Applicant did not incorporate a two-mile buffer around historic nests. Day 8 Tr. at 1630:6-9 (McIvor). McIvor could not say how much of the proposed project would be sidelined, how many turbines would have to be eliminated, or even whether the project would remain viable at all if a two-mile buffer is required. Day 8 Tr. at 1599:18-22 (McIvor).
[226] [redacted]
Day 5 Tr. at 926:10-20 (Jansen). U.S. Fish and Wildlife Service recommends a one-mile buffer. *See* Day 8 Tr. at 1562:18-25 (McIvor); *see also* Day 5 Tr. at 1596:15-23 (McIvor

Importantly, the Project's design is consistent with guidance published for wind projects by WDFW in 2009 and the WDFW ferruginous hawk management recommendations published in 2004.[228] Though not new, the 2004 recommendations are the most recent to have been finalized and the only ones to have been circulated and peer-reviewed to date and, therefore, the best available science on the subject. Though an update is in progress, it has changed substantively several times.[229] It currently exists only as an informal *draft*, is subject to future revision and peer review[230] and cannot possibly be interpreted as official agency guidance.[231]

In any event, a proffered WDFW representative agreed it would be possible for the Applicant to move forward with the Project in the absence of updated guidance, so long as best available science is being followed.[232] Nonetheless, WDFW continues to insist that the unpublished, non-peer-reviewed draft constitutes the best available science and should therefore govern decision-making.[233] By "best available science," WDFW apparently means "what department officials say."[234] In effect, WDFW is asking EFSEC to make a leap of faith and choose the government's position over the recent data amassed by the Project's scientific consultants. It should be clear, though, that private research, like that carried out by the Applicant's consultants, could in fact be the best available science.[235] In this instance, the Project's design, taking into account the modifications offered in the Moon Memo, is

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does not disagree that Utah and Colorado also recommend smaller buffers than those proposed in this case).

[228] It is worth noting that WDFW declined to participate in this adjudication. Fidorra Dep. at 101.

[229] Day 8 Tr. at 1618:8-1619:3 (McIvor).

[230] Day 8 Tr. at 1657:13-1658:20 (McIvor).

[231] Watson Dep. at 57:12-58:17 ("if we waited for scientific information to be in some official form before it became usable and applied, in the wildlife world things would go extinct every day, because we need to provide information as it's synthesized and published – as soon as it's published – both verbally and presentations and meetings and other places").

[232] Fidorra Dep. at 44.

[233] At the time, WDFW presumably said the very same thing about the 2009 guidelines, which Watson now claims were *not* the best available science. Waston Dep. at 55:16-17.

[234] Watson Dep. at 96:1-5 ("best available science has not necessarily been peer reviewed").

[235] Fidorra Dep. at 107-109.

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consistent with best available science.[236]

In the absence of consensus over what constitutes the best available science, even the CFE's witness, Mr. McIvor, conceded that the better approach would be to respond to actual conditions at the site, taking into account the empirical information collected through ongoing surveys.[237] Ferruginous hawks have very large home ranges and will not confine their movements to an artificially designated buffer.[238] Being able to tailor infrastructure location and operational decisions to actual area use patterns would undoubtedly minimize missed effects on the species. Additionally, it is well-established that ferruginous hawk use of the Project area is very low.[239] Adopting a site-specific, data-supported approach would eliminate the problem of divining the likelihood of reuse at historic but likely obsolete nests.[240] WDFW Lead Planner for Solar and Wind Energy Development Michael Ritter's proposal to keep non-occupied territories completely open against the very theoretical possibility that ferruginous hawks might someday use them again, despite continued agricultural use and residential development, is a prime example of a one-size-fits all approach, unsupported by science of any kind.[241] Mr. Ritter made that suggestion even while

[236] Day 6 Tr. at 1177:10-14 (Rahmig).
[237] Day 8 Tr. at 1589:5-1590:4 (McIvor); *see also id.*, at 1592:23-1593:4 (agrees that determination needs to be "nuanced and biologically informed approach to an offset") (McIvor).
[238] Day 8 Tr. at 1637:18-21 (McIvor); *see also id.*, at 1612:5-12 (ferruginous hawk ranges expanding because available prey is becoming scarcer) (McIvor).
[239] Day 5 Tr. at 934:23-935:3 (Jansen). One bird was observed flying in Webber Canyon in 2023, but the last bird observed physically on a nest in the Project area was in 2019. *Id.; see also id.*, at 955:14-21 (Jansen).
[240] Day 8 Tr. at 1601:24-1602:8 (McIvor); *see also* Day 5 Tr. at 954:10-16 (Applicant has not proposed setbacks at all historical nests, "because simply some of them are simply not on the landscape anymore") (Jansen); *id.*, at 991:21-992:2 ("[M]ajority of historical nests in the WDFW PHS database are considered gone, so no longer on the landscape, or in remnant condition, which is essentially defined as a scattering of sticks on the ground.") (Jansen). Additionally, "the occupancy rates of territories within the Horse Heaven Hills are below the statewide average." *Id.*
[241] Ritter Dep. at 91:11-19. Note that Mr. Ritter is clearly uninformed about the project or its potential impacts on wildlife. He repeatedly defers to Jason Fidorra and James Watson on specific issues. *See*, *e.g.*, Ritter Dep. at 68:21-24, 70:4-10, 71:2-5, 74:6-11, 75:15-23, 83:12-14, 84:2-6, 94:12-15, 126:13-16, 145:23-146:3, 1497:16-18 (deferring to Jason Fidorra); *see also id.*, at 27:13-19, 70:4-10, 74:6-11, 83:12-21, 84:10-24, 92:8-15, 94:21-24, 98:16-25, 99:1-3, 104:12-20, 105:408, 126:10-16, 146:5, 147:16-18 (deferring to James Watson). He

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acknowledging that the relevant nests may have gone unoccupied for more than two or three *decades*.[242] By contrast, with regard to historic nests,[243] Mr. McIvor very reasonably suggested that a process be established for identifying historic nests and determining whether there was any likelihood those were likely to be reused by ferruginous hawks.[244] Consistent with Mr. McIvor's approach, ***sixth***, the Applicant is proposing that the Project area be surveyed for nesting raptors for five years after construction.[245]

While the Applicant absolutely recognizes it has some responsibility to minimize the Project's impact on ferruginous hawks, it bears no responsibility for recovering the species or for restoring habitat that has been lost because of unrelated human activity. Certainly, it has no obligation to restore habitat lost due to the County's complicity in authorizing and permitting sprawling residential development on valuable shrub-steppe.[246] Nonetheless, WDFW is currently advocating that the Project be completely redesigned based on the unsupported theory of recovery of a species that has not nested in the area in four years, faces far more significant threats, and that in any case will almost certainly never return to the Project area in meaningful numbers.[247] Despite its recommendation that the Project be

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was unaware that the Applicant had submitted a Habitat Mitigation Plan. *See also* Ritter Dep. at 95:4-15. He did not know that the Applicant has proposed monitoring for ferruginous hawk activity. *Id.*, at 99:4-13. He could not say what protections would be afforded to endangered species. *Id.*, at 101:19-23 ("Depends. Federal species sometimes come with certain protections. State species, I'm not sure, but I don't believe there's a whole lot.").

[242] Ritter Dep. at 91:11-19.

[243] Note that there are no active ferruginous nests in the project area. *See* Day 8 Tr. at 1600:24-25 (McIvor). By the same token, McIvor could not say how many historic nests are present. He estimated there may have been 10-12 over a period of decades. *Id.*; *see also id.,* at 1600:19-23; Watson Dep. at 119:19-122:8 (Watson cannot say how many of the 16 historic territories within the project area have been occupied in the last two years and would not disagree if told that number was zero).

[244] Day 8 Tr. at 1602:1-8; *see also id.*, at 1615 (WDFW could be involved in process of evaluating whether historic nests could be viable for reoccupation) (McIvor)

[245] Day 5 Tr. at 971:4-9 (Jansen).

[246] *See*, *e.g.*, Ritter Dep. at 164.

[247] *See*, *e.g.*, Watson Dep. at 51:14-31 (it is not enough to protect areas acknowledged to be unoccupied; those areas should be "not just protected but even [be] improved [in] the quality, that needs to be maintained ***and improved*** in order to have those territories reoccupied to be able to recover the species" (emphasis added)).

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redesigned to avoid hypothetical impacts to the ferruginous hawk's historic and potentially obsolete range areas, the State has not itself acted to protect the species, nor has it updated its ferruginous hawk recovery plan or provided any funding to support the species' recovery.[248]

Climate change, too, poses a "giant" threat to both the ferruginous hawk and its prey. WDFW Research Scientist James Watson testified that climate change will lead to a significant loss of range for ferruginous hawks.[249] Mr. McIvor agreed, testifying that the Project's risk of contributing to ferruginous hawk declines "does need to be balanced against the fact that this project will address … climate change, which is also impacting the bird."[250] By asking EFSEC to impose potentially Project-killing conditions, WDFW is letting the perfect — not only minimizing impacts but also anticipating some future, theoretical species recovery — be the enemy of the good, reducing the impacts of climate change on ferruginous hawks and many other species, including humans.

The Applicant proposes a better, scientific approach through protection and restoration of habitat in an historically used nest location, the use of artificial nest platforms to boost population numbers, vegetation with native grasses under solar panels, data-supported buffers around historical nests, and at least five years of post-construction nest activity monitoring, to facilitate adaptive management techniques. In the unlikely event such monitoring suggests ferruginous hawks have returned to the area, with the help of the TAC, additional measures, including adaptive management, can be deployed to ensure protection of this elusive species.

3. Pronghorn antelope are neither threatened nor endangered; still, Applicant has mitigated for any potential adverse impact to the species.

Pronghorn antelope are a reintroduced species that are not listed as endangered or

[248] Ritter Dep. at 102:25-103:10. Note, however, that James Watson testified that a recovery plan was prepared in 1996 but that it has not been updated since that time. Watson Dep. at 30:3-18.

[249] Watson Dep. at 83:1-16; *see also* Day 8 Tr. at 1578:3-5 (McIvor agrees that climate change poses "giant threat"); *id.*, at 1584:7-14 (McIvor); Watson Dep. at 112:11-14.

[250] Day 8 Tr. at 1645:1-1646:5 (McIvor).

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threatened on any state or federal list, are not managed by WDFW,[251] and are generally treated as a game species throughout the American West, commonly hunted in many locations. Washington, too, classifies pronghorn as a game species, although currently without a designated hunting season.[252]

Despite protestations from Yakama Nation, the potential effects of the Project on the off-reservation pronghorn antelope population are likely to be minimal, and they are sufficiently addressed in the Application. Although some data has been collected, there are still significant gaps in the scientific community's understanding of the dynamics of pronghorn movement and use of the local habitat.[253] It is clear, however, that gaps in the available data should not delay siting of the Project.[254] For instance, the literature is unclear over whether antelope generally avoid wind facilities, and thus any concern that the Project would suddenly make the area inhospitable to the pronghorn is not substantiated by any data or other scientific evidence.[255]

In fact, the Project as currently designed would have only a minimal impact on pronghorn antelope. Roughly 84-85 percent of the Project is sited on agricultural land that is not the pronghorn's preferred habitat in any case.[256] And based on the data available, it appears pronghorn rarely, if ever, use the area of the Project where fenced solar arrays (the features that pose most likelihood of interference) are proposed.[257] The modifications

[251] Day 6 Tr. at 1183:23-1184:2 (Jansen).
[252] Fidorra Dep. at 124-25; *see also* Day 6 Tr. at 1232:19-20 (Rahmig).
[253] Fidorra Dep. at 58-59 ("We are not familiar exactly where they're fawning, the areas that are important to them for … rearing young, what the biggest threats to them [are] on the landscape. And so there's still a lot that we don't know. … [W]hile we know they're in this project area in the winter and we have incidental observations that they're there at other times of the year, including the spring and summer, we don't know to what extent they are present there."); *see also* Day 6 Tr. at 1209:12-1210:16 (raw data collected by the Yakama Nation must be analyzed, but unlikely that further analysis would prompt Applicant to change its position on pronghorn) (Rahmig).
[254] Day 6 Tr. at 1210:3-1211:20 (Rahmig).
[255] Day 8 Tr. at 1587:2-8; *see also* Day 6 Tr. at 1216:2-9, 1237:9-1238:9 (Rahmig).
[256] Day 6 Tr. at 1231:10-12.
[257] Day 6 Tr. at 1206:5-13 (Rahmig).

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proposed in the Moon Memo would reduce the impact on pronghorn still further.[258] Even Mr. McIvor testified that for mammals other than bats, including pronghorn antelope, the Applicant's proposed mitigation is reasonable and likely to be sufficient[259] and no further mitigation is warranted.[260] If by some chance that assumption proves incorrect, there are many possible mitigation options that a future TAC could recommend.[261]

4. The Technical Advisory Committee is an established tool to address any wildlife impacts through adaptive management; tailored, data-supported solutions; and future technological advancements.

Ultimately, the impacts to local wildlife will not be fully known until the Project is built and put into service. For that reason, a TAC is expected to oversee the effects of the Project and will be in a position to make recommendations to ameliorate any unforeseen negative consequences. The TAC is likely to include resource agencies with relevant oversight responsibilities[262] and can be expected to function over the life of the Project.[263]

The Applicant has proposed to supply wildlife monitoring for the entire life of the Project, and once those results start coming in, future operations can be fine-tuned to address the Project's impacts on multiple species.[264] As an example of how this would work, once the Project is operational, the TAC can craft appropriately tailored, data-driven curtailment strategies for species of concern like bats and ferruginous hawks.[265] Right now, the Applicant can estimate the prevalence of the bat population in the Project area, but it cannot predict with certainty how many bats might be killed until the facility is up and running.[266] Once that information is collected, the TAC can recommend and the operator can implement

[258] Day 6 Tr. at 1231:6-1232:3 (Rahmig).
[259] Day 8 Tr. at 1584:23-25 (McIvor).
[260] Day 6 Tr. at 1190:8-16 (Rahmig).
[261] Day 6 Tr. at 1234:3-12 (Rahmig).
[262] Day 5 Tr. at 970:14-971:10 (Jansen, responding to questions from Chair Drew).
[263] Day 6 Tr. at 1212:12-16 (technical advisory committee, "being seated for the life of the project, is really intended to help manage that uncertainty during project operations") (Rahmig).
[264] Day 5 Tr. at 879:4-880:8 (Jansen).
[265] Day 8 Tr. at 1606:4-21 (McIvor).
[266] Day 5 Tr. at 1023:6-12 (Rahmig).

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targeted curtailment in response to the data.[267] The same is true for the Project's impacts, if any, on the local pronghorn antelope population.[268]

There can be no serious doubt that data-driven decisions are preferable to blanket curtailment.[269] They also can incorporate future developments in technology. For example, technologies are emerging that will employ deterrence, rather than curtailment, as a means of minimizing the Project's impacts on wildlife, particularly bats.[270]

H. The Project complies with all applicable air quality standards and does not pose air quality risks.

RCW 80.50.010 directs the Council to consider whether a project will "promote air cleanliness."[271] Applicant has assessed the potential air quality impacts and proposes numerous mitigation measures.[272]

TCC witness Mr. Krupin raised concerns over the release of fugitive dust during Project construction:[273] he assumes that the entire Project lease boundary will generate construction dust emissions and worries about deferring the mitigation of fugitive dust to the

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[267] Day 5 Tr. at 1035:15-1036:19 (Rahmig).
[268] Day 6 Tr. at 1208:6-1209:3 (Rahmig).
[269] An experiential, data-driven approach is absolutely necessary. To avoid strikes, Watson says there should be no turbine operation at all during the nesting season. Watson Dep. at 70:19-71:1. Moreover, he says it is not enough to shut down turbines in just the hawks' core areas. *Id.*, at 71:24-72:1 ("Yes, they use core areas, but they're also flying around and in and through other areas, so they're exposed as well to operating turbines."). His justification for that extreme position lacks logic demonstrates Watson's unwillingness to entertain even those proposals that would undoubtedly reduce threats to hawks. "[T]heir problem with species identification with the current IdentiFlight technology, that radar can identify but it also misidentifies eagles occasionally flying around turbines, which case you might have a strike that wouldn't have happened had the turbine been shut down during that time." If the curtailment program accidentally calls an eagle by another bird's name, it would shut down the turbine and there would be no strike. *See* Day 5 Tr. at 1036:16-19 (Rahmig).
[270] Day 6 Tr. at 1228:16-25 (Rahmig) ("[T]he acoustic deterrents are being deployed on projects right now. Mostly they're – it's being done in experimental fashion to figure out is it working, and if not, making adjustments, sort of in a research capacity. …[I]t's available now. It will certainly be refined, probably pretty heavily refined in the next three to five years as the data come in from the research projects that are undergoing – are underway.").
[271] RCW 80.50.010(2); WAC 463-62-070.
[272] ASC Secs. 3.2.2, 3.2.3.
[273] EXH-5302_T_REVISED at 97; Day 6 Tr. at 1153:19-1154:1 (Krupin).

local permitting authority prior to construction.[274] Those concerns are unfounded. *First*, Mr. Krupin seems to ignore that dust-generating construction activities will occur only in the micrositing corridors, not the entire lease boundary.[275] *Second*, Applicant proposes several measures to mitigate fugitive dust, including reduced traffic speeds and dust-abatement and erosion control measures.[276] *Third* regulations contemplate the exact framework used in the ASC—that dust control mitigation measures are most appropriately addressed once more specific construction plans are developed.[277] *Finally*, Mr. Krupin's environmental expertise and concerns are questionable at best. Mr. Krupin conceded during live testimony he was merely "familiar" with air quality issues, lacked specific expertise, and could not recall what air permits Scout would ultimately be required to obtain or what air information is required to be in the ASC.[278] When asked by Councilmember Levitt whether TCC has actually engaged in environmental projects in the area, Mr. Krupin replied no, TCC's only work has been "on this project."[279]

V. CONCLUSION

The Horse Heaven Energy Project is large. It *must* be, to make even a dent in the State's renewable energy goals. It has been strategically sited (i) on sub-prime agricultural lands, with which its use is compatible, (ii) avoiding habitat and environmental impacts, (iii) in a viewshed already developed with existing energy infrastructure and residential development. For years, Scout engaged with affected Tribes to understand their concerns and has addressed those concerns through a mitigation agreement and voluntary commitments. The "pressing need" for clean energy ever present, the stage is set for the

[274] EXH-5302_T_REVISED at 100; Day 6 Tr. at 1155:23-1156:2 (Krupin).
[275] *See* ASC at 2-1, 2-5, Table 2.1-1.
[276] ASC at 3-61, 3-62.
[277] Day 6 Tr. at 1152:25-1153:6, 1155:9-1156:7 (Krupin).
[278] Day 6 Tr. at 1151:13-21, 1153:11-18, 1156:3-7.
[279] Day 6 Tr. at 1157:15-1158:10.

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760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

Council to exercise its duties under RCW 80.50.010. Respectfully, Applicant requests the Council grant its request for site certification.

DATED: October 13, 2023.

STOEL RIVES LLP

TIMOTHY L. MCMAHAN
tim.mcmahan@stoel.com
WILLA B. PERLMUTTER
willa.perlmutter@stoel.com
ARIEL STAVITSKY
ariel.stavitsky@stoel.com
EMILY K. SCHIMELPFENIG
emily.schimelpfenig@stoel.com
Telephone: (503) 294-9517

Attorneys for Applicant

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

CERTIFICIATE OF FILING AND SERVICE

I hereby certify that on October 13, 2023, I filed the foregoing **APPLICANT'S POST-HEARING BRIEF** with the Washington Energy Facility Site Evaluation Council through electronic filing via email to adjudication@efsec.wa.gov.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by electronic mail at the email addresses listed on the attached Service List.

DATED: October 13, 2023.

STOEL RIVES LLP

TIMOTHY L. MCMAHAN
tim.mcmahan@stoel.com
WILLA B. PERLMUTTER
willa.perlmutter@stoel.com
ARIEL STAVITSKY
ariel.stavitsky@stoel.com
EMILY K. SCHIMELPFENIG
emily.schimelpfenig@stoel.com
Telephone: (503) 294-9517

Attorneys for Applicant

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480

Service List

AAG Sarah Reyneveld
Attorney General's Office
800 Fifth Avenue, Suite 2000 (TB/14)
Seattle, WA 98104-3188
sarah.reyneveld@atg.wa.gov
CEPSeaEF@atg.wa.gov
Julie.dolloff@atg.wa.gov

Attorney for Counsel for the Environment

Kenneth W. Harper
Aziza L. Foster
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
kharper@mjbe.com
zfoster@mjbe.com

Attorneys for Benton County

J. Richard Aramburu
Law Offices of J. Richard Aramburu, PLLC
705 2nd Ave, Suite 1300
Seattle, WA 98104-1797
rick@aramburulaw.com

Attorney for Tri-Cities C.A.R.E.S.

Ethan Jones
Shona Voelckers
Jessica Houston
Yakama Nation Office of Legal Counsel
P.O.Box 151
Toppenish, WA 98948
ethan@yakamanation-olc.org
shona@yakamanation-olc.org
jessica@yakamanation-olc.org

Attorneys for Confederated Tribes and Bands of the Yakama Nation

STOEL RIVES LLP
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205
Main 503.224.3380 Fax 503.220.2480