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5 BEFORE THE STATE OF WASHINGTON
6 ENERGY FACILITY SITE EVALUATION COUNCIL
7

8 In the Matter of the Application of:

9 Scout Clean Energy, LLC, for
10 Horse Heaven Wind Farm, LLC,
11 Applicant

Docket No. EF-210011

12 YAKAMA NATION'S ANSWER TO
13 APPLICANT'S PETITION FOR
14 RECONSIDERATION

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I. Introduction

24 Nothing in the record supports Governor Jay Inslee's conclusion that Washington State's
25 growing energy needs must be met by building the Horse Heaven Hills Wind and Solar Farm Project
26 ("Project") specific to the enormous size, scale, and location proposed by Applicant, Scout Clean
Energy ("Applicant"). Rather, the Energy Facility Site Evaluation Council's ("Council") record
reflects that the Confederated Tribes and Bands of the Yakama Nation's ("Yakama Nation") is an
overburdened community whose interests will be decimated by the full buildout of the Project.¹ Too
often, the Yakama People have been forced to sacrifice where others have not.² The landscape in and
around Horse Heaven Hills holds meaning to the Yakama Nation – it is sacred. The landscape contains

¹ EFSEC Order No. 892, Adjudicative Order Resolving Disputed Issues, pg. 46, ¶ 42 (April 17, 2024)
("Adjudicative Order). *See also* RCW 70A.02.010(11) and RCW 19.405.020(23).

² EXH_4007_T_CONFIDENTIAL, pg. 4. (C. Wallahee) ("Historically and continuing into today, we have been
asked to give up our lands, foods, and clean water. The dams had a devastating impact on our fishing. Solar is
having a devastating impact on our gathering and wildlife habitat.")

1 their stories; their legends; their foods and medicines; and very likely the bodies of their ancestors.³
2 The landscape holds habitat and wildlife corridors for the Pronghorn Antelope, a culturally significant
3 species to the Yakama Nation which were once extirpated from this land, and to which the Yakama
4 Nation has worked tirelessly to reintroduce.⁴ The landscape is also within the traditional nesting
5 territory of the Ferruginous Hawk, a species placed on Washington State’s endangered species list in
6 2021,⁵ and which holds special meaning to the Yakama People.⁶

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8 The Governor, this Council, and the Applicant have all acknowledged that one of the
9 Council’s primary objectives is “**to preserve and protect the quality of the environment; to**
10 **enhance the public’s opportunity to enjoy the esthetic and recreational benefits of the air, water and**
11 **land resources; to promote air cleanliness; to pursue beneficial changes in the environment; and to**
12 **promote environmental justice for overburdened communities.**”⁷ Furthermore, the Council also
13 correctly concluded that the Energy Facility Site Location Act (“EFSLA”)⁸ “does not address the
14 economic viability of an applicant’s proposal, nor does it address the market demand for power.”⁹
15 Nonetheless, Governor Inslee seeks to do just that by directing the Council to reduce mitigation
16 measures so as “not [to] reduce the generation capacity of the [P]roject.”¹⁰ Promoting environmental
17 justice for overburdened communities should not include requiring those communities to
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21 ³ EXH-4003_T_CONFIDENTIAL at 6-8 (J. Lally).

22 ⁴ EXH_4008_T_REVISED (L. Ganuelas); EXH_4009_CONFIDENTIAL (Pronghorn Reintroduction PowerPoint);
23 EXH_4010_CONFIDENTIAL (Pronghorn Abundance Survey Reports).

24 ⁵ Hayes, G. E. and J. W. Watson. 2021. Periodic Status Review for the Ferruginous Hawk. Washington Department
25 of Fish and Wildlife, Olympia, Washington.

26 ⁶ See e.g. EXH_4005_CONFIDENTIAL at 4 (G. Selam).

⁷ RCW 80.50.010(2).

⁸ RCW 80.50 *et seq.*

⁹ Adjudicative Order at 9 (citing to *Residents Opposed to Kittitas Turbines (ROKT) v. EFSEC*, 165 Wn.2d 275, 197
P.3d 1153 (2008)).

¹⁰ Letter from Jay Inslee, Washington State Governor, to Kathryn Drew, Chair of EFSEC at 5 (May 23, 2024)
 (“Governor’s Reconsideration Letter”).

1 painstakingly gather evidence of highly sensitive sacredly held beliefs, only to have the Governor
2 wholly dismiss it with direction that the Council rely on evidence expressly outside of the record,
3 such as demand for market power, instead.¹¹

4 As has been emphasized extensively throughout the adjudicative process, the Yakama Nation
5 supports responsibly sited renewable energy projects.¹² However, EFSEC has more project
6 applications under review than ever before;¹³ no pet project of the Governor should get to sidestep
7 statutorily required siting considerations nor undercut meaningful mitigation measures because the
8 Governor views it as too big to fail.¹⁴ We therefore call upon the Council when reconsidering the
9 April 29, 2024 Recommendation Package (“Recommendation Package”) to limit their review to
10 information in the record, and to strike a balance that meaningfully protects vulnerable wildlife
11 species, preserves critical habitat, and appropriately addresses the Yakama Nation’s significant
12 cultural resources concerns. To be clear, the Council should be doing more to protect the Yakama
13 Nation’s significant interests impacted by this project; not less.

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15 **II. Arguments**

16 **a. Governor Inslee has frustrated the EFSEC process**

17 Governor Inslee has procedurally jumped the gun and frustrated the Council’s process by
18 issuing the Governor’s Reconsideration Letter directing the Council to reconsider the
19 Recommendation Package before giving the Council the opportunity to resolve the Applicant’s
20 Petition for Reconsideration (“Applicant’s Petition”). In fact, on May 23, 2024 when the Governor’s
21 Reconsideration Letter was issued, the other adjudication parties had not even had the opportunity to
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24 ¹¹ *Id.*

25 ¹² Confederated Tribes and Bands of the Yakama Nation’s Prehearing Brief at 3; Confederated Tribes and Bands of
26 the Yakama Nation’s Post Hearing Brief at 3.

¹³ https://www.efsec.wa.gov/sites/default/files/public/images/State_WithRoads_v7.png (last visited
on May 31, 2024).

¹⁴ RCW 80.50.010; *see also* Governor’s Reconsideration Letter at 3-6.

1 file an answer to the Applicant’s Petition. The Governor’s improper action 1) undermined any
2 appearance that the answers the other parties are legally entitled to file would be meaningfully
3 considered by the Council and Governor;¹⁵ and 2) afforded the Applicant the opportunity to
4 supplement the record with over 300 pages, including untested references to the market need for the
5 Project¹⁶ and unsubstantiated claims related to the Project’s economic viability¹⁷—neither of which
6 are appropriate for the Council to consider. Any directive that the Council should consider economic
7 factors and market need must come from the Washington State Legislature through statutory
8 amendments to EFLSA, not through the Governor’s unilateral prescriptions.

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10 **b. Applicant’s Plea for the Council to Consider the Project’s Feasibility Stands
11 Contrary to Law and is Inconsistent with the Record**

12 Despite the fact that Administrative Law Judge Adam Torem was unwaveringly clear in his
13 direction to the adjudication parties that economic feasibility would not be an issue in the
14 adjudication,¹⁸ once again the Applicant renews its plea for the Council to analyze the economic
15 viability of the Project, this time by raising a convoluted argument that the Final Environmental
16 Impact Statement (“FEIS”) violates the State Environmental Policy Act (“SEPA”) because the
17 modified Project design will not achieve a specified nameplate capacity.¹⁹ This argument
18 demonstrates a shocking lack of forethought on Applicant’s part. It betrays Applicant’s belief that it
19 locked in an aspirational nameplate capacity for the Project without any regard for the mitigation
20 measures that would assuredly be considered for the largest proposed wind and solar farm in State
21 history. Furthermore, the Applicant forfeited their ability to object to this alleged SEPA violation
22 based on the invited error doctrine, which “prohibit[s] a party from setting up an error at trial and then

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¹⁵ WAC 463-30-355.

25 ¹⁶ Applicant’s Petition at 15-21; *Id.*, Exhibit C at 9-10.

26 ¹⁷ *Id.*, Attachment A at 2-3.

¹⁸ Second Prehearing Conference Order (May 29, 2023) at 2; Hearing Transcript Day 7 at 1468.

¹⁹ Applicant’s Petition at 42-43.

1 complaining of it on appeal.”²⁰ The Yakama Nation, Benton County, and Tri-Cities C.A.R.E.S. all
2 filed petitions with the Council to stay or continue the adjudication until the Council issued an FEIS
3 in order to understand the “potential environmental impacts of the Project and any alternative Project
4 designs.”²¹ The Applicant objected to all parties’ motions, stating that “SEPA regulations make clear
5 that an FEIS is *not* a cumulative document that must come after all other internal agency process.”²²
6 Because the Applicant first argued that the FEIS did not need to be issued before the adjudication,
7 and therefore could be devoid of analyzing any modification recommendations derived from that
8 process, it cannot now argue that the FEIS is insufficient for that very reason.

9 Second, should the Council be persuaded by the Applicant’s argument regarding Project
10 feasibility considerations, the record is wildly inconsistent on what that even means. Given the size
11 of the Project, it is not surprising that Scout’s own representatives have acknowledged the possibility
12 of moving forward with a variety of significant Project modifications.²³ Seemingly, the massive
13 proposed size of the Project gave it the theoretical flexibility to move forward in a multitude of ways.
14 While the Applicant and Governor²⁴ would like to “build as much capacity . . . as we can possibly
15 do,” that interest should not come at the expense of the interests of overburdened communities like
16 the Yakama Nation.²⁵ Hydroelectric power decimated the Yakama Nation’s inherent sovereign and
17 Treaty-reserved interests nearly a century ago, and those burdens continue to this day. Governor
18 Inslee invites the Council to compound these harms by approving the Project at the Yakama Nation’s
19 expense without qualification—an invitation that the Council should roundly reject.

21 ²⁰ *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 823 (2012) (quoting *City of Seattle v. Patu*, 147 Wn.2d 717, 720
22 (2002)).

23 ²¹ Yakama Nation’s Motion for Continuance of Adjudication Deadlines at 2.

24 ²² Applicant’s Opposition to Motions to Stay at 6.

25 ²³ See e.g. Dave Kobus Deposition at 106; 154; <https://www.seattletimes.com/seattle-news/climate-lab/how-an-endangered-hawk-could-topple-plans-for-was-largest-wind-farm/> (last visited May 31, 2024).

26 ²⁴ The Governor mentions his experience as a “life-long birder” when outlining his decision to disregard Ferruginous Hawk buffer recommendations and guidelines developed by Washington State Department of Wildlife experts. Governor’s Reconsideration Letter at 4; see also Applicant’s Petition at 21-24.

²⁵ Dave Kobus Deposition at 154.

1 **c. Governor Inslee’s Decision and Applicant’s Petition Run Counter to Wildlife**
2 **Experts**

3 The Governor and the Applicant would like this Council to overlook Ferruginous Hawk buffer
4 zone guidance from the very agency experts that Washington State charges with making such
5 decisions. The Washington State legislature found that “all fish, shellfish, and wildlife species should
6 be managed under a single comprehensive set of goals, policies, and objectives, and that the decision-
7 making authority should rest with the fish and wildlife commission.”²⁶ In 2021, the Washington State
8 Fish and Wildlife Commission voted to list the Ferruginous Hawk as a Washington State endangered
9 species.²⁷ According to Washington Department of Fish and Wildlife (“WDFW”) expert James
10 Watson, an endangered species status means that the species requires “active management” and
11 maintaining the status quo will likely result in extinction in Washington.²⁸ In order to meet those
12 active management goals, Mr. Watson recommends 3.2 kilometer no-construction buffer zones
13 around historic and active Ferruginous Hawk nesting sites.²⁹ And as we later learned, the 3.2
14 kilometer buffer zone around historic and active nesting sites is actually a conservative approach; a
15 10 kilometer buffer zone is ideal.³⁰ It is the Council’s responsibility to “produce minimal adverse
16 effects on the environment, ecology of the land and its wildlife, and the ecology of the state water and
17 their aquatic life.”³¹ To the extent that the Governor is directing EFSEC to elevate the Applicant’s
18 biased, un-peer reviewed reports above the guidance and authority from WDFW, the Governor is not
19 making that direction with the best available science in mind, and is blatantly breaking from
20 Washington State’s statutory environmental policy goals.³² The health, vitality, and survival of the
21 Ferruginous Hawk must be a primary consideration in the Council’s decision, and that decision must

22 ²⁶ RWC 77.04.013.

23 ²⁷ Hayes, G. E. and J. W. Watson. 2021. Periodic Status Review for the Ferruginous Hawk. Washington Department
of Fish and Wildlife, Olympia, Washington.

24 ²⁸ James Watson Deposition at 29.

25 ²⁹ *Id* at 67.

26 ³⁰ *Id* at 50.

³¹ RCW 80.50.010

³² Governor’s Reconsideration Letter at 4-5.

1 be driven by the science-based, recent WDFW recommendations.³³

2 **d. Governor Inslee’s Decision and Applicant’s Petition Run Counter to Cultural**
3 **Resource Testimony**

4 The legislative policies of EFSLA require the Council to not only consider the Project’s
5 detrimental impacts to the environment, but specifically requires the Council to encourage
6 development that promotes “environmental justice for overburdened communities.” The Council has
7 recognized the existence of the Yakama Nation’s numerous Traditional Cultural Properties (“TCPs”)
8 in and around the Project’s footprint.³⁴ The Governor also acknowledged EFSEC’s identification of
9 numerous impacted tribal resources and rights.³⁵ Even still, the Governor and this Council both seem
10 to struggle with their moral and statutory responsibility to protect the Yakama Nation’s ability to
11 continue practicing its way of life, as all proposed mitigation measures fall woefully short of any
12 meaningful mark. This Council concluded that “more is necessary to further reduce impacts to
13 Yakama Nation TCPs beyond what has been proposed by the Applicant.” A correct statement, but
14 one which is both vague and unenforceable.³⁶ Then shockingly, instead of directing the Council to
15 strengthen cultural resource protections in the recommendation, the Governor instructed the Council
16 to require significantly less protections.³⁷ When reconsidering the Recommendation Package, the
17 Council needs to remember its duties as outlined in EFSLA’s policy directives, and go further to
18 protect the Yakama Nation’s cultural resources in order to hold both the Governor and the Applicant
19 accountable.
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24 ³³ RCW 80.50.010; WAC 463-47-110(1).

25 ³⁴ Adjudicative Order at 19-25.

26 ³⁵ Governor’s Reconsideration Letter at 4.

³⁶ Adjudicative Order, 44, ¶ 21.

³⁷ Governor’s Reconsideration Letter at 9.

1 Furthermore, while the Applicant concedes that it is “wholly appropriate to defer to the
2 Yakama Nation’s traditional knowledge and classification system in determining what is or is not
3 culturally significant to its People,”³⁸ they also unfoundedly imply that the Yakama Nation’s TCPs
4 might not be eligible for TCP status under state law—an issue not argued during the adjudication.³⁹
5 The Applicant’s double speak in acknowledging the Yakama Nation’s ability to define what is
6 culturally important to the Yakama People, while also undercutting that statement by asking the
7 Council to disregard those same TCPs, highlights the Applicant’s cultural incompetency. For this
8 reason, the FEIS recommendation that the Applicant be required to have ongoing engagement with
9 affected Tribes in order to mitigate for cultural resource issues is equally inadequate.⁴⁰
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11 The Yakama Nation’s decision to engage in EFSEC’s adjudicative process reflects the
12 extreme importance the site holds to its People. In order to engage in EFSEC’s Westernized process,
13 multiple cultural taboos have been broken. Sensitive cultural information is not normally shared with
14 non-Members, nor is it met to be transcribed for others to scrutinize.⁴¹ “In Yakama culture, these oral
15 traditions are not to be written down – they are to be conveyed verbally through deep connection to
16 location and orientation to the greater landscape.”⁴² Governor Inslee’s failure to appropriately assess
17 the gravity and loss this Project will have on the Yakama Nation’s cultural resources requires that the
18 Council fulfill their statutory duties by outlining serious, tangible mitigation measures that protect the
19 Yakama Nation’s resource and allow the Yakama People to maintain their cultural into the future.
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24 ³⁸ Applicant’s Petition at 37 (responding to conclusion in the Adjudicative Order at 23).

25 ³⁹ Scout’s Post Hearing Brief at 20-29; Applicant’s Petition at 35-39.

26 ⁴⁰ FEIS at 4-437.

⁴¹ EXH_4003_CONFIDENTIAL at 3.

⁴² *Id.*

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CERTIFICATE OF SERVICE

I, Jessica Houston, certify that on June 3, 2024 I electronically filed the foregoing document with the Energy Facility Site Evaluation Council (“EFSEC”) at Adjudication@efsec.wa.gov.

I further certify that on June 3, 2024 I served the same upon all parties of record and identified EFSEC staff in this proceeding by electronic mail as follows:

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Dated this 3rd day of June, 2024.

/s/ Jessica Houston
Jessica Houston, WSBA No. 60319

Counsel for Yakama Nation