

NO . 81332-9

SUPREME COURT OF THE STATE OF WASHINGTON

RESIDENTS OPPOSED TO KITTITAS TURBINES,
KITTITAS COUNTY, and F. STEVEN LATHROP,

Petitioners,

v.

WASHINGTON STATE ENERGY FACILITY SITE EVALUATION
COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the
State of Washington,

Respondents.

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KITTITAS COUNTY'S REPLY TO AMICUS

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 ORIGINAL

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STATE OF WASHINGTON

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I. STATEMENT OF THE CASE

This case is about who makes land use decisions. It is not about the merits of alternative energy. The vast majority of Amicus' (NVEC) brief is an attempt to confuse this Court by focusing attention upon that which is not at issue here-the merits of alternative energy. NVEC seeks to have this Court abdicate its responsibilities of deciding the legal issues in this matter, and instead bask in the glow of alternative energy. The County does not contest the merits of alternative energy. Indeed, Kittitas County adopted its wind farm overlay zone as part of the county code in 2002, and it has sited two wind farms pursuant to that regulation-one being the largest wind farm in the state, and both being larger than the one at issue in this matter.¹ The County again reminds the Court that the merits of alternative energy are not at issue here, and that what is at issue are questions of statutory interpretation and land use.

II. ARGUMENT

A. Vast Majority of NVEC's Brief Is Irrelevant.

NVEC's arguments are both irrelevant and unsupported by the law. NVEC describes the State's carbon dioxide mitigation standards,

¹ Ch. 17.61A KCC. Wild Horse Wind Farm contains 127 turbines, produces 230 megawatts, and was sited in 2006 by Kittitas County and EFSEC, Vantage Wind Farm will contain 69 turbines, will produce 103 megawatts, and was sited in 2008 only by Kittitas County. See Exhibit "A."

apparently found in Ch. 80.70 RCW, without any explanation as to how this pertains to this case, much less citing to any evidence in the record or other authority that any relevance exists. NWECC concludes that, by adopting this RCW chapter, “Washington became a leader in the nation’s nascent response to the issue of climate change.” NWECC brief at 7. How that gives EFSEC preemption authority over wind farms, demonstrates whether or not the appearance of fairness doctrine was violated, or relates to Supreme Court jurisdiction over this action is unknown.

NWECC then discusses I-937 which was approved after the close of briefing and prior to deliberation in this matter, and so its relationship to this action was never briefed nor evidence supporting or undermining that relationship ever taken. As explained in the County’s rebuttal, this project is actually contrary to the goals of I-937. I-937 requires utilities to provide 15% of their power from renewable resources by 2020. (RCW 19.285.050) As part of its motion for reconsideration, the County (CP 11289, 11290) alleged that the power produced by this project was actually to be sold to California. Neither during the reconsideration briefing nor during the remand from the governor has that allegation been challenged. Hence, the only thing in the record relevant to I-937 is the still-unchallenged allegation that the power generated from this project is to be sold to California. So, contrary to the goals of I-937, not only does

the power potentially generated from this project not appear available for Washington energy needs or the needs of Washington utilities in meeting their legal obligations under RCW 19.285.050, but one of the State's allegedly prime wind farm locations will be occupied by a project sending its power out of the region.²

NWEC then discusses Executive Order 07-02, which was not enacted until after deliberation in this matter, without any explanation of its relevance to this case. At page 10 of its brief, NWEC states that siting power plants has regional implications. How that gives EFSEC preemption authority over wind farms, gives this Court jurisdiction over this matter, or supports the notion that the law was or was not properly applied is never explained.

What NWEC seeks to have this Court do is not legally supported. At page 10 of its brief, NWEC states "The extraordinary policy mandates discussed above require measurable actions now, not actions delayed or deferred to some unspecified time in the future." In short, NWEC argues that the policies around alternative energy compel affirmation of the governor's decision regardless of any legal infirmities that decision, or the

² The County is pointing out that I-937 cannot be used as justification for approving this project, and is not stating that power projects should only be approved whose purchaser is a Washington utility, as that would clearly be a violation of the commerce clause.

process and recommendation leading to it, may possess. NWEC's argument is that the law should not stand in the way of alternative energy. Neither lack of jurisdiction, misapplication of law, nor violation of appearance of fairness should create an obstacle to alternative energy, according to NWEC.

NWEC sites no authority for this proposition, and this Court should therefore refuse judicial consideration of this argument. It is not the job of a court to search for authority for a party's arguments that are unsupported by authority. *Orwick v. Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). Without citation to authority, it is presumed that none exists and the issue will not be judicially considered. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). NWEC cites no authority for its argument that legal infirmities should not stand in the way of alternative energy, and so it is presumed that none exist, and this Court should refuse judicial consideration of anything contained in NWEC's brief.

B. NWEC's Challenge To County's Interpretation of Ch. 80.50 RCW Unsupported by Authority and Unworthy of Consideration.

NWEC's argument regarding the interpretation of Ch. 80.50 RCW is not supported by the law. NWEC argues that the County's interpretation of Ch. 80.50 RCW is strained and absurd. First it

mischaracterizes the County's argument as being that EFSEC lacks authority over "alternative energy facilities." NWEC brief at 11, 12. The County's central argument (County's brief at 18-28, County's rebuttal at 10-18) is that wind farms do not fit within the statutory definition of "energy facilities." NWEC's urging the Court to "avoid such a literal reading" (NWEC brief at 12) concedes the point. NWEC's reliance upon *State v. Elgin*, 118 Wn.2d 551, 825 P.2d 314 (1992) is misplaced as that case does not involve preemption. The law regarding potential preemption of otherwise constitutional regulation by municipalities is far more stringent. "Municipal ordinances are presumed constitutional and a challenger bears a heavy burden of showing otherwise...A statute will not be construed as taking away a municipality's power to legislate unless that intent is clear and expressly stated." *Lawson v. City of Pasco*, ___ Wn.App. ___, 181 P.3d 896, 898 (Div. III April 24, 2008); *see also Weden v. San Juan County*, 135 Wn.2d 678, 695, 958 P.2d 273 (1998); *Rabon v. City of Seattle*, 135 Wn.2d 278, 287, 291, 957 P.2d 621 (1998). As the County has pointed out (County's brief at 18-28, County's rebuttal at 10-18), Ch. 80.50 RCW does not clearly, expressly, or unambiguously state that wind farms are "energy facilities" over which EFSEC has siting jurisdiction and/or preemption authority.

NWEC's argument (NWEC brief at 11, 12) that the plain reading of Ch. 80.50 RCW yields "unlikely, absurd, or strained consequences" is unsupported by the record or legal authority, and, under *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) it should therefore be assumed that no such authority exists and judicial consideration should be refused.

There is no citation to the record or authority for the proposition that the Legislature meant to include wind farms in the definition of "energy facilities" and that an interpretation of the statute excluding them is "unlikely, absurd, or strained." There is no citation to the record or authority for the proposition that wind cannot exclusively power any of the "energy plants" described in RCW 80.50.020(15) and therefore the plain reading of the statute yields an "unlikely, absurd, or strained" result.

There is no citation to the record or authority for the proposition that it is "unlikely, absurd, or strained" to think that the Legislature actually meant to limit EFSEC's authority to the "energy facilities" plainly described in the statute. Without any citation to authority that anything about the plain reading of these statutes yields an "unlikely, absurd, or strained" result, under *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), it is presumed that no such authority exists and judicial consideration of these arguments or positions is withheld.

The argument by NWEA that wind farms should be written into parts of Ch. 80.50 RCW, where they are not clearly, expressly, or unambiguously present, is an invitation for the judiciary to legislate-- something not countenanced by the law. “[T]he court has no legislative power, but is strictly limited to enforcing the law as it finds it.” *Eggert v. Ford*, 21 Wn.2d 152, 160, 161, 150 P.2d 719 (1944). “[C]ourts must interpret statutes as written and may not add or move language, even if we believe the legislature intended a different result.” *Cascade Floral Products, Inc. v. Dept. of L&I*, 142 Wn.App. 613, 621, 177 P.3d 124 (2006). “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). As the County has demonstrated (County’s brief at 18-28, County’s rebuttal at 10-18), wind farms are not clearly, expressly, or unambiguously “energy facilities” under Ch. 80.50 RCW, and encouragement to essentially rewrite the statute to place wind farms within the definition of “energy facilities” is an invitation to prohibited legislation by the judiciary in the guise of statutory interpretation. Under *Cascade Floral Products*, even if the Court believes that the legislature intended a different result, the Court “may not add or move language” to or in the statute. 142 Wn.App. at 621.

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C. Land Use Decisions To Be Locally Made.

On page 12 of its brief, NWEC expresses, without citation to authority, what can only be described as a sense of utter horror at the idea that land use decisions would be made locally. The state constitution, Art. XI §11, however, essentially guarantees that land use decisions are locally made. It states that any county “may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”

D. There Is Energy Without EFSEC.

NWEC essentially argues (NWEC’s brief at 1, 3, 5, 6, 12) that without EFSEC, there would be no production of energy from alternative resources and that the State would lack “abundant energy at a reasonable cost.” At page 6 of its brief, NWEC states “Ultimately, assurance to other utilities that the state’s siting authority and one-stop permitting process remain intact may encourage further energy facility development, a benefit rebounding to the consumers, who await abundant, affordable, clean, renewable power.”

This is a curious position to take given NWEC’s description of the current energy market in Washington and its evaluation of EFSEC’s performance. At page 3 of its brief, NWEC urges the Court to take judicial notice of a current “energy crisis” characterized by a lack of

abundance and affordability. On page 4 of its brief, NWECC, after explaining that the legislative intent in forming EFSEC was to ensure the “abundance and affordability” of energy, stated that “Neither of those elements—abundance or affordability—are any more available in today’s economy than they were at the time the legislature first enacted RCW 80.50 in 1970.” Essentially, NWECC, a self-described (NWECC brief at 2-3) entity with expertise on the subject of energy, evaluates EFSEC as having failed for the entire 38 years of its existence to have any effect upon the core reason it was created, and that there exists a current energy crisis centrally characterized by qualities evidencing that failure. How NWECC can then urge, as it does on page 6 of its brief, that “Expedited judicial review of this case and a timely decision upholding the governor’s approval of the project will affirm and fulfill the legislature’s interest in ensuring provision of abundant energy at reasonable cost” is impossible to understand.

This notion that, without EFSEC, power would not be generated from alternative sources, besides being without citation to authority, is objectively false and contrary to the history of alternative energy in this state. Kittitas County has recently sited a wind farm without EFSEC involvement, which is the second one the County has sited, both of which

are larger than the project at issue here.³ As of the end of 2007, Washington was the fifth largest producer of electricity via wind power in the United States.⁴ Over 1,100 megawatts of electricity was generated by Washington's nine (9) operational wind farms.⁵ Of these nine (9) operational wind farms, only one (1) had any EFSEC involvement in its siting-the Wild Horse Project which was jointly sited by EFSEC and Kittitas County.⁶ Hence, every wind farm in this state, except one, was sited pursuant to local land use regulations without EFSEC involvement, and even the exception was only jointly sited by EFSEC. Said another way, in the state that produces the fifth most power from wind farms in the country, EFSEC was not completely responsible for siting any wind farms, local land use regulation was. This is consistent with our State's Constitution Art. XI §11, and belies NWEA's argument that we will literally fall into the dark ages without EFSEC.

///

³ Attached hereto as Exhibit "A" is a true and correct copy of an article from the Ellensburg Daily Record from May 7, 2008 describing the siting of the new wind farm. Similarly, attached hereto as Exhibit "B" is a true and correct copy of an article from the Seattle Times from April 24, 2008 describing a power generating plant run by biomass that has no EFSEC involvement.

⁴ See Exhibit "C" which is a true and correct copy of a chart downloaded from the American Wind Energy Association's website (www.awea.org) on June 11, 2008.

⁵ See Exhibit "D" which is a true and correct copy of a chart downloaded from the American Wind Energy Association's website (www.awea.org) on June 11, 2008.

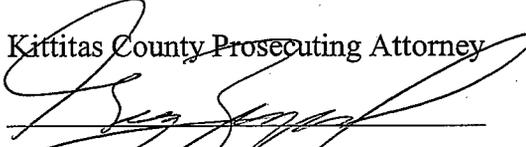
⁶ See Exhibit "E" which is a true and correct copy of a page downloaded from EFSEC's website (www.efsec.wa.gov) on June 11, 2008.

III. CONCLUSION

The vast majority of the discussion in NVEC's brief is irrelevant to the issues in this case, and the lack of citation to record or authority precludes judicial consideration of propositions put forward. Wind Farms are not clearly, expressly, or unambiguously "energy facilities" within the definition of Ch. 80.50 RCW and NVEC's arguments to the contrary are not supported by the law and are invitations to improper judicial legislation. The Constitution of this State establishes that land use decisions are within the authority of municipalities. Energy from alternative sources is not only actually being produced without EFSEC participation, but EFSEC has had insignificant participation in the siting of the State's wind farms, virtually all of which have been sited pursuant to local land use regulations. The County is entitled to the remedies it seeks.

Respectfully submitted this 12 day of June, 2008.

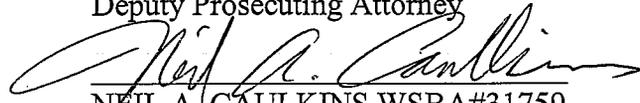
Kittitas County Prosecuting Attorney



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Attorney for Kittitas County

County approves Vantage wind farm

Construction of 69 turbines could start in October

By **MIKE JOHNSTON**
senior writer

The 69-turbine, \$250 million wind farm proposed for seven miles west of Vantage was approved Tuesday by Kittitas County commissioners, and construction at the site could start in October.



Mike Logsdon

Commissioners Mark McClain and Alan Crankovich OK'd a final version of a development agreement with Invenergy Wind North America LLC after making minor changes to some of its provisions.

Before a wind-farm building permit can be issued to the Chicago-based energy company, a list of requirements in the agreement must be met, said Dar-ryl Piercy, director of county Community Development Services.

Piercy, before commissioners approved the agreement, said four structures found to be within the half-mile setback requirement from planned turbine locations have been analyzed for sound and sight impacts.

He said the impact is rated to be less than moderate for each structure, and commissioners agreed that moving of turbine locations is not needed.

See *Wind farm*, Page A3

Burning at both



Three firefighters head west from Observatory Road near the origin of the Manastash a blaze in this picture taken last summer.

DNR funds cut, firefighters ha

By **CHANCE EDMAN**
staff writer

A slowing Northwest timber industry and fewer firefighters are stretching state wildfire resources in Kittitas County.

The state Department of Natural Resources recently added 80,000 acres of land to its 12.7 million acres of statewide wildfire coverage area, but that isn't the problem.

DNR's land management activity is funded by revenues from logging. The state makes estimates every two years on the projected revenue from the timber industry, but when the

people around, but we haven't lost any," Boyum said. "We have some positions we're choosing not to fill. It's a belt-tightening move."

The funding cuts, combined with a shortage of firefighting recruits, may mean parking some fire trucks this summer, according to fire management forester Dave Brown. Colleges are prime territory for seasonal firefighters, Brown says, especially in the natural resource departments. But by paying \$9.09 an hour, which is set by the state Legislature, DNR is having some difficulty luring college students this year.

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WIND FARM

Continued from Page A1

The structures included the state rest area at Ryegrass Hill, which is 1,200 feet from the nearest turbine, and three structures along Vantage Highway, with the closest structure at 1,400 feet from a turbine.

The approval of the wind farm located 15 miles east of Ellensburg between Vantage Highway and Interstate 90 is the first project proposed within the county's 500-square-mile wind energy overlay zone. The zone is an area on the county's east end that is pre-identified as being generally compatible for wind farms.

Commissioner Alan Crankovich, after the approval, said the county put a thorough wind farm review process in place "and it worked."

"This shows we are not anti-wind farm," Crankovich said. "We will do our part in supporting alternative energy development."

Commissioner Mark McClain said he was "excited to see the new county process work judiciously and expeditiously."

Mike Logsdon, Invenergy's director of development, said construction at the site could start in October or November, with possible completion in May or early June 2009.

The project is on ridgetops about three miles southwest of the existing Wild Horse wind farm owned by Puget Sound Energy.

He said work may begin earlier if an agreement with Puget Sound Energy that allows power from the Invenergy wind farm to use existing PSE power lines is completed sooner.

Logsdon said Invenergy is negotiating with Pacific Northwest utilities on purchasing power from the project that has a maximum 103-mega-

watt generation capacity.

"The county staff and commissioners did a good job at presenting fair and reasonable conditions in the development agreement," Logsdon said. "It appropriately protects the county and puts reasonable expectations on the project."

He said if construction goes as planned, the local work will coincide with Invenergy's Boardman, Ore., wind farm now under construction that is due for completion in December.

Invenergy continues to plan for a second wind farm within the county's wind energy overlay zone, but Logsdon declined to indicate its size or exact location. He did say negotiations are under way with property owners to secure property leases for the project.

Commissioners will sign the amended development agreement after Invenergy officials sign it. County Planning Commission members earlier recommended approval of the project.

HAPPY BIRTHDAY

May 7

Alena Camarata
 Zackary Daviston
 Jenni Day
 Kelly Evans
 Lili Lulu Mangels Geyer
 Michelle Rentz Goldsmith

When is your birthday or the birthday of a loved one? Let us know and we'll publish it. Please send birthday announcements before noon the day before the birthday. Just call 925-1414 or e-mail birthdays@kvnews.com.

IN BRIEF

ELLENSBURG

Composer's concert set

Lillian Yang, a departing graduate student at Central Washington University will present a retrospective of her works during the CWU Composer's concert scheduled at 7 o'clock tonight at the Music Recital Hall.

The free concert showcases student compositions in a variety of genre and will include a pre-concert brass fanfare in the foyer of the music building.

ROSLYN

New city hall hours

Roslyn City Hall is now open from 8 a.m. to 5 p.m. Monday through Thursday but closed on Fridays.

The temporary change is expected to last approximately three months.

While the number of days the office is open has been reduced, the office will actually be open to the public two more hours each week than under the previous schedule.

—staff reports

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 nom this Mother's Day with a
 our salon. It makes the perfect gift!

Our son, *Mike Chambers* was injured in a chain saw accident April 23rd in Thorp. Mike recently opened Lazy M Western Furniture in Roslyn. An account has been established at Wells Fargo Bank to help the family with expenses. Any donation would be greatly appreciated. Thank you for your thoughtfulness.

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 Chief John Sir
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 following calls for emerger
 April 27 - May 3

Emergency Medical Services	45 - 4 motor ve
Fire	7
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Rescue	0



EXHIBIT

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Thursday, April 24, 2008 - Page updated at 01:41 PM

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Puget Energy taps dairy manure as power source

Puget Sound Energy says it has an agreement with a Mount Vernon company to produce electric power from manure from dairies.

The deal with Farm Power Northwest could generate enough power for 1,000 households or a city the size of LaConner.

The Bellevue utility will purchase the electricity and the resulting renewable energy credits.

The cow manure will be processed in a digester that produces methane gas to fuel generators. Byproducts are more environmentally friendly than unprocessed manure.

Farm Power says it has manure commitments from four dairies and is building a digester near Mount Vernon. President Kevin Maas says it should be a long-term source of renewable energy and of additional income for dairies.

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EXHIBIT "C" Market Trends: All About Growth

World's Largest Wind Power Market: U.S.

The U.S. led the world in wind power installations for the third year in a row in 2007. Global wind capacity increased by more than 20,000 megawatts (MW), with 5,244 MW installed in the U.S. Spain and China were the second and third largest markets last year with 3,515 MW and 3,449 MW of wind power capacity added respectively. All three broke the single-country record for new wind power installed in one year, set in 2002 by Germany (3,244 MW).

America's Largest Wind Power Market: Texas

Wind power development in Texas continues to outstrip the rest of the country, with 1,618 MW added in 2007, the most of any state by far, and another 1,200 MW under construction as of early 2008.

Competitive, Vibrant Market

The U.S. wind energy market is very competitive, attracting new players and providing growth opportunities in all sectors of the industry. For example:

- Over 15 utility-scale wind turbine manu-

facturers are selling turbines to the U.S. market in 2007, up from only six in 2005.

- In 2007, 15 developers accounted for over 80% of the market. In 2005, nine companies accounted for a similar market share.

Larger Turbines

The average wind turbine installed in 2007, at 1.6 megawatts (1.6 MW) of capacity, is twice as powerful as the average wind turbine installed in 2000 (0.76 MW). The largest wind turbines installed in the country, in California and Texas, have a capacity of 3 MW per turbine.

Higher Costs Hitting All Power Technologies

Worldwide consumption of raw materials and other factors are driving up capital costs for all electricity generating technologies, including wind turbines. However, wind power is immune to increases in the price of fuels needed to run other power plants (such as natural gas, coal and uranium, all of which have been increasing recently). The Bottom Line: Diversifying an electricity portfolio with wind power and other renewables helps protect against fuel price volatility.

Gigawatt-Size Projects

At least three gigawatt-size wind projects were proposed in the U.S. as of early 2008, one in California and two in Texas. Such gigawatt-size projects

1. are evidence of the strong interest in investing in wind power;
2. take advantage of the nation's natural attributes (wide-open spaces and a vast wind resource), allowing large projects to capture economies of scale; and
3. help drive investment in transmission, which is needed to bring ever-larger amounts of wind power to market.

Supply Chain Challenges

The wind power industry is facing shortages of wind turbine components, as demand for wind power continues to increase in the U.S. and worldwide. To foster development of a robust supply chain here in America, the U.S. government needs to provide steady policy support, including a long-term extension of the production tax credit (PTC) and a national renewable electricity standard (RES). Long-term incentives would unleash billions of dollars in investment.

Total Installed Wind Power Capacity: Top 15 States

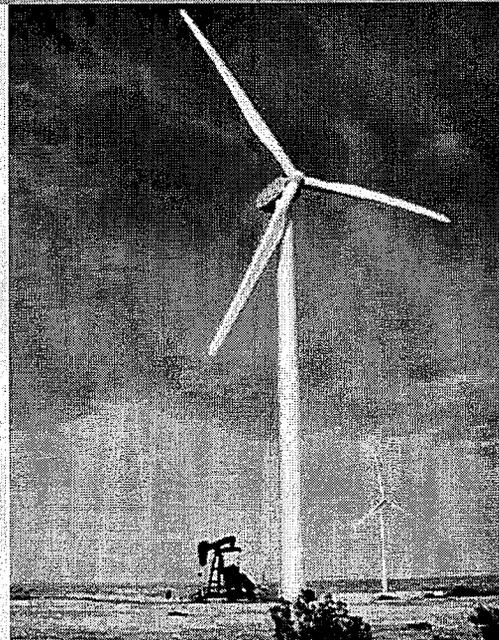
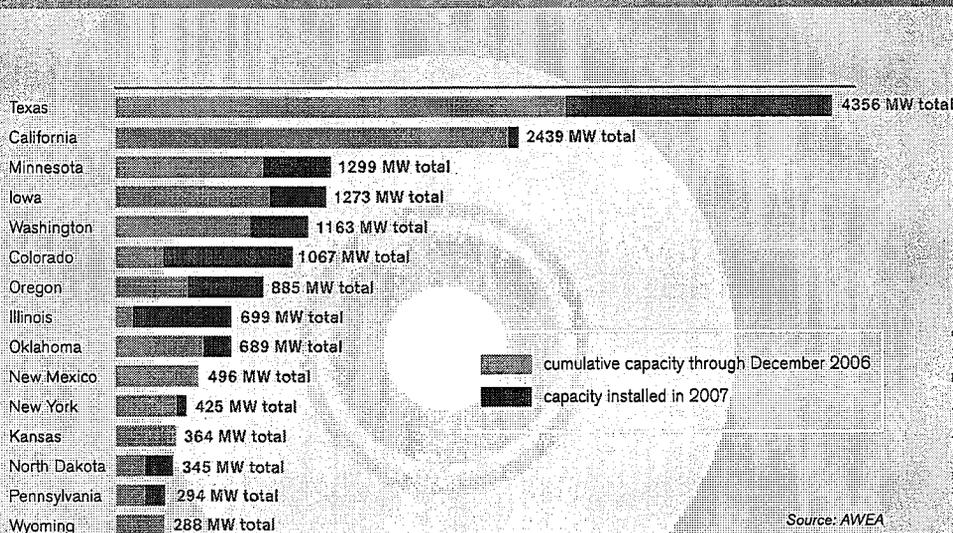
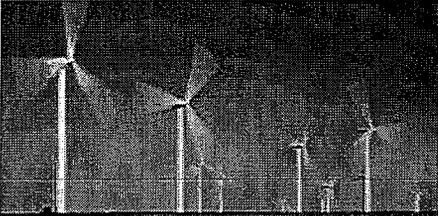


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resources

U.S. Wind Energy Projects - Washington

(As of 03/31/2008)

State:

Power Capacity - Existing projects (MW):	1195.38
Power Capacity - Projects under construction (MW):	94
Rank In US (by Existing Capacity):	5
Rank In US (by Potential Capacity):	24
Potential Capacity (in MW):	3740
Annual Energy (in billion kWh):	33



Status:

Sort table by a specific column by clicking on its heading.

areas of interest

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Name	Location	Power Capacity (MW)	Units	Turbine Mfr.	Developer	Owner	Power Purchaser	Year Online
Nine Canyon III		32.2	14	Siemens	Energy Northwest/RES Americas	Energy Northwest	Energy Northwest	2008
White Creek Wind Power Project	Klickitat County	204.7	89	Siemens	Last Mile Electric Cooperative	Last Mile Electric Cooperative	Last Mile Electric Cooperative	2007
Marengo Wind Farm	near Dayton	140.4	78	Vestas	RES America	PacifiCorp	PacifiCorp	2007
Big Horn Wind Power Project	Klickitat County	199.5	133	GE Energy	PPM Energy	PPM Energy	Modesto-Santa Clara-Redding Public Power	2006

Wild Horse Wind Power Project	Kittitas County	228.6	127	Vestas	Horizon Wind Energy	Puget Sound Energy	Agency Puget Sound Energy	2006
Hopkins Ridge Wind Farm		149.4	83	Vestas	RES America	Puget Sound Energy	Puget Sound Energy	2005
Nine Canyon Wind Farm, phase II	Benton County	15.6	12	Bonus	Energy Northwest	Energy Northwest	Energy Northwest	2003
Nine Canyon Wind Farm	Benton County	48.1	37	Bonus	Energy Northwest	Energy Northwest	Energy Northwest	2002
Stateline Wind Energy Project	Walla Walla County	176.88	268	Vestas	FPL Energy	FPL Energy	PPM Energy	2001

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EXHIBIT "E"

Under Review:

- [Pacific Mountain Energy Facility \(IGCC\)](#)
- [Desert Claim Wind Power Project \(Wind\)](#)

Potential Site Study:

- [Wallula Energy Resource Center \(IGCC\)](#)

Licensed and Permitted:

Currently Operating

- [Columbia Generating Station \(Nuclear\)](#)
- [Chehalis Generation Facility \(Natural Gas\)](#)
- [Wild Horse Wind Power Project \(Wind\)](#)

Under Construction

- [Satsop Combustion Turbine Project \(Natural Gas\)](#)

Permitted but construction not started:

- [Kittitas Valley Wind Power Project \(Wind\)](#)
- [BP Cherry Point Cogeneration \(Natural Gas\)](#)

Once Licensed but canceled by proponent:

- [Sumas Energy 2 Generation Facility \(Natural Gas\)](#)
- [Wallula Power Project \(Natural Gas\)](#)

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