

No. 81332-9

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 APR 17 P 4:13

SUPREME COURT OF THE STATE OF WASHINGTON BY RONALD R. CARPENTER

RESIDENTS OPPOSED TO KITTITAS TURBINES and
F. STEVEN LATHROP,

CLERK *[Signature]*

Petitioners,

v.

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

Respondents.

BRIEF OF PETITIONERS RESIDENTS OPPOSED TO KITTITAS
TURBINES and F. STEVEN LATHROP

James C. Carmody, WSBA 5205
VELIKANJE HALVERSON, P.C.
405 E. Lincoln Avenue
Yakima, Washington 98901
(509) 248-6030

Jeff Slothower, WSBA 14526
LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP
P.O. Box 1088
Ellensburg, Washington 98926
(509) 962-8093

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
A. Statement of Error.....	1
B. Issues Pertaining to Assignment of Error.	1
III. STATEMENT OF THE CASE.....	2
A. Application and EFSEC Review Process	6
B. Kittitas County Review Process	9
C. EFSEC Adjudicative Process.....	14
D. Review and Decision by Governor.....	15
IV. ARGUMENT.....	17
A. Standard of Review – Administrative Procedures Act.....	17
B. The Supreme Court Lacks Original Jurisdiction to Decide the Issues this Case Presents.....	19
C. Thurston County Superior Court Failed To Take Testimony And Make Factual Determinations On Alleged Irregularities In Procedure Before EFSEC As Required By RCW 80.50.40	23
D. EFSEC Engaged in Improper and Unlawful Procedures.....	25
1. EFSEC Violated Established Appearance of Fairness and Due Process Requirements of Fair and Impartial Hearing.	25
(a) The Appearance of Fairness Doctrine Requires that Adjudicative Hearings Are Fair in Fact on Appearance and That Decision-Makers are Impartial and Free of Undue Influence	26
(b) Department of Natural Resources Had a Direct Pecuniary Interest in the Application and EFSEC Participation Violated Appearance of Fairness Doctrine	28
(c) Department of Community, Trade and Economic Development (CTED) Was Granted Intervenor Status and Participated in Hearings as Project Advocate.	33
(d) EFSEC’s Chairman, James O. Luce’s Violation of the Appearance of Fairness Doctrine.....	34
E. Preemption of Kittitas County Land Use Determinations is Unlawful and Outside Scope of Authorized Authority	35
1. RCW 80.50.110(2) Does Not Authorize Preemption of Local Land Use Decisions On Alternative Energy Facilities	38

2.	Governor’s Exercise of Preemption Authority Was Based on Erroneous Legal Interpretation and Was Not Supported by Substantial Evidence.....	40
a.	Background.....	40
b.	The Standard of Review for Preemption Determinations.....	42
c.	Preemption Authority May Only Be Exercised In Accordance with WAC 463-28-040	43
	(i) Applicant Failed to Establish Good Faith Effort to Resolve Consistency Issues by Withdrawing From Local Review Processes and Failing to Submit Required Review Documents	44
	(ii) Failure to Reach Agreement	61
	(iii) EFSEC Improperly Considered and Evaluated Alternate Locations Under WAC 463-28-040(3)	64
	(iv) The Interests of the State	66
F.	EFSEC Improperly Exercise Preemption Authority in Conflict with Growth Management Act (GMA)	68
1.	RCW 80.50.110(1) Specifically Recognizes that Subsequently Adopted State Authority Will Prevail Over Conflicting Statutory Provisions Relating to EFSEC	69
2.	State Agencies Are Required to Comply With Provisions of Growth Management Act (GMA) – RCW 36.70A.103.....	72
3.	Growth Management Act (GMA) Specifically Recognizes That Land Use Decisions Are Best Made at The Local Level and Mandates that Substantial Deference Be Afforded Local Decision Makers	74
4.	Preemption Authority Recognizes Deference To Local Laws and Regulations.....	75
5.	Rules of Statutory Construction Regarding Conflicting Statutes Militate in Favor of the Perasive Authority Under Growth Management Act (GMA).....	77
V.	CONCLUSION.....	78

TABLE OF AUTHORITIES

Federal Cases

Klein v. Rossi, 251 F.Supp. 1 (D.N.Y.1966).....45

State Cases

American Continental Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).....38

Buell v. Bremerton, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972).....27, 28

Byers v. Board of Clallam County Commissioners, 84 Wn.2d 796, 529 P.2d 823 (1974).....27

Carrick v. Locke, 125 Wn.2d 129, 143 n.8, 882 P.2d 173 (1994).....30

Chrobuck v. Snohomish County, 78 Wn.2d 858, 868, 480 P.2d 489 (1971).....26

Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 37, 785 P.2d 447 (1990).....71

Citizens to Preserve Pioneer Park LLC v. The City of Mercer Island, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001).....42, 43

City of Des Moines v. Central Puget Sound Growth Management Hearings Board, 97 Wn.App. 920, 929, 988 P.2d 993 (1999).....77

City of Hoquiam v. Public Employment Relations Com'n of State of Wash., 97 Wn.2d 481, 646 P.2d 129 (1982).....28

City of Pasco v. Public Employment Relations Commission, 119 Wn.2d 504, 507, 833 P.2d. 381 (1992).....68

Cobra Roofing Services v. State Department of Labor and Industries, 157 Wn.2d 90, 99, 135 P.3d 913(2006).....40

Cowiche Canyon Conservancy vs. Bosley, 118 Wn.2d. 801, 813-814, 828 P.2d 549 (1992).....69

Department of Highways v. King County Chapter, 82 Wn. 2d 280, 510 P. 2d 216 (1973).....21, 22

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 123 P.3d, 102.....42

Fleck v. King County, 16 Wn.App. 668, 670, 558 P.2d 254 (1977)....27, 32

Fleming v. Tacoma, 81 Wn.2d 292.....26

Gafco, Inc. v. H.D.S. Mercantile Corp., 47 Misc.2d 661, 263 N.Y.S.2d 109 (1965).....45

Guardianship Estate of Keffleler v. State of Washington, Department of Social and Health Services, 145 Wn.2d 1, 32 P.3rd 267 (2001).....28

Harris v. Hornbaker, 98 Wn.2d 650, 656-57, 658 P.2d 1219 (1983).....26

In re Detention of Brooks, 145 Wash.2d 275, 284, 36 P.3d 1034 (2001).76

In re Personal Restraint of Stewart, 115 Wn.App. 319, 75 P.3d 521 (2003).....	76
Lathrop v. State Energy Facility Site Evaluation Council, 130 Wn. App. 147, 151-52, 121 P.3d 774 (2005).....	20
Ledgerwood v. Lansdowne, 120 Wn. App. 414, 420, 85 P.3d 950 (2004).....	20
Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 488, 511, 139 P.3d 1096 (2006).....	72
Narrowview Preservation v. City of Tacoma, 84 Wn.2d 416, 526 P.2d 897 (1974).....	26, 27, 29, 31, 32, 33
Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 179, 157 P.3d. 847 (2007).....	71
North Bend Stage Line v. Department of Public Works, 170 Wash. 217, 219, 16 P. 2d 206 (1932).....	21
Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 913 P.2d 193 (1996).....	32
Percival v. Bruun, 28 Wn. App. 291, 293, 622 P.2d 413 (1981).....	45
Quadrant Corporation v. State Growth Management Hearings Board, 154 Wn.2d 224, 233, 110 P.3d. 1132 (2005).....	42, 78
Raynes v. City of Leavenworth, 118 Wn. 2d 237, 245, 821 P. 2d 1204 (1992).....	26
Robin Miller Construction Co. Inc. v. Coltram, 110 Wn.App. 883, 890...76	
Save A Valuable Environment v. City of Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978).....	26, 29, 31
Schrom vs. Board of Volunteer Firefighters, 153 Wn.2d 19, 24 100 P.3d 814 (2004).....	68
Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969).....	28
Smith v. Whitman, 39 N.J. 397, 189 A.2d 15 (1963).....	45
State ex rel Barnard v. Board of Education, 19 Wash. 8, 52 P. 317 (1898).....	27
State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999).....	30, 31
State v. J.P., 149 Wn.2d 444, 452, 69 P.3d 318 (2003).....	71, 77
State v. Martin, 137 Wn.2d. 149, 154, 969 P.2d 450 (1999).....	24
State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992).....	30
State v. Ryan, 103 Wn.2d 165, 172 691 P.2d 197 (1984).....	46, 50
State v. Smith 144 Wn.2d 665, 673, 30 P.3d 1245 (2001).....	76
State v. Smith 148 Wn.2d 122, 59 P.3d 74 (2002).....	46
State v. Watson, 146 Wn.2d. 947, 954, 51 P.3d 66 (2002).....	38
State v. Whittaker, 133 Wn.App. 199, 135 P.3d 923 (2006).....	44
State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d. 320 (1994).....	71
Swift v. Island County, 87 Wash.2d 348, 361, 552 P.2d 175 (1976).....	28

Tacoma Ass'n of Credit Men v. Lester, 72 Wn.2d 453, 458, 433 P.2d 901, (1967).....	45
Telepage, Inc. v. City of Tacoma Dept. of Finance, 140 Wn.2d 599, 608, 998 P.2d 884 (2000).....	38
Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 126, 118 P.3d 322 (2005).....	72
Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).....	20
Waste Management of Seattle, Inc. v. Utilities and Transportation Commission, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).....	71, 78

Federal Statutes

Wash. Const. art. IV.....	20, 21
---------------------------	--------

State Statutes

Administrative Procedures Act (APA) (RCW Ch. 34.05.....	6
RCW 34.05.425(3)	30
RCW 34.05.570(3)	17, 42
RCW 34.05.570(3)(a)	17
RCW 34.05.570(3)(c)	25
RCW 34.05.570(3)(d)	42
RCW 34.05.573(3)(d)	68
RCW 36.70.3201.....	2, 70
RCW 36.70A.010.....	69, 72, 77
RCW 36.70A.020(11)	70
RCW 36.70A.040.....	73
RCW 36.70A.130.....	73
RCW 36.70A.200.....	70, 73
RCW 36.70A.200(5)	74
RCW 36.70A.320(1)	74
RCW 36.70A.3201.....	75, 77
RCW 47.06.140.....	74
RCW 62A.1-201(19)	45
RCW 62A.1--201(19)	45
RCW 71.09.020.....	74
RCW 80.50.010.....	37, 40, 41, 43, 64, 66
RCW 80.50.020(10)	38
RCW 80.50.020(15)	38, 39, 76
RCW 80.50.020(18)	40
RCW 80.50.030.....	73
RCW 80.50.030(3)	25, 29
RCW 80.50.040(1)	41
RCW 80.50.060.....	36, 38, 72

RCW 80.50.060(2)	75
RCW 80.50.080.....	7
RCW 80.50.090.....	6, 7, 43
RCW 80.50.090(2)	36, 69, 75
RCW 80.50.090(3)	6, 31
RCW 80.50.100.....	18, 31
RCW 80.50.100(1)	6
RCW 80.50.110.....	22, 35, 36, 75
RCW 80.50.110(1)	2, 68, 70, 75
RCW 80.50.110(2).....	2, 36, 38, 43, 71
RCW 80.50.110(i)	36
RCW 80.50.140.....	1, 2, 17, 18, 19, 23, 24, 42
RCW 80.50.140(1)	18, 20, 22, 23
RCW Ch. 36.70A.....	69
RCW Ch. 80.50.....	71, 75

State Rules

RAP 9.7(c)	24
------------------	----

State Regulations

WAC 163-30-010.....	31
WAC 365-195-765(2)	73
WAC 46.28.040(3)	65
WAC 463-18-090.....	6
WAC 463-24-040(4)	66
WAC 463-28-020.....	43
WAC 463-28-030.....	7
WAC 463-28-030(1)	7, 36, 37, 78
WAC 463-28-040(1)	44
WAC 463-28-040(2)	62
WAC 463-30-010.....	6
WAC 463-30-020.....	31
WAC 463-42-362.....	76

I. INTRODUCTION

This case is not a referendum on wind energy. This case is about the Governor's ability to impose one wind energy developer's flawed choice for a wind energy site upon the citizens of Kittitas County and in doing so ignore the law, ignore fundamental and basic issues of fairness and usurp local decision making mandated by the Growth Management Act (GMA).

II. ASSIGNMENTS OF ERROR

A. Statement of Error.

1. Supreme Court erred in exercising original jurisdiction to review site certification decisions under RCW 80.50.140.
2. Thurston County Superior Court erred when it failed to conduct an evidentiary hearing and make findings of fact on alleged procedural irregularities.
3. EFSEC engaged in unlawful or improper procedures in hearing and recommending site certification agreement and preemption for Kittitas Valley Wind Power Project.
4. EFSEC erroneously interpreted and applied review and preemption authority in context of Growth Management Act (GMA).
5. EFSEC and Governor improperly preempted local decision-making determinations.

B. Issues Pertaining to Assignment of Error.

1. Does Supreme Court have original jurisdiction to directly review preemption and site certification by Governor under RCW 80.50.140?

2. Did Thurston County Superior Court fail to comply with the procedural requirements of RCW 80.50.140 by failing to conduct evidentiary hearing and making factual determinations regarding alleged irregularities in procedure?
3. Did EFSEC violate appearance of fairness and due process requirements of fair and impartial hearing?
4. Does RCW 80.50.110(1) supersede the application of Growth Management Act (GMA)?
5. Is EFSEC Required by RCW 36.70.3201 to grant substantial deference to determinations made by local jurisdictions with respect to land use determinations?
6. Does the Governor have authority to preempt local decisions under RCW 80.50.110(2)?
7. Did EFSEC and Governor erroneously apply and interpret preemption requirements of WAC 463-28-040?
8. Is Governor's determination to preempt local land use decision-making supported by substantial evidence?

III. STATEMENT OF THE CASE

Sagebrush Power Partners, LLC ("Sagebrush" or "Applicant")¹ submitted an application to Energy Facilities Site Evaluation Council ("EFSEC") for construction of the Kittitas Valley Wind Power Project

¹ Sagebrush Power Partners, LLC now is a wholly owned subsidiary of Horizon Wind Energy, Houston, Texas. Project ownership was initially Zilkna Renewable Energy, LLC (AR 2). In mid-2005, Goldman Sachs purchased Zilkna and changed the company name to Horizon Wind Energy. (FEIS 2-1). Sagebrush was formed as a Delaware limited liability company for the sole purpose of developing, permitting, financing, constructing, owning and operating the Kittitas Valley Wind Power Project.

("Project" or "KVVWPP"). (AR 1-714).² Sagebrush proposed to develop a wind farm facility with 65 wind turbines and a maximum installed nameplate capacity of 180 megawatts (MW).³ The project site is located on open ridge tops between Ellensburg and Cle Elum, about 12 miles northwest of the City of Ellensburg in Kittitas County. (FEIS 2-9).⁴ The entire project area encompasses 6000 acres with approximately 118 acres required to accommodate the permanent footprint of the proposed turbines and related facilities. (Council Order No. 826, AR 14257-14333). The site is located on a Scenic Byway at the foot of the Stuart Range. Vicinity maps are attached as Attachment A.

The project would utilize a series of three-bladed wind turbines on tubular steel towers to generate electricity. (Council Order No. 826 at 5).

² Thurston County Superior Court has certified the Administrative Record to the Court. EFSEC has prepared and submitted the record through administrative process together with an index. References to the Administrative Record will be by designation of "AR" and the applicable page number.

³ The initial application provided that "... [t]he Project will consist of up to 121 wind turbine generators with a total nameplate capacity of approximately 181.5 MW." (AR 2). The project application included inconsistent references to both the number of turbines and nameplate capacity. Other references included: (1) a project consisting of up to 150 wind turbines with an installed nameplate capacity of up to 205 MW. (AR 64); (2) a project of 121 wind turbines with installed nameplate capacity of up to 200 MW. (AR 58). The original application reflected that the project would implement 3-bladed wind turbines on tubular steel towers each ranging in size from 1.3 MW to 2.5 MW (generator nameplate capacity) (AR 64). The project was revised in 2005 with a reduction in both turbine number and nameplate capacity. (AR 6205-6209). An addendum to the Draft Environmental Impact Statement was prepared and circulated for comment. (AR 6222-6329).

⁴ Final Environmental Impact Statement (FEIS) is found at AR 9710-11285). References to FEIS may be to FEIS page number.

The specific size and type of turbine to be utilized for the project was not disclosed in the application or environmental review process. The final selection of the exact make and model of wind turbine to be used for the project was a function of a number of factors including equipment availability at the time of construction. (FEIS 2-3). Hearing analysis reviewed a "reasonable range" of potential project impacts based upon two alternative scenarios:

- **330-foot Turbine Scenario:** This scenario was represented by turbines with a name plate capacity of approximately 1.5 to 2 MW, resulting in a total name plate capacity of 97.5 to 130MW. Up to 65 turbines would be constructed with turbine location established at time of construction. This turbine scenario assumed a turbine height of 330-feet.
- **410-foot Turbine Scenario:** This scenario represents a project configuration utilizing three MW turbines with a maximum tip height of 410 feet. With an approximate name plate capacity of 3MW each, up to 65 turbines would be constructed for a total approximate name plate capacity of 195MW.

(FEIS 2-4). Turbine height and dimensions are set forth in FEIS Figure 2-2 (Attachment B). Turbines would be arranged in "strings" throughout the project site. Proposed string locations were depicted on FEIS Figure 2-1 (Attachment C). The proposed project contemplated 23 total miles of turbine strings. The length of the nine turbine strings remained constant under the two proposed action scenarios. Turbine strings would be placed

on ridges within the project area. The project site is a checkerboard of public and private properties in proximity to a significant number of small rural residential parcels. (Ownership at time of application is depicted on Attachment B).

The project also included: (1) approximately 13 miles of new roads and improvements to roughly 8 miles of existing roads; (2) approximately 23 miles of underground and 2 miles of overhead 34.5-kilovolt (kV) electrical power lines; (3) two new substations; (4) approximately 5,000 square foot operations and maintenance facility; and (5) up to five permanent meteorological towers. The project site is in an area of considerable rural development and small parcel residential, recreational and farm uses. Parcelization and ownership is depicted on FEIS Figure 2-1.

The project area is zoned Forest and Range and Agriculture-20 under the Kittitas County Zoning Ordinance. (AR 49). Zoning map is set forth as FEIS Figure 3.6-2, Attachment D: (Kittitas County Comprehensive Plan and Zoning Ordinance – AR 715-1254) Sagebrush does not own any of the land but purported to have rights through wind option agreements with private landowners and a long term lease with Washington Department of Natural Resources (DNR). (AR 49). Approximately one-fourth of the turbine site lies on state owned land.

The project is designed to interconnect with the Bonneville Power Administration (BPA) Grand Coulee to Olympia 287-kV and/or the Puget Sound Energy (PSE) Rocky Reach to White River 230-kV electric transmission lines. (AR 48).

A. Application and EFSEC Review Process. Sagebrush Partners submitted its Application for Site Certification (“Application”) to EFSEC on January 13, 2003. (AR 1-714) EFSEC is authorized to process applications and conduct adjudicative hearings on site certification applications. RCW 80.50.090.⁵ Any adjudicative hearing is conducted under the Administrative Procedures Act (APA). RCW 80.50.090(3) and WAC 463-18-090.⁶ Following public hearings, EFSEC reports to the governor with its recommendation on the application for certification and preemption RCW 80.50.100(1).

EFSEC granted intervention status to Washington State Department of Community, Trade and Economic Development (CTED);

⁵ EFSEC is constituted with representatives from state government and one representative from the local jurisdiction. Council representatives participating in the proceeding were: James O. Luce, Council Chair; Richard Fryhling, Department of Community, Trade and Economic Development; Hedia Adelsman, Department of Ecology; Chris Towne, Department of Fish and Wildlife; Judy Wilson, Department of Natural Resources; Tim Sweeney, Washington Utilities and Transportation Commission; and Patti Johnson, Kittitas County. Adam E. Torem, Administrative Law Judge, Office of Administrative Hearings, was retained by EFSEC to facilitate and conduct the hearings.

⁶ EFSEC determined that the Application (No. 2003-01) would be reviewed pursuant to applicable law and regulations in effect on January 13, 2003. Council Order No. 826 – 7. (AR 14172). Adjudicative hearings are conducted in accordance with the Administrative Procedures Act (APA) (RCW Ch. 34.05). WAC 463-30-010.

Kittitas County; Residents Opposed to Kittitas Turbines (ROKT); F. Steven Lathrop; Chris Hall; Renewable Northwest Project (RNP); Sierra Clubs Cascade Chapter; and the Economic Development Group of Kittitas County (EDG).⁷ (AR 14083). Also participating in the proceeding was the Council for the Environment – Michael Tribble. RCW 80.50.080.

EFSEC conducted initial informal meetings and determined that the proposed project was inconsistent with Kittitas County land use plans and zoning ordinances. Council Order No. 776. (AR 14076). Pursuant to WAC 463-28-030(1)⁸, EFSEC directed the applicant to make efforts to

⁷ All interveners participated in the hearing and public processes. Chris Hall withdrew as an intervenor in the proceedings by letter dated May 25, 2005. Council Order No. 816.

⁸ WAC 463-28-030 provides:

If the Council determines during the hearing required by RCW 80.50.090 that the site of a proposed energy facility or any portion of a site is not consistent and in compliance with land use plans or zoning ordinances in effect at the date of the application, the following procedures shall be observed:

- (1) As a condition necessary to continue processing the application, it shall be the responsibility of the Applicant to make the necessary application for change in, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.
- (2) All council proceedings on the application for certification may be stayed at the request of the applicant during the period when the plea for resolution of noncompliance is being processed by local authorities.

resolve existing land use inconsistencies. Council Order No. 776 gave the applicant ninety (90) days to resolve the inconsistencies. Applicant filed a Development Activities Application (DAA) with Kittitas County requesting project approval and designation of the project site as a Wind Farm Overlay in accordance with KCC Ch. 17.61A. On February 9, 2004, applicant filed a Request for Preemption with EFSEC. (AR 3062-3212). Adjudicative hearings on the Kittitas Valley Wind Power Project were postponed at the request of the Applicant. (AR 3791-3792) Council Order No. 804 (AR 14217-14218). The postponement was to allow for the priority of processing another wind farm project - Horizon Wind Energy's Wild Horse Wind Power Project located in eastern Kittitas County.⁹ Council Order No. 826-11(AR 14257-14332). Kittitas County approved the Wild Horse Wind Power Project and Governor Gregoire approved the project on July 26, 2005.

More than a year passed before any substantive activity was taken with respect to the application. On August 22, 2005, the Applicant

-
- (3) The applicant shall submit regular reports to the Council regarding the status of negotiations with local authorities on noncompliance issues.

⁹ Wild Horse Wind Power Project is located in the eastern part of Kittitas County, Washington, approximately ten miles east of the town of Kittitas. The project consists of 127 turbines with a maximum installed capacity of 229 MW. The site consists of approximately 8,600 acres of open range land. The project interconnects to the Puget Sound Energy Transmission System. On August 30, 2005, EFSEC approved the transfer of the site certification agreement to Puget Sound Energy. (Council Order No. 815).

informed EFSEC of its intention to reduce the scope of the Kittitas Valley Wind Power Project and file a new Development Activities Application (DAA) with Kittitas County. Council Order No. 816 (AR 14219-14223).¹⁰ At the request of Kittitas County, Applicant withdrew its Request for Preemption on October 19, 2005. (AR 6159-6164). Notice of the revised application was issued by Kittitas County on December 2, 2005. (AR 6205-6209). An addendum to the draft environmental impact statement was made available on December 22, 2005. (AR 6211-6215).

B. Kittitas County Review Process. Beginning in January, 2006, Kittitas County Board of County Commissioners (BOCC) and its Planning Commission jointly held a series of public hearings on the Kittitas Valley Wind Power Project. Kittitas County had established a specific procedure for review of wind farm resource projects. KCC Ch. 17.61A. (AR 1250-1254). An integrated application and review process included the consideration and determination of four integrated components:

- (1) An amendment to the Comprehensive Plan Land Use Map to designate a uniform resource district;

¹⁰ Applicant originally proposed a project that would have between 121 and 150 turbines. (AR 58 and 64). The number of turbines would be based upon turbine size. 82 turbines were proposed at the largest size of 3MW. The revised project reduced the number of 3MW turbines to 65 turbines. Turbine strings that were removed in the revised proposal were primarily located within the center portion of the property, however, the exact location and ultimate number of Towers remains uncertain.

- (2) A site specific rezone to create a wind farm resource overlay zone;
- (3) Execution of development agreement; and
- (4) Issuance of a wind farm resource development permit.

(AR 1246-1254). Major alternative energy facilities (including wind farm developments) are authorized in four separate zoning districts: Agricultural-20, Forest and Range, Commercial Agriculture and Commercial Forest zoning districts. (AR 1251). These districts represent the majority of rural lands in Kittitas County. The local process had been successfully utilized to process and approve the Wild Horse Wind Power Project.

Kittitas County's wind farm resource overlay ordinance was developed following a full and complete public process.¹¹ An approach was developed for siting of major wind farm facilities based upon highly successful processes utilized for siting master planned resorts under the

¹¹ Kittitas County enacted a temporary moratorium on wind farm development on October 23, 2002 with the adoption of Ordinance No. 2002-13. (AR 250). Environmental review and public notice (including notice to governmental agencies and interested parties) was circulated in accordance with law. (AR 250-251). Public hearings were held with regard to the regulations on November 18, 20, 25 and 26, 2002. (AR 1251). Ordinance No. 2002-19 was adopted on December 3, 2002. (AR 1250-1254). Sagebrush Partners was specifically advised of the public hearings but chose not to participate in the public process. The initial Application for Site Certification – Kittitas Valley Wind Power Project was submitted to State of Washington – Energy Facilities Site Evaluation Council on January 13, 2003. (AR 2).

Growth Management Act (GMA).¹² The process involves an integrated public process for project review. No appeal was filed with respect to the Wind Farm Resource Overlay Zone (KCC Ch. 17.61A).

EFSEC determined that the original application was inconsistent with local land use plans and zoning ordinances. (AR 14076, Council Order No. 776). More than two years passed before Sagebrush initiated local review processes.¹³ Sagebrush filed a Kittitas Valley Wind Power Project Development Activities Application (DAA) with Kittitas County on September 30, 2005. (AR 6145). Board of County Commissioners and Planning Commission conducted eleven (11) public hearings on the application.¹⁴ EFSEC was designated lead agency for SEPA review (AR

¹² Kittitas County has the most extensive and complete experience of any jurisdiction in the state with respect to the siting of large site specific projects. The largest recreational and residential development in the history of Central Washington had been recently processed for a project now known as Suncadia. The master planning of that project utilized the identical process adopted for wind resource facilities. That process was subjected to review by both Eastern Washington Growth Management Hearings Board and appellate judicial review. The process and concept were lauded as a thoughtful and integrated method of addressing complex and large projects.

¹³ KVWWP was put on hold while Kittitas County and developer reviewed and approved the Wild Horse Wind Energy project in eastern Kittitas County. Wild Horse received local approvals as well as site certification by EFSEC.

¹⁴ Board of County Commissioners and Planning Commission conducted joint public hearings on January 10, 11 and 12, 2006. Planning Commission deliberated on the application on January 30, 2006, and issued a recommendation and findings of fact on February 13, 2006. BOCC conducted additional public hearings on March 29 and 30, 2006. Applicant was provided the opportunity to submit additional information (including revisions to proposed Development Agreement) which were considered on May 12 and 27, 2006. Specific discussions and concerns were addressed on May 3, 2006. Applicant chose to terminate active participation in the project and refused to submit a proposed Development Agreement or discuss appropriate setbacks for turbines.

6163-6164). A Supplemental EIS was issued for the proposal. (AR 6232-6329).

Public testimony was provided and decision-makers were intimately familiar with the proposal and proposed project site. A wide range of issues were addressed but primary concerns related to impacts on adjacent properties and overall environmental impacts. A critical dialogue

Planning Director Darryl Piercy addressed the issue by letter date May 22, 2006, which included the following observations:

I am somewhat puzzled by your letter dated May 19, 2006. In our meeting, neither Jim Hurson, Joanna Valencia, nor I suggested a specific configuration or specific setback for your project. What we did suggest is that you carefully review the transcripts of the public hearing and provide a revised proposal that meets the issues and comments offered by the Board of County Commissioners.

We did inquire as to why the internal strings of turbines that were included in earlier proposals have been eliminated to a large degree in your current proposal and if turbines were placed at these internal string locations the number of turbines located on the perimeter could be reduced and thereby increase the setbacks to nonparticipating property owner. * * * We also requested at our meeting that you identify what economic viability is and provide some analysis to support your needs. You refused to provide this information stating that it was proprietary information and would be made public.

Applicant simply chose to withdraw from deliberative process based upon purported "economic infeasibility" associated with a 2,500 foot setback. No explanation, analysis, or data was submitted to support this proposition. BOCC visited comparable projects including Hopkins Ridge in Dayton, Washington. On May 31, 2006, BOCC reviewed draft findings of fact and conclusions of law and advised that appropriate setbacks from existing nonparticipating residents (2,500 feet) and nonparticipating owners' property lines (2,000 feet) would be appropriate. Applicant advised that these setbacks would render the project "unviable." Based upon Applicant's refusal to provide any information to support the proposition that the setbacks rendered the project "infeasible", BOCC adopted Resolution No. 2006-90 which denied the project.

evolved over appropriate setbacks and turbine locations. BOCC visited similar wind farm projects in order to fully understand the size, magnitude and impacts of these massive machines.

Based on site review and experience with other wind farm projects, BOCC was considering a 2500 foot setback from residences and 2000 foot setback from property lines. The process continued until Sagebrush terminated the dialogue based on the unsubstantiated contention that contemplated setbacks rendered the “. . . project inviable.” Transcript of Hearing of May 3, 2006 50-52. No information or analysis was provided to support this proposition. Horizon terminated effective participation on May 3, 2006. Applicant refused to submit a proposed Development Agreement. Despite this withdrawal, BOCC extended additional time and opportunity for dialogue.

The final chapter in this saga played out on May 31, 2006. During the course of that hearing, BOCC Chairman Bowen asked counsel for the applicant “. . . do you have information with you today that could help us to see if that's viable or not?” The only answer was provided by counsel for the applicant:

Tim McMahan: I was afraid you were going to ask me that question. All I can tell you is the information we provided you in the correspondence is that a half mile setback reduces the project in half and doesn't leave a

sufficiently viable process. That's the information that I have back from my client.

No reference to the record and no information or data as to the number of turbines required to make the project economically viable. Board of County Commissioners had no factual or record basis to evaluate the assertions of economic inviability or consider alternative turbine configurations. The failure to submit evidence or participate in a dialogue left Kittitas County, as the quasi-judicial decision maker, with no alternative but to deny the project.

In the context of applicant's withdrawal from meaningful dialogue and process, BOCC reconvened its public hearing on June 6, 2006 and adopted Resolution 2006-90 denying the project. The applicant filed a Second Request for Preemption with EFSEC on June 20, 2006. (AR 6587-8278).

C. EFSEC Adjudicative Process. EFSEC held formal adjudicative proceedings on September 18, 19, 20, and 21, 2006. After public and adjudicative hearings and issuance of Final Environmental Impact Statement, EFSEC issued Order No. 826 on March 27, 2007 (AR 14257 – 14333). Order No. 826 constituted a recommendation to the Governor which included the following:

1. The Council recommends that the Governor of the State of Washington PREEMPT the Kittitas County zoning code's 35-foot height limitation in the Forest & Range Zone as well as the wind farm overlay ordinance adopted by Kittitas County Board of County Commissioners in December, 2002.
2. The Council recommends that the Governor of the State of Washington APPROVE certification for the construction and operation of the Kittitas Valley Wind Power Project located in Kittitas County, Washington.
3. Council orders that its recommendations as embodied in the Findings of Fact, Conclusions of Law and this Order, together with the Site Certification Agreement appended hereto, be recorded and forwarded to the Governor of the State of Washington for consideration and action.

Order No. 826 included a proposed Site Certification Agreement. Kittitas County EFSEC councilmember – Patti Johnson – dissented in part and resulted to the recommendation. The recommendation was transmitted to Governor Gregoire on May 2, 2007. (AR 11294-11295).

D. Review and Decision by Governor. On June 22, 2007, Governor Gregoire sent a letter to EFSEC directing the Council to reconsider the Article I (C)(7) of the proposed Site Certification Agreement pertaining to setbacks from adjacent land owners residences.¹⁵ (AR 11390-11391). Specifically, the reconsideration of the draft Site

¹⁵ The Administrative Record provided by the State of Washington does not include any correspondence or decision documents from the Governor. The record should be supplemented with such documents in order to allow for full and complete review by the Court.

Certification Agreement was “solely focused on the need to determine on this particular Project whether additional setbacks beyond the four times height (4xh) requirement for non-participating landowners was achievable while allowing the Project to remain economically viable.”

EFSEC conducted two public hearings on the remand on July 17, 2007. (AR 16224-1632). EFSEC adopted Council Order No. 831 (AR 14337-14341) in response to the remand and found as follows:

The Council is authorized to consider “economic viability” of proposed projects, but only at a very broad level. A developer’s ability to construct a project and earn a reasonable rate of return on its capital investment is simply beyond EFSEC’s authority. The parties to this case and the general public are also united in their comments during the July 17 meetings that the ultimate responsibility for determining the economic viability of a privately financed for-profit undertaking must remain in the hands of its proponent. EFSEC’s governing statute support this position. . . . The evidence available in the existing record demonstrates that only on the Applicant can determine when a reduction in number of turbines permitted will prevent construction of the Project.

This was exactly the issue that created a stumbling block before Kittitas County Board of County Commissioners. In both instances Applicant refused to provide any information to substantiate its claim that a setback of 2500 feet rendered the project “economically inviable.” EFSEC transmitted Order No. 831 on August 14, 2007. (AR 11862-11863).

Governor Gregoire approved the project by letter dated September 18, 2007. (AR 11907-11908). The approval affirmed preemption of local decision-making processes and approved the Site Certification Agreement.

IV. ARGUMENT

A. Standard of Review – Administrative Procedures Act.

The Administrative Procedures Act (APA) governs this appeal. RCW 80.50.140 (“A final decision pursuant to RCW 80.50.100 on an application for certification shall be subject to judicial review pursuant to the provisions of Chapter 34.05 RCW and this section.”). Relief may be granted from an agency’s adjudicative order if it is established that the final decision is inconsistent with any one of nine standards delineated in RCW 34.05.570(3).¹⁶ Review is under RCW 34.05.570(3)(a), (c), (d), (e) and (h).

¹⁶ RCW 34.05.570(3) provides as follows:

Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;

Review of a final decision on site certification of an energy facility is generally based upon the administrative record developed by EFSEC. RCW 80.50.140(1). Thurston County Superior Court has responsibility to both certify and supplement the record for appellate review. RCW 80.50.140 provides, in part, as follows:

The Thurston County Superior Court shall assign a Petition for Review of a decision under RCW 80.50.100 for hearing at the earliest possible date and shall expedite such petition in every way possible. *If the court finds that review cannot be limited to the administrative record as set forth in subparagraph (a) of this subsection because there are alleged irregularities in the procedure before the Council not founding the record, but finds that the standards set forth in subparagraphs (b), (c) and (d), of this subsection are met, the court shall proceed to take testimony and determine such factual issues raised by the alleged irregularities and certify the petition and its determination of such factual issues to the Supreme Court.*

-
- (e) The order is not supported by evidence as is substantially reviewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
 - (f) The agency has not decided all issues requiring resolution by the agency;
 - * * *
 - (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
 - (i) The order is arbitrary or capricious.

Thurston County recognized that there were “alleged irregularities in procedure” and allowed limited discovery.¹⁷ The record was supplemented with a portion of the discovery. The court did not, however, conduct a hearing, take testimony or make factual determinations with respect to the alleged irregularities in procedure.

B. The Supreme Court Lacks Original Jurisdiction to Decide the Issues this Case Presents.

The Supreme Court lacks jurisdiction to decide this case and, as a result, RCW 80.50.140 is unconstitutional to the extent that it vests this court with original jurisdiction to hear an appeal of the governor’s approval or rejection of an application for site certification under RCW 80.50.100(2)(a)-(b).

Upon receipt of an EFSEC report and recommendation, the governor may approve the application and execute the proposed site certification agreement, reject the application, or direct EFSEC to reconsider particular aspects contained in the draft site certification agreement. RCW 80.50.100(2)(a)-(c). The governor’s final decision is subject to judicial review pursuant to RCW 80.50.140 and chapter 34.05

¹⁷ As with the lack of records from the Governor’s Office, the current appellate record fails to include Clerk’s Papers from Thurston County Superior Court. Those records (including supplementation documents and materials) are essential to the review and analysis of issues presented in this case.

RCW, the Administrative Procedure Act. RCW 80.50.140(1). A petitioner seeking review of the governor's final decision must file a petition for judicial review in the Thurston County Superior Court. RCW 80.50.140(1); *Lathrop v. State Energy Facility Site Evaluation Council*, 130 Wn. App. 147, 151-52, 121 P.3d 774 (2005). The Thurston County Superior Court must then certify the petition for review to the Supreme Court upon the following four conditions:

- (a) Review can be made on the administrative record;
- (b) Fundamental and urgent interests affecting the public interest and development of energy facilities are involved which require a prompt determination;
- (c) Review by the supreme court would likely be sought regardless of the determination of the Thurston county superior court; and
- (d) The record is complete for review.

RCW 80.50.140(1)(a)-(d). The trial court certified the present petition to this court subject to identified supplementation.

Article IV, section 4 of the Constitution governs this Court's original jurisdiction and limits the scope of this Court's original jurisdiction.¹⁸ WASH. CONST. art. IV, §4; *See Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). That section provides, in pertinent part, that the "supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and

¹⁸ A court has original jurisdiction if an action may be filed there. *Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 420, 85 P.3d 950 (2004).

appellate jurisdiction in all actions and proceedings”.¹⁹ WASH. CONST. art. IV, §4. By its plain language, the constitution does not provide this Court with original jurisdiction for judicial review of the type of decision at issue in this case.

In *North Bend Stage Line v. Department of Public Works*, 170 Wash. 217, 219, 16 P. 2d 206 (1932), this Court held unconstitutional a law that gave an appellant the right to appeal Department of Public Works orders directly to the Supreme Court. The Court concluded that the legislature is without authority to expand or limit the scope of this court’s appellate jurisdiction. *North Bend*, 170 Wash. at 222. Moreover, this Court held that article IV, sections 4 and 6 of the Washington constitution “render plain the constitutional intent to make the Supreme Court the court of general appellate jurisdiction, giving to it certain limited original jurisdiction; and to make the Superior Court the court of general original jurisdiction.” *North Bend*, 170 Wash. at 221.

In *Department of Highways v. King County Chapter*, 82 Wn. 2d 280, 510 P. 2d 216 (1973), this Court acknowledged its position that appellate jurisdiction “is jurisdiction over appeals and actions of a purely judicial nature, which have been determined in some judicial court

¹⁹ Article IV, section 4 provides this court with original jurisdiction to determine the validity of a statute; thus, the court has jurisdiction to determine the constitutionality of RCW 80.50.140.

established by the Constitution or in pursuance thereto”. *Dep’t of Highways*, 82 Wn.2d at 284. This Court further stated that “jurisdiction to review actions of administrative bodies, in the first instance, is in the superior court and that the legislature may not oust that court of such jurisdiction.” *Dep’t of Highways*, 82 Wn.2d at 284.

The statute at issue in *Department of Highways* provided for judicial review of a permit application in the court of appeals. *Dep’t of Highways*, 82 Wn.2d at 287. That statute conflicted with the Administrative Procedure Act (APA), which vested the superior courts with original jurisdiction to hear petitions for judicial review. *Dep’t of Highways*, 82 Wn.2d at 287. Because the applicable statutes provided that the APA controlled where such a conflict existed, the Court held that the superior court was the proper forum to hear the petition for judicial review. *Dep’t of Highways*, 82 Wn.2d at 287.

Here, RCW 80.50.110 provides that chapter 80.50 RCW controls where its provisions conflict with any other laws. As in *Department of Highways*, RCW 80.50.140(1)’s judicial review provisions conflict with the APA in that RCW 80.50.140(1) authorizes this Court to exercise original jurisdiction while the APA provides the superior courts with original jurisdiction to consider petitions for judicial review. *See Dep’t of Highways*, 82 Wn.2d at 87. Thus, RCW 80.50.140(1) governs judicial

review of the governor's decision on energy facility siting applications. But because RCW 80.50.140(1) purports to vest this Court with original jurisdiction to review the governor's decision, that statute usurps article IV, section 4's limitation on the scope of this Court's original jurisdiction.

The legislature exceeded its constitutional authority in authorizing this Court to exercise original jurisdiction to review the governor's decision regarding a site certification under chapter 80.50 RCW.

C. Thurston County Superior Court Failed To Take Testimony And Make Factual Determinations On Alleged Irregularities In Procedure Before EFSEC As Required By RCW 80.50.40.

Thurston County Superior Court has sole responsibility for certification of the administrative record and determination of factual issues raised by alleged irregularities in the procedure before EFSEC. RCW 80.50.140. Kittitas County alleged irregularities in procedure before EFSEC. The procedural irregularities included, but were not limited to the following: (a) proceeding in adjudicative process with clear and identified conflicts of interest; (b) improper ex parte communications between EFSEC Chairman, James O. Luce, and parties or "stakeholders"; (c) improper communications with the Governor during pendency of adjudicative hearing; (d) improper discussion of issues and policies outside of hearing and deliberative process; and (e) improper bias and

predetermination of preemption issues. The alleged procedural irregularities were identified by Kittitas County in submissions to Thurston County Superior Court.²⁰

Thurston County authorized limited discovery with respect to such alleged irregularities. Preliminary Order on Motion to Certify Petitions for Review to Supreme Court. Discovery included the completion and delivery of EFSEC records pursuant to Public Disclosure Requests; authorization of depositions of James O. Luce and Chris Towne; and supplemental filings. No further discovery was allowed by the trial court.

RCW 80.50.140 provides that “. . . the court *shall proceed to take testimony and determine such factual issues* raised by the alleged irregularities and certify the petition and its determination of such factual issues to the Supreme Court.” The taking of testimony and determination of factual issues is mandatory (i.e., the court “shall take testimony”) and not discretionary. *State v. Martin*, 137 Wn.2d. 149, 154, 969 P.2d 450 (1999). Thurston County Superior Court failed to take the requisite testimony and make factual determinations. The record on procedural

²⁰ State of Washington has filed the Administrative Record (including Revised Document Index) with the Court. The Administrative Record includes all documents and transcripts of proceedings before EFSEC. References to the Administrative Record will be by designation of “AR” and applicable page numbers. The certified record of administrative adjudicative proceeding was provided pursuant to RAP 9.7(c). No record or document was provided by the Governor other than her two letters, one asking the “economic viability” question and the other approving the Site Certification Agreement. The current appellate record also fails to include the additional certified documents and Clerk’s Papers from Thurston County Superior Court.

irregularities is therefore incomplete and Appellate review cannot be meaningfully conducted in the absence of record supplementation.²¹

D. EFSEC Engaged in Improper and Unlawful Procedures.

EFSEC engaged in unlawful procedures and decision-making processes. RCW 34.05.570(3)(c). Those procedural violations included the following: (a) a violation of procedural due process and appearance of fairness requirements for quasi judicial proceedings; (b) councilmembers participated with known conflicts of interest; and (c) EFSEC Chairman engaged in unlawful and inappropriate predetermination and ex parte communications.

1. EFSEC Violated Established Appearance of Fairness and Due Process Requirements of Fair and Impartial Hearing.

Energy Facility Site Evaluation Council (EFSEC) includes designated representatives of (a) Department of Ecology; (b) Department of Fish and Wildlife; (c) Department of Community, Trade and Economic Development; (d) Utilities and Transportation Commission; and (e) Department of Natural Resources. RCW 80.50.030(3). It is uncontroverted that Department of Natural Resources (DNR) is the owner

²¹ This issue also bears upon the Supreme Court's exercise of "original" or "appellate" jurisdiction. The Superior Court is clearly designated as the court of original jurisdiction for making factual determinations with respect to "alleged irregularities and procedure." This determination can not be made in this case by this court and the appellate record is deficient with regard to these critical components.

of a substantial portion of the property utilized for the project. (AR 388 and attachments). Sagebrush had paid DNR rent of \$26,261.88 on the property prior to the commencement of the hearing process. (AR 388, Exhibit 1). CTED was granted intervenor status and advocated approval of the site certification application. Despite the direct and clear conflict of interest, EFSEC representatives from DNR and CTED participated in the adjudicative proceeding and voted on the site certification preemption. See Council Order Nos. 778, 781, 782, 783 (AR 14605-14171).

(a) The Appearance of Fairness Doctrine Requires that Adjudicative Hearings Are Fair in Fact on Appearance and That Decision-Makers are Impartial and Free of Undue Influence.

The appearance of fairness doctrine is a well established and recognized doctrine applied in adjudicative hearings. *Narrowsview Preservation v. City of Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974); *Save A Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978); and *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 868, 480 P.2d 489 (1971). Procedures applied in quasi-judicial processes must be fair in both fact and appearance and decision-makers must be impartial and free from undue influence. *Fleming v. Tacoma*, 81 Wn.2d 292; *Raynes v. City of Leavenworth*, 118 Wn. 2d 237, 245, 821 P. 2d 1204 (1992); *Harris v. Hornbaker*, 98 Wn.2d 650, 656-57, 658 P.2d 1219 (1983) (“In an

adjudicatory setting, impartiality and lack of bias are required of decision-makers.”). The court in *Narrowsview Preservation Ass'n. v. Tacoma*, 84 Wn.2d 416, 420, 526 P.2d 897 (1974) set forth the adopted test as follows:

Members of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality. *Buell v. Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). The doctrine is applicable to show an interest which might have substantially influenced a member of the commission even if that interest did not actually affect him.

The doctrine does not require a showing of actual influence but only that some interest may have substantially influenced a board or commission member. *Fleck v. King County*, 16 Wn.App. 668, 670, 558 P.2d 254 (1977); *Byers v. Board of Clallam County Commissioners*, 84 Wn.2d 796, 529 P.2d 823 (1974). Administrative tribunals that perform adjudicative functions must be above suspicion and reproach in the same as a courts. *Fleck v. King County*, 16 Wn.App. at 671; *State ex rel Barnard v. Board of Education*, 19 Wash. 8, 52 P. 317 (1898).

The appearance of fairness doctrine has been applied to administrative tribunals acting in a quasi-judicial capacity in two circumstances: (1) when an agency has employed procedures that created

the appearance of unfairness; and (2) when one or more acting members of the decision-making bodies have apparent conflicts of interest creating an appearance of unfairness or partiality. *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969); *Buell v. Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972); *City of Hoquiam v. Public Employment Relations Com'n of State of Wash.*, 97 Wn.2d 481, 646 P.2d 129 (1982). The test is "would a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist?" *Swift v. Island County*, 87 Wash.2d 348, 361, 552 P.2d 175 (1976). In Washington, a State agency as a whole is precluded, as opposed to an individual within an agency, from engaging in conflicts of interest. See *Guardianship Estate of Keffleler v. State of Washington, Department of Social and Health Services*, 145 Wn.2d 1, 32 P.3rd 267 (2001).

(b) **Department of Natural Resources Had a Direct Pecuniary Interest in the Application and EFSEC Participation Violated Appearance of Fairness Doctrine.**

Department of Natural Resources (DNR) had a direct pecuniary interest in the proposed project. (AR 2358-2393). Approximately one-fourth of the proposed wind turbines were located on land owned by Department of Natural Resources (AR 2360). Sagebrush

had paid DNR approximately \$28,261.88 as rent for the land prior to commencement of hearings. (AR 2389). Long-term financial benefits would accrue through executed leases. (AR 2389).

DNR is a member of EFSEC. Its representatives participated in hearings and voted on each critical finding, determination and recommendation. The conflict of interest is patent and palpable.²² In any other forum, the conflict and recusal obligation is not even debatable. *Narrowsview Preservation Ass'n. v. Tacoma*, 84 Wn.2d 416, 526 P.2d 897 (1974) (member employed by entity that would benefit by decision); and *Save A Valuable Environment v. Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978) (association with organization supporting application). The conflict and pecuniary interest are actual – not perceived. DNR acknowledged the clear financial interest. (AR 14110-14111).

²² The legislature established the make up of EFSEC in the 1970's when no one contemplated EFSEC would decide an application on state land and where the state receives compensation. Chapter 80.50 provides no direction on the subject, and, more importantly, provides no conflict of interest or appearance of fairness exceptions or waivers. RCW 80.50.030(3) indicates the Energy Site Evaluation Council shall consist of directors, administrators, or their designees of certain enumerated departments, including the DNR and CTED. However, it is impossible to reconcile their participation in this quasi-judicial decision making process with well established law prohibiting representatives of the State of Washington from engaging in conflicts of interest and violations of the Appearance of Fairness Doctrine.

EFSEC denied a Motion to Disqualify DNR representative Tony Ifie. Council Order No. 778 (AR 14105-14121).²³ The actual determination was made by the council member with the conflicting interest – Tony Ifie. Disqualification was premised upon three erroneous legal conclusions: (1) the appearance of fairness doctrine applies only to quasi judicial *decision-makers* and is not applicable to EFSEC; (2) the matter before EFSEC is not quasi-judicial; and (3) the moving party failed to meet the threshold burden of proof of actual or potential bias. (AR 14112-14115). Each legal conclusion is erroneous.

First, the appearance of fairness doctrine is not limited solely to quasi judicial “decisionmakers”.²⁴ EFSEC found that the appearance of

²³ EFSEC found that the Motion to Disqualify “. . . shall be determined by the person or persons asserted to be disqualified. . . .” (AR 14105). The process was purportedly based upon RCW 34.05.425(3) through (5). Councilmember Tony Ifie denied the Motion to Disqualify on October 13, 2003. Council Order No. 781 (AR 14107 – 14121). Councilmember Richard Fryhling denied disqualification in Council Order No. 782. (AR 14122-14137). EFSEC also denied the motions for disqualification in Council Order No. 783 (AR 14138-14156). An additional decision was issued in Council Order No. 786 dated January 13, 2004. (AR 14156-14171). Each of the decisions contains virtually identical language and reasoning.

²⁴ Councilmember Ifie concluded as a matter of law that the appearance of fairness doctrine “. . . applies only to quasi-judicial decision-makers.” (AR 14112). This legal conclusion is purportedly supported by *State v. Finch*, 137 Wn.2d 792, 308, 975 P.2d 967 (1999); *Carrick v. Locke*, 125 Wn.2d 129, 143 n.8, 882 P.2d 173 (1994); and *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). None of the cited cases involve adjudicative hearings. *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994) (county prosecutor’s participation in coroner inquest; *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992) (challenge to correction officer’s conflict in preparing pre-sentencing report for judicial consideration); and *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999) (appearance of fairness doctrine does not apply to prosecutor in administrative process). The court in *State v. Finch* noted that “appearance of fairness doctrine has never been

fairness doctrine applied only to “decisionmakers” and that councilmembers simply made a “recommendation” on the site certification application. This analysis has been firmly rejected in this state. Commission Members that make “recommendations” are also subject to the appearance of fairness doctrine. *Narrowsview Preservation Ass’n v. City of Tacoma*, 84 Wn.2d 416, 418-420, 526 P.2d 897 (1974) (Applied appearance of fairness doctrine to planning commission member that made recommendation on rezone of property); and *Save A Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 864, 576 P.2d 401 (1978) (Planning Commission member violated appearance of fairness doctrine in voting to recommend rezone).

Second, EFSEC conducts an adjudicative hearing quasi-judicial process. RCW 80.50.090(3) (“prior to the issuance of a council recommendation to the Governor under RCW 80.50.100 a public hearing, *conducted as an adjudicative proceeding under Chapter 34.05 RCW*, the administrative procedure act, shall be held.”); and WAC 163-30-010 (an administrative law judge was appointed to oversee the proceedings). WAC 463-30-020. EFSEC proceedings are clearly quasi judicial in nature and subject to the appearance of fairness doctrine. The court in

applied to an administrative action except where a hearing was required by statute”. *State v. Finch*, 137 Wn.2d at 809n.2.

Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 913 P.2d 193 (1996) clearly recognized that permit application hearings for the siting of a regional landfill are quasi judicial hearings. *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d at 889.

Finally, the application of the appearance of fairness doctrine does not require a showing of actual bias or influence. *Fleck v. King County*, 16 Wn.App. 668, 670, 558 P.2d 254 (1997). In *Narrowsview Preservation Association*, the vice chairman of the Planning Commission was an employee of a bank that stood to gain by approval of a proposed rezone. The court noted that the record showed that the Planning Commission vice chairman's position at the bank did not involve him in decisions regarding loan secured by the property, and that he only had authority to make personal loans of up to \$1,000. *Narrowsview*, 84 Wn.2d at 420. Nevertheless, the court held that the appearance of fairness doctrine applied because the Planning Commission vice chairman's employment with the bank was "an interest which might have substantially influenced a member of the commission even if that interest did not actually affect him." *Narrowsview*, 84 Wn.2d at 420. The court explained that "[m]embers of commissions with the role of conducting fair and impartial fact finding hearings must, as far as practical, be open minded, objective,

impartial, free of entangling influences, and must also give the appearance of impartiality.” *Narrowview*, 84 Wn.2d at 420 (citing *Buell v. Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972)). See, also, *Save A Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 872-873, 576 P.2d 401 (1978).

(c) Department of Community, Trade and Economic Development (CTED) Was Granted Intervenor Status and Participated in Hearings as Project Advocate.

Department of Community Trade and Economic Development (“CTED”) is a statutory member of EFSEC. CTED has intervened to support the application and to ensure that state energy policy, purportedly encouraging renewable energy resources, is followed. With CTED as an intervenor as well as a decision maker, there is a conflict of interest as CTED is publicly advocating for the approval of this application and was doing so prior to the commencement of the public hearing process. In fact, during the course of this proceeding CTED employees have used wind power lobbying groups’ stationary and signed correspondence to advance positions advocated by the wind power lobbying groups. (CITATION) CTED, as a voting member of EFSEC, has prejudged this application. This violates the Appearance of Fairness Doctrine and should serve as a basis for the disqualification of CTED and its designated

representative from the Energy Facility Site Evaluation Council in this matter.

(d) EFSEC's Chairman, James O. Luce's Violation of the Appearance of Fairness Doctrine.

James O. Luce ("Luce" or "Chairman") is the Chairman of EFSEC. He is a paid employee of the State of Washington. After the adjudicative process was complete and the Governor had approved the Application and preempted Kittitas County, Kittitas County submitted Public Disclosure Act ("PDA") requests to EFSEC. The documents were revealing and disturbing in their content and tone. Ex parte communications with parties; strong predisposition (prior to hearings) regarding preemption; and lobbying of council members outside of the deliberative process were commonplace. (*See, generally*, Deposition of Luce). Allegations of procedural irregularities led to supplementation of the record. This additional information shows Mr. Luce making statements that EFSEC has to preempt or it would "be out of business". (Deposition of Luce, Exhibit 7; *see, also*, Thurston County Case No. 07-7-02080-0, Declaration of Neil Caulkins in Support of Response in Opposition to Certificate, Exhibit B).²⁵

²⁵ The Second Declaration of Neil Caulkins should be contained within the clerk's papers transmitted to (or to be transmitted) by Thurston County to Division II and the, pursuant to this court's direction, to this court.

The record shows Mr. Luce worked vigorously behind the scenes, with no disclosure to Kittitas County, ROKT or Lathrop, to secure a clarification of remarks the Governor made at the Wild Horse Wind Power dedication about preemption. (*Id.*, Exhibits H and I). Mr. Luce sought to assure that he had the ability to preempt Kittitas County. On the very day he received assurances from the Governor's office that he had the ability to preempt this Application, he called counsel for the Applicant, at home, presumably to inform him the Governor had assured Mr. Luce that EFSEC still had the power to preempt.

Under the case law these actions on the part of Chairman Luce create the appearance of ex parte communication, bias and prejudgment that violates the appearance of fairness doctrine and should result in Mr. Luce's disqualification.

E. Preemption of Kittitas County Land Use Determinations is Unlawful and Outside Scope of Authorized Authority.

Governor's preemption of local land use determinations was based on erroneous interpretation and application of preemption authority under RCW 80.50.110. KVVPP represents the first and only time that preemption authority has been applied to siting of energy facilities.

Preemption authority is derived from a single statutory source – RCW 80.50.110. RCW 80.50.110 establishes statutory authority in two

respects: (1) the limited authority to supersede conflicting state law and regulations (RCW 80.50.110(i)); and (2) and preemption authority related to location, construction and operational conditions. (RCW 80.50.110(2)).

Specifically, RCW 80.50.110 provides:

(1) If any provision of this chapter is in conflict with any other provision, limitation, or restriction *which is now in effect* under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control and such other law or rule or regulation promulgated thereunder shall be deemed superseded for the purposes of this chapter.

(2) The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of *the energy facilities included under RCW 80.50.060* as now or hereafter amended. (emphasis added)

(Italics added). As an initial matter, the preemption process requires a determination of consistency and compliance with local comprehensive plan and zoning ordinances. RCW 80.50.090(2). WAC 463-28-030(1) provides:

As a condition necessary to continue processing the application, it shall be the responsibility of the applicant to make the necessary application for changing, or permission under, such land use plans or zoning ordinances, and make all reasonable efforts to resolve the noncompliance.

EFSEC determined that the original application was inconsistent with local land use plans and zoning ordinances. (AR 14076-14082). Based upon such determination, Sagebrush was required to (a) submit the necessary application for permission under local land use plans and zoning ordinances; and (b) make all reasonable efforts to resolve the noncompliance. WAC 463-28-030(1).

Resolution of land use inconsistencies also requires satisfaction of four (4) separate elements as a prerequisite to the exercise of preemptory authority. WAC 463-28-040 provides:

The request for preemption must address the following requirements:

- (1) That the applicant has demonstrated a good faith effort to resolve the noncompliance issues.
- (2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.
- (3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.
- (4) Interests of the state as delineated in RCW 80.50.010.

Each of the four components are characterized as “requirements” for the exercise of preemptive authority. The required elements must be established in order to preempt a local land use decision.

1. **RCW 80.50.110(2) Does Not Authorize Preemption of Local Land Use Decisions On Alternative Energy Facilities.**

As a beginning proposition, EFSEC possesses preemptory authority only with respect to “. . . *energy facilities* included under RCW 80.50.060.” RCW 80.50.110(2). The statutory regimen contains specific definitions for each of the critical terms.²⁶ An “energy facility” is defined to mean “. . . an energy plant or transmission facilities. . . .” RCW 80.50.020(10). Since this application does not include siting of transmission facilities, the sole authority for preemption relates to “energy plants”. RCW 80.50.020(15) specifically limits the definition of “energy plant” to five (5) facilities: stationary thermal power plants; liquefied natural gas facilities; facilities receiving crude or refined petroleum or

²⁶ Legislative definitions included in the statute are controlling. *American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The court is not to search for “an ambiguity by imagining a variety of alternative interpretations.” *American Continental Ins. Co.*, 151 Wn.2d at 518, 91 P.3d 864 (citing *Telepage, Inc. v. City of Tacoma Dept. of Finance*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000)).

liquefied petroleum gas (with an average of 50,000 barrels per day); underground natural gas reservoirs; and petroleum processing facilities.²⁷

The statutory term “energy plant” does not include alternative energy facilities.²⁸ Application of statutory definitions to terms of art is essential

²⁷ RCW 80.50.020(15) defines “energy plant” as follows:

“Energy plant” means the following facilities together with their associated facilities:

- (a) Any *stationary thermal power plant* with generating capacity of 350,000 kilowatts or more, measure using maximum continuous electric generating capacity, less minimum auxiliary load, at average ambient temperature and pressure, and floating thermal power plants of 100,000 kilowatts or more, including associated facilities. For the purposes of this subsection, “floating thermal power plants” means a thermal power plant that is suspended on the surface of water by means of a barge, vessel, or other floating platform;
- (b) Facilities which have the capacity to receive liquefied natural gas in the equivalent of more than one hundred million standard cubic feet of natural gas per day, which has been transported over marine waters;
- (c) Facilities which will have the capacity to receive more than an average of 50,000 barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters, except that the provisions of this chapter shall not apply to storage facilities unless occasioned by such new facility construction;
- (d) Any underground reservoir for receipt and storage of natural gas as defined in RCW 80.50.010 capable of delivering an average of one hundred million standard cubic feet of natural gas per day; and
- (e) Facilities capable of processing more than 25,000 barrels per day of petroleum into refined products.

to determining the plain meaning of the statute. *Cobra Roofing Services v. State Department of Labor and Industries*, 157 Wn.2d 90, 99, 135 P.3d 913(2006). The statutory definitions and language are clear and preemption authority does not extend to alternative energy resource facilities.

2. Governor's Exercise of Preemption Authority Was Based on Erroneous Legal Interpretation and Was Not Supported by Substantial Evidence.

a. Background.

Reserving all objections to the Governor's authority to preempt Kittitas County local land use ordinances and decisions, and assuming arguendo that such authority exists, preemption must operate within the legislative intent as expressed in RCW 80.50.010. The need for increased energy facilities is recognized, but key to the intent is "that the location and operation of such facilities will produce minimal adverse effects on

²⁸ "Alternative energy resource" is defined in RCW 80.50.020(18). The sole reference to "alternative energy resource" is contained in RCW 80.50.060(2). That section provides:

The provisions of this chapter shall apply to the construction, reconstruction, or enlargement of a new or existing *energy facility* that *exclusively uses alternative energy resources* and chooses to receive certification under this chapter, regardless of generating capacity of the project.

The clear and unambiguous statutory language relates to an "energy facility" that "exclusively uses alternative energy resources." No definitional change was made for the terms "energy facility" or "energy plant". If the legislature intended to allow preemption for "alternative energy facilities", the simple procedure would have been to amend the definition of "energy plant" and add "alternative energy facility" as an additional category of energy plant. This was not included in the legislation.

the environment, ecology of the land and its wildlife...” RCW 80.50.010. This emphasis is repeated in the second premise of that section as actions must also serve to “preserve and protect the quality of the environment; to enhance the public’s opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; ...and to pursue beneficial changes in the environment.” Thus, while preemption is authorized by the statute it must be balanced with the other purposes of the EFSEC statutory scheme.

Under RCW 80.50.040(1) the Council must adopt rules under the Administrative Procedures Act, and has adopted Chapter 463-28 WAC. As such, the Council must operate within those self-imposed constraints and require all persons requesting the Council to exercise its authority to operate within those rules as well, and, of all the rules controlling Council actions, probably none is more critical than those dealing with preemption. The Council has previously determined that the Kittitas Valley Project is not in compliance with Kittitas County land use codes, a determination which essentially divests the Council of any authority to act until the Applicant has made its application compliant with Kittitas County Codes and the decisions of its Board of Commissioners.(AR 14076-14083) If the Applicant fails to resolve the non-compliance issues with the County, the Applicant must meet its burdens under WAC 463-28-040.

b. The Standard of Review for Preemption Determinations.

Under RCW 80.50.140, judicial review of the Governor's decision to adopt the Council's recommendation is controlled by Chapter 34.05 RCW, the Administrative Procedures Act ("APA"). This Court under RCW 34.05.570(3) must reverse the Governor's decision and adoption of EFSEC's recommendation when based upon an erroneous interpretation or application of law, is not supported by substantial evidence; or is inconsistent with a rule of the agency. RCW 34.05.570(3)(d), (e) and (h). Errors of law are reviewed de novo. *Quadrant Corporation v. State Growth Management Hearings Board*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth or correctness of the order. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d, 102.

In order to determine if a decision is clearly erroneous, the court must apply the law to the facts. *Cingular Wireless*, 131 Wn.App. at 768; see also *Citizens to Preserve Pioneer Park LLC v. The City of Mercer Island*, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001). If after applying the law to the facts the court is left with a firm conviction that a mistake was

made then the decision is clearly erroneous. *Cingular Wireless*, 131 Wn.App. at 768; *Citizens to Preserve*, 106 Wn.App. at 473.

c. Preemption Authority May Only Be Exercised In Accordance with WAC 463-28-040.

EFSEC has adopted specific rules for application and exercise of preemption authority under RCW 80.50.110(2). WAC 463-28-040 provides as follows:

Should the applicant report that efforts to resolve noncompliance issues with local authorities have not been successful, then, if applicant elects to continue processing the application, the applicant shall file a written request for state preemption as authorized in WAC 463-28-020 within ninety days after completion of the public hearing required by RCW 80.50.090, or later if mutually agreed by the applicant and the council. The request shall address the following:

(1) That the applicant has demonstrated a good faith effort to resolve the noncompliance issues.

(2) That the applicant and the local authorities are unable to reach an agreement which will resolve the issues.

(3) That alternate locations which are within the same county and city have been reviewed and have been found unacceptable.

(4) Interests of the state as delineated in RCW 80.50.010.

All four of the WAC 463-28-040 elements must be established prior to the exercise of preemption authority. No one criteria is given priority over any of the other criteria. The record does not support a determination that all four requirements have been satisfied in this case.

(i) Applicant Failed to Establish Good Faith Effort to Resolve Consistency Issues by Withdrawing From Local Review Processes and Failing to Submit Required Review Documents.

The first requirement for preemption is the Applicant demonstrate a good faith effort to resolve the non-compliance issues with Kittitas County. WAC 463-28-040(1). EFSEC concluded that “the Applicant expended significant effort to navigate the County’s permitting process and that those efforts to resolve the land use noncompliance were made in good faith.” (AR 14257, Council Order 826, p. 21).

What constitutes a “good faith effort”? Established case law uses the term with some frequency but does not draw a clear, general definition. But, that is not to say that a good faith effort is simply in the eye of the beholder. A good faith effort is a question of fact established through the record. *State v. Whittaker*, 133 Wn.App. 199, 135 P.3d 923 (2006). “‘Good faith’ is defined as: Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon

inquiry...an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with an absence of all information, notice or benefit or belief of facts which would render transaction unconscientious.’ Black’s Law Dictionary 822 (Rev. 4th ed. 1968). Good faith is also defined as “honesty in fact”. RCW 62A.1-201(19).

“There have been numerous efforts to define the term ‘good faith’. See, e.g., RCW 62A.1-201(19); *Klein v. Rossi*, 251 F.Supp. 1 (D.N.Y.1966); *Smith v. Whitman*, 39 N.J. 397, 189 A.2d 15 (1963); *Gafco, Inc. v. H.D.S. Mercantile Corp.*, 47 Misc.2d 661, 263 N.Y.S.2d 109 (1965); 1 G. Glenn, *Fraudulent Conveyances and Preferences* s 295 (1940). These efforts, if viewed as a whole, seem to attribute three factors or indicia to good faith: (1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, hinder, delay, or defraud others. Moreover, whether or not there has been good faith is to be determined by looking to the intent behind or the effect of a transaction, rather than to its form.”

Tacoma Ass’n of Credit Men v. Lester, 72 Wn.2d 453, 458, 433 P.2d 901, (1967).

The courts of Washington have adopted an approach to good faith that includes both an objective and subjective elements. *Percival v. Bruun*, 28 Wn. App. 291, 293, 622 P.2d 413 (1981). Although it deals

with the State's obligation to produce a witness at trial, *State v. Smith* 148 Wn.2d 122, 59 P.3d 74 (2002) also provides some elements that generally apply to establishing a good faith effort. One need not perform a futile act but "if there is a possibility, albeit remote, that affirmative measures might produce the [objective result], the obligation of good faith *may* demand their effectuation." *State v. Ryan*, 103 Wn.2d 165, 172 691 P.2d 197 (1984).

Two uncontroverted facts are present in this proceeding: (1) Sagebrush withdrew from substantive participation in Kittitas County review processes; and (2) Applicant failed to submit required materials (i.e., draft Development Agreement). An assessment of the conclusions contained in Council Order No. 826 requires a careful review of the very transcripts and evidence developed in public hearings in Kittitas County. (AR 14257). The clear evidence was that Applicant failed to follow instructions; was truculent and arrogant; and had, from the outset, had absolutely no interest in finding any level of compromise with Kittitas County. The sole focus and purpose was to "go through the motions" with Kittitas County and move forward to the friendly forum offered by EFSEC. Applicant knew the local process and requirements because it had just completed securing local approval for the larger Wild Horse Wind Power Project.

The best and most accurate way for the Court to weigh the Applicant's good faith efforts is through a full reading of the Verbatim Transcript of Proceedings of the April 12 and 27, May 3 and 31, and June 6, 2006 Kittitas County Board of County Commissioners Meetings ("BOCC")²⁹. For it is not the arguments of the parties or their self-serving statements or conclusions that are determinative of the issue--it is the record. The record effectively defeats any and all claims the Applicant attempted in good faith to comply with Kittitas County wind farm regulations and the requests of the Commissioners made during the County hearing process.

Although self-evident under the terms of County code, after reiterating that the Kittitas County Wind Farm Overlay Process is site-specific, Commissioner Huston, at the hearing on April 12, 2006, pointed out the Applicant has chosen an area for the Kittitas Valley project that was already vested with the Comprehensive Plan designation of "Rural" making it eligible for higher levels of residential development as opposed to lower intensity uses. He then posed the question: was there adequate justification of public benefit to find the project consistent with County

²⁹ The transcripts of all BOCC meetings referenced, except the April 12, 2006 meeting were attached to the Applicant's request for preemption. (AR 6587-8279). The transcripts of the April 12, 2006 meeting were submitted by Kittitas County. (AR 13686). The citations in the following sections are directly to the BOCC transcript and are referenced as VTP (Verbatim Transcript of Proceedings).

goals and policies? VTP, April 12, 2006, Pages 7-11. He pointed out that the Commissioners previously stated that the Development Agreement executed by the County for the Wild Horse Project was to be the template for the Kittitas Valley Project, recognizing, of course, that the specifics would need to change because the site specific circumstances and impacts of the two projects were quite different.³⁰ But what did the Applicant actually provide to the County? As of April 12, 2006, and after seven prior public hearings, the Applicant had only managed a Development Agreement draft that had essentially nothing more done to it than to change the names in the document from Wild Horse to Kittitas Valley. This was obviously the case as it contained numerous provisions that related only to the Wild Horse Project. VTP, April 12, 2006, Pages 12-16. The Development Agreement is the “heart and soul of the mitigations of the impacts” and Commissioner Huston found the current draft of the Development Agreement particularly lacking in this regard. VTP, April 12, 2006, Page 17.

With regard to setbacks, the central issue at the County level and the central issue when the Governor reviewed EFSEC’s preemption request, Commissioner Huston pointed out the very clear distinctions between the Wild Horse Project and the Kittitas Valley Project. The

³⁰ The Wildhorse Wind Power Project, unlike this application, was in an area of Kittitas County with no significant population.

former presented questions of impacting properties where no residences presently exist as compared to the KV Project where many residences do exist within the impacted areas of the project. *Id.* at 25. Shadow flicker, noise and lights were recognized impacts in the Development Agreement--even as proposed by the Applicant. The only mitigation proposed to mitigate these impacts was distance, and the Commissioners clearly felt 1000 feet was not adequate. *Id.* at 26-28 and 43. Not until the Applicant got to EFSEC did it suggest it could use technology to shut turbines off during periods when significant shadow flicker impacted residences. (Adjudicative Hearing Transcript of Proceedings, page 782-786). A good faith approach would have been to make that mitigation proposal at the county level. Council Order 826 ignores this fact.

It was also obvious that as of April 12 the Commissioners had yet to be presented with a Development Agreement draft that specified either the number, location, or size of the towers. VTP, April 12, 2006, p. 41-45. Commissioner Bowen pointed out that, with the Rural Lands Comprehensive Plan designation, the structure height limitations, and the underlying zoning districts, the tremendous impact of turban towers anywhere approximating the size of those being proposed by the Applicant led him, likewise, to the conclusion that establishing adequate setbacks were critical to the approval of the Application.

Commissioner Bowen also noted that, while the Applicant had apparently reduced the number of turbines over-all, many of the reductions took place in the center of the project as opposed to tower locations closer to the project boundaries. Thus, the reduction provided little in the way of mitigating the impact on residents in the area. *Id.* at 47-48. He noted that the DEIS analyzed setbacks from 0.4 to 1.5 miles but that the Development Agreement as proposed by the Applicant proposed no such distances in the way of mitigation or that the acknowledged impacts would be mitigated by the 1000 foot setback that was proposed by the Applicant. *Id.* at 48-51.

At the conclusion of April 12 hearing, the Commissioners requested the Applicant bring them information on setbacks that would mitigate uncontroverted, admitted impacts of the project and to revise the draft Development Agreement so that it actually addresses the specifics of the Kittitas Valley Project and the Commissioners' clearly expressed mitigation requirements. (*Id.*). The Commissioners even determined to independently go to wind farm projects to see them during the day and night times so that they could better assess reasonable setbacks, and Mr. Peck, on behalf of the Applicant, was not only enthusiastic about the prospect of the Commissioners visiting existing wind power projects, but clearly expressed that they did not see any "deal killers" on the subject of

set backs and that all parties were negotiating together in good faith. *Id.* at 53-57.

Commissioner Huston could not have been more clear when he said: “I’m looking for the Applicant to actually present additional information to suggest a setback from their perspective, mitigates the impacts that they have agreed exist.” *Id.* at 62. He continued

“I think in terms of what I’m looking for, I think I’ve been fairly clear about what I’m dealing with is, frankly, the question of an identified probable significant adverse impact which I must mitigate. And just to be clear for the record, I’m not prepared to walk away from that as just an acceptable impact and one that’s not – that we’re not able to mitigate. I don’t believe that’s the case. I need to mitigate that impact before I can determine that in fact this project’s public benefit outweighs the negative impact. So in a nutshell that’s it.”

Id. at 64.

Finally, Commissioner Huston makes a very key statement that shows complete and accurate comprehension of the very same issues presented to EFSEC:

“I’m not prepared to accept the global notions that power generation is a public benefit; I’ll just accept that, that’s fine. But we’re dealing with the question of this project generating power. *Because as we’ve already indicated with past decisions, there are other sites at which wind farms can be placed...* The question is in this site. Can the benefits that it will generate, can they be made to

outweigh the impacts that they cause? Question of mitigation.”

(Italics added) *Id.* at 64-65.

Could the directions of the Commissioners to the Applicant at the conclusion of the April 12 meeting have been made more clear? Fix the Development Agreement so it actually addresses the Kittitas Valley Project and have it provide data on setbacks that specifically address adequate mitigation for shadow flicker, lights, noise and the imposition of very large structures into an area already settled with residences.

The April 27, 2006 hearing commenced with the Commissioners each relaying their independent site visits to other wind farms, and County Staff stated for the record the Applicant sent a letter responding to some of the Commissioners issues raised at the April 12 hearing. VTP, April 27, 2006, Pages 1-15. Staff also indicated that elements set forth within the decision making matrix previously provided to the Applicant had not been introduced and thus were not in the record. VTP, April 27, 2006, Pages 16-17. Counsel for the Applicant then made a presentation but did not present an updated draft Development Agreement. *Id.* at 18.

At this point Commissioner Huston stated the obvious: “The biggest concern that I have is at this point is that I don’t have what I asked for, which was a current, updated draft of the Development Agreement. I

have a letter that certainly explains why I'm wrong on a couple of points and – and tells me the things you probably would include in a new draft Development Agreement, but that's not exactly the same thing.” *Id.* at 25-26. The Commissioners' request was then restated: “I want a new, clean Development Agreement that representatives of Horizon are prepared to stand in front of me and say, we will do everything, everything without exception that is in this draft. Not promise that you'll talk about doing some things in the future. Tell me what you are prepared to do, should that Development Agreement be signed.” *Id.* at 28. Commissioner Crankovich concurred, and they each restated their positions on the point. *Id.* at 29-31. The Applicant's counsel indicated a continued willingness to work on Development Agreement issues (*Id.* at 32-33) and the matter was continued yet again.

The direction of the Commissioners on April 27 was absolutely the same as that given on April 12: fix the Development Agreement to deal specifically with the Kittitas Valley project and provide data on setback distances that would adequately mitigate all of the acknowledged impacts the project would have to the surrounding neighborhood.

At the May 3, 2006 hearing the tenor of the Applicant's posture with the County decidedly changed, and one leaves it to the court to

determine if the ultimatum the Applicant presented was made in good faith under the circumstances then existing.

Commissioner Bowen opened by acknowledging receipt of a draft Development Agreement dated May 1, 2006 and responded to prior correspondence from the Applicant to the effect that they believed the County was unreasonably delaying the process and not acting in good faith. VTP, May 3, 2006, Pages 5-6. A history of the process was recited by Commissioner Bowen. *Id.* at 6-10. Each of the Commissioners then discussed the evidence in the record and their individual wind farm site visits with regard to a setback distance necessary and appropriate to mitigate all impacts of the KV Project. Interestingly, the Commissioners independently arrived at approximately the same conclusion based on their observations at other wind projects--that it would take 2000 feet to one-half mile setbacks from neighboring properties to adequately mitigate all impacts on the KV Project site, with something approximating 3000 feet from non-participating lands and residences being a reasonable target. *Id.* at 10-15, 21-24, 26-29.

County Staff then provided its critique of the most recent draft Development Agreement and reiterated its concern about new information being placed in the record by the Applicant. *Id.* at 16-18, 31-45. After a break, the Commissioners asked the Applicant to address the

Commissioners' questions and issues. It should be emphasized at this point that the May 1 draft Development Agreement proposed by the Applicant to increase the setback from 1000 feet to 1350 feet but provided absolutely no justification for either the increase or any specific setback distance with reference to any of the enumerated impacts for which the Commissioners had specifically requested information. Instead, Mr. Taylor, on behalf of the Applicant stated that it was the Applicant's position that the record already adequately addressed all of the Commissioners' concerns and "as a representative of the Applicant and on behalf of Applicant Power Partners and its parent company Horizon Wind Energy, I must inform you that at the proposed setback of 2500 feet, as I – if I've understood correctly the proposal from the Board, would, in our opinion, render this project inviable." [sic] *Id.* at 47. The Commissioners stated that the Applicant had provided no information to substantiate that the project was economically viable with setbacks of 1350 feet but not at any greater distance, let alone not viable at 2500 feet, and that the Applicant had not directed the Commissioners to any part of the record to support any assertion on economic viability. *Id.* at 47-50. Without elaboration, the Applicant's counsel said the Applicant would not go forward with 2500 foot setbacks and that the Commissioners should take

whatever action they choose. *Id.* at 49. This exchange then took place at pages 50-52.

COMMISSIONER HUSTON: I think it's important to note for the record, Mr. Chairman, that through this entire process we've had continuous notation in terms of the items in the record. We now have an assertion by the proponent, who's essentially tossed their hands up and said, It's not viable.

I guess at this point – frankly I'm a bit disappointed that after all this time and effort and months of discussion, they're not even prepared to offer into the record – we've already discussed the need to throw this back open for comment. They're not even prepared to discuss in fact why it's not viable, what constitutes an economically viable project, or anything in the record to substantiate what has been a last-minute assertion that apparently there is a magical number of towers that makes a project viable.

I'm hearing nothing to support that assertion, nothing whatsoever, other than I guess they don't want to play anymore. And I think it's important when this record goes to EFSEC that after a great deal of deliberation, a great deal of discussion, a great deal of effort on the part of a number of citizens, as well as staff and the Board of County Commissioners of Kittitas County, we're now at a point where essentially the hands have gone up and I guess the discussion is over.

And frankly, I'm not absolutely sure why we can't get a more definitive statement from the Applicant, although I suspect I know why; it'll play much better in front of EFSEC.

If in fact this is your last and best effort, Applicant, come to the microphone and tell me that the draft I have dated May 1, 2006, is the absolute final and best offer of the Applicant, and then I guess I'll base my decision on that.

CHAIRMAN BOWEN: We should note for the record the Applicant doesn't wish to reply to that statement.

COMMISSIONER HUSTON: Well, then, we'll note for the record that they do not wish to indicate whether

in fact this is their best offer; and I guess we'll then have to make our decision in essentially a vacuum at this point. I would note for the record the Applicant has chosen to no longer participate in the process in a meaningful manner.

At the hearing before the BOCC on May 31, 2006, in response to letters received from the Applicant, County Staff relayed to the Commissioners the contents of those letters as well as meetings with the Applicant subsequent to May 3. It was the understanding of Staff that the Applicant was going to take a look at the record and the range of setbacks identified by the Commissioners to see if it would be willing to discuss some scenario of either fixed or variable setbacks. VTP, May 31, 2006, Pages 9-13, 13-21. The Applicant's counsel made a presentation followed by an indication from the Commissioners of a willingness to consider a 2000 foot setback from nonparticipating property boundaries so long as the setback from any residence was 2500 feet. *Id.* at 34, 36-38. The Applicant responded by indicating again that the setbacks would make the project not economically viable. *Id.* at 41-42. Again, no data or substantiation for the point at which the project would no longer be economically viable had yet been presented by the Applicant.

At page 50, Chairman Bowen then asked counsel for the Applicant: "...do you have information with you today that could help us to see if that's viable or not?" The answer illuminates the absolute lack of

any good faith on the part of the Applicant to even attempt justification for its refusal to objectively shoulder its burden for providing data establishing that the setbacks it was proposing (or was objecting to) were or were not adequate to mitigate known impacts.

MR. TIM MCMAHON: *I was afraid you were going to ask me that question.* All I can tell you is the information we provided you in the correspondence is that a half-mile setback reduces the project in half and doesn't leave a sufficiently viable project. That's the information I have back from my client. (Emphasis added).

No reference to the record. No economic data as to the number of turbines required to make the project economically viable, and how, or if certain turbine locations are critical to that viability. No substantive information about how adequate setbacks can or should be determined for this project. No effort to relocate turbines within the central portion of the project (which were areas specifically identified for turbine strings in the initial application). These absences stand in stark contrast to the findings of the DEIS that significant impacts would result from this project—impacts acknowledged by the Applicant to require distances greater than 1350 feet.

No substantive basis was given to support the refusal to continue participation. The sole reason for withdrawal was that possible setbacks rendered the project “economically inviable.” It is incongruous for

EFSEC to later conclude that economic viability is irrelevant to the consideration (see Council Order No. 831) but find that Sagebrush acted in good faith in withdrawing from the local process because of purported "economic inviability." Common sense (and the law) requires consistent application of rules and reasoning.

The key issue for the siting of any wind farm, including this one, is its proximity to and impact on surrounding land. These are the elements which form the very basis of EFSEC's existence. Yet for the boxes and boxes of material submitted by the Applicant for the record, some of which may be interesting, but most of which is totally irrelevant to the key questions, the Applicant failed to produce substantive and useful information to Kittitas County, that assisted in establishing objective standards for turbine setbacks from both residences and property boundaries of non-participating parties. The Applicant did not even want to discuss with the County a variance procedure that could allow for exceptions from the setback requirement for particular tower locations. One would think that, at the very least, the Applicant would have attempted to contrast this project with the Wild Horse requirements.

The DEIS identifies, and the Applicant agrees, that several significant environmental impacts on neighboring properties will result from this project, and there is agreement that distance is the primary, if not

only, effective means of mitigating these impacts. (AR 3838, see also FEIS, AR 9710) But, what did the Applicant provide to the County? It proposed 1000 foot setbacks with no justification for that distance and then increased it to 1350 feet, again with no substantiation. Was 1000 feet inadequate? Was 1350 adequate or just arbitrary? The claim the Applicant made that any greater setback would make the project no longer economically viable was likewise unsubstantiated, but this Court, just as the County, has absolutely no information in the record on that point, either.

One cannot read the transcripts of the County proceedings and reach the conclusions the Applicant acted in good faith. Applicant has the burden of establishing its good faith efforts, and it is not accomplished when the Applicant unilaterally elects to terminate discussions with the County, especially under the circumstances in this case. It can only be presumed from the Applicant's actions that any information it would have produced about the setback distances necessary to adequately mitigate the height and scale of the towers and their associated shadow flicker, noise and lights, would also establish setbacks that would make the project uneconomic, at least in the opinion of the Applicant. What this really says is that the Applicant has not made the effort to obtain a large enough project area so that it could mitigate all of its impacts onsite. To accept

the Applicant's flat statement that the project would no longer be economic would have to be based upon faith because there certainly is no substantive evidence in the record to support the assertion. The Applicant could not and did not make its case with the County, and, as Commissioner Huston opined, it now hopes to not only being relieved of the obligation to come forward with credible, objective information that at least attempts to counter the setback observations of the Commissioners, but also from the obligation to accept setbacks as necessary to fully mitigate onsite the acknowledged impacts of this project.

(ii) Failure to Reach Agreement.

The second element the Applicant must establish under WAC 463-28-040 is that it and the County have been unable to reach an agreement to resolve the outstanding issues. Again, the primary issue is one of setbacks, and the record is clear that it was the Applicant, not the County, that declared an impasse.

The transcript of the exchanges between the County and the Applicant on the setback issue speaks for themselves. From the outset, the County made clear to this Applicant that, consistent with the Applicant's processing of the Wild Horse project, each application must rise or fall on the specifics of the site. It was not the County's burden to justify any particular setback distance and it repeatedly asked for this information

from the Applicant. It has never been provided, even when the Governor asked for it. The Commissioners, having independently arrived at a setback range they felt would be necessary to deal with the impacts of this project, continued to hold open the option of discussing different distances or even a variance process if the Applicant would come forward to justify those considerations. The Applicant elected not to.

Under WAC 463-28-040(2), the point is not a lack of understanding on the part of the County as to visual impacts and proposed mitigation. Rather, the question is whether the County and the Applicant have failed to reach an agreement on the issues. By its very definition, agreement requires mutuality, and the failure to reach agreement requires fixed and final positions of the parties that cannot be reconciled. The County was open to further discussions and invited the continuance of an open dialogue and it was the Applicant that refused to continue to look for an answer.

But there is another issue that was and is central to reaching agreement—the substantive terms of the application must be fixed and certain and remain so. From the time it first filed its Application, the Applicant had been constantly modifying the scope of the project, the location and number of turbines, and the terms and conditions to which it agrees to be bound. The letter of Mr. McMahan which transmits the

Applicant's brief to EFSEC contains nearly five pages of mitigation detail and other points with which the Applicant was now apparently willing to agree. (AR 9032). These concessions by the Applicant were not offered to the County.

In spite of repeated requests from the Commissioners, the County was never even given a draft development agreement that the Applicant said it would sign. The record was closed at the County, yet the Applicant kept on with new information that it had failed to timely introduce. County staff called out this fact, and the Commissioners, while observing that it might well be necessary to reopen the record due to the extent and content of what the Applicant was providing, nevertheless continued to invite the Applicant to cure the defects in its presentation and supply substantive data on not only setbacks and project economics, but also on all of the other details it was proposing for the development agreement as required under County code.

The record is now closed, yet the Applicant failed to present a complete and accurate package of everything it intends or to which it is willing to be bound, let alone anything remotely resembling what it was proposing to the County. One can fairly ask: Exactly what was, at the end, the complete proposal to the County that the County was supposed to agree to?

**(iii) EFSEC Improperly Considered and
Evaluated Alternate Locations Under
WAC 463-28-040(3).**

Applicant must establish that alternate locations within the county have been reviewed and found unacceptable. WAC 463-28-040(3) (“... that alternate locations which are within the same county and city have been reviewed and have been found unacceptable.”). The consideration of alternative sites must be made in the context of statutory directives regarding regional energy needs (RCW 80.50.010) and not on the sole basis of sites under the control of an applicant. In other words and to be clear: Can the Power be produced elsewhere in the county? The evidence is yes it can be. Yet here EFSEC and the Governor erroneously applied the law.

The record of this Application clearly establish the existence of vast areas in Kittitas County suitable for wind farm development which also possesses a high probability of being consistent with local land use regulations. FEIS recognized six (6) alternatives with comparable wind energy production values. (AR 9710, p. 2-42 to p. 2-80). Commissioner Huston stated as much. VTP, April 12, 2006, Page 65. Notably, the Wild Horse project itself, developed by this very Applicant, has substantial room for expansion. Applicant acknowledged but pleaded ignorance of

the energy project proposed on land immediately south of Wild Horse. (AR 15332). There are alternative locations for this type of power generation facility in Kittitas County.

It is disingenuous for the Applicant to argue that there are no alternative sites in Kittitas County for wind power projects, and the issue of preemption must fail on this element alone. Council Order 826 attempts to steer away from this by suggesting there are no sites available to this Applicant. (AR 14257). However, nowhere does WAC 463-28-040(3) suggest this criteria calls for this type of examination focused solely on the Applicant as opposed to sites capable of generating the power. The inquiry should, based on EFSEC's statutory mandate, be the state's energy needs not this applicant's bottom line. In fact, the Final EIS issued identifies other locations in the County that could be used to produce electricity through the use of wind turbines. (AR 9710, p. 2-42 to p. 2-80) Instead, EFSEC and the Governor focused on whether these sites were available to this Applicant as opposed to whether sites were available to produce the given quantity of electricity. This interpretation of WAC 46.28.040(3) is erroneous. Because the interpretation is an erroneous interpretation of the law, let alone erroneous application of the law to the facts, it by itself can serve as the sole basis for this court to reverse the Governor's decision.

(iv) **The Interests of the State.**

WAC 463-24-040(4) directs compliance with this element to RCW

80.50.010 which provides in part:

“...It is the intent 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. Such action will be based on these premises:

(1) To assure Washington state citizens that, where applicable, operational safeguards are at least as stringent as the criteria established by the federal government and are technically sufficient for their welfare and protection.

(2) To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment.

(3) To provide abundant energy at reasonable cost.

(4) To avoid costs of complete site restoration and demolition of improvements and infrastructure at unfinished nuclear energy sites, and to use unfinished nuclear energy facilities for public uses, including economic development, under the regulatory and management control of local governments and port districts.

(5) To avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay.”

Applicant established no shortage of electrical power generation in this State for the foreseeable future; is not a utility or other provider of electrical power; has no contract for either the development of this project or the sale of project electricity; and offers no analysis of substantial wind power production and projects in other counties of the state (Klickitat, Benton, Walla Walla and Columbia). Electricity demand in the region of the next 20 years is less than 1% per year. FEIS 1-8.

There is no demonstrated interest of the State in approving this project as there appear to be more than enough such projects constructed or proposed for Kittitas County to serve future power needs. To do otherwise would be tantamount to saying that whatever wind power site an applicant has under contract is sufficient to deem its approval to be in the best interests of the State, regardless of other available lands, projects or market forces. The EFSEC statute also requires EFSEC and ultimately the Governor to balance the need for power with a number of compatibility goals. The fact the project cannot be made economically viable from the Applicant's prospective while the acknowledged and known impacts on citizens residing within and adjacent to the project boundaries cannot be adequately mitigated is perhaps the best indicator that the site is not appropriate. Applying EFSEC's own rules on preemption leads to the inescapable conclusion that preemption was not warranted by the facts and

was based on an erroneous interpretation and application of the law to the facts.

F. EFSEC Improperly Exercise Preemption Authority in Conflict with Growth Management Act (GMA).

The interplay between Growth Management Act (GMA) and EFSEC authority was a focal point in the adjudicatory proceeding. EFSEC incorrectly concluded that GMA has no application or impact on its authority or determinations. Council Order No. 826 contained the following analysis and conclusions:

RCW 36.70A.103 requires state agencies to comply with local comprehensive plans and development regulations adopted pursuant to the GMA. However, no language within the GMA explicitly repeals RCW 80.50.110(1), which clearly elevates Chapter 80.50 RCW to override any conflicting law, rule, or regulation.

(AR 14257-14331). This conclusion is an erroneous statement of law. RCW 34.05.573(3)(d). The Court reviews legal issues under the error of law standard. *Schrom vs. Board of Volunteer Firefighters*, 153 Wn.2d 19, 24 100 P.3d 814 (2004); *City of Pasco v. Public Employment Relations Commission*, 119 Wn.2d 504, 507, 833 P.2d. 381 (1992) (“construction of a statute is a question of law reviewed de novo under the error of law

standard.”)³¹ The issue is not a matter of “repeal” but rather one of statutory interpretation and harmonization.³²

1. RCW 80.50.110(1) Specifically Recognizes that Subsequently Adopted State Authority Will Prevail Over Conflicting Statutory Provisions Relating to EFSEC.

Washington’s energy facility siting statute confers a limited power of preemption, but also requires land use conformity hearings that involved affected local jurisdictions. RCW 80.50.090(2). Twenty years after adoption of the initial iteration of the Thermal Power Plant Site legislation, the legislature of this state adopted the Growth Management Act (GMA). RCW Ch. 36.70A. This places long term planning at the local level. RCW 36.70A.010.³³ GMA recognizes that land use planning

³¹ Review of EFSEC proceedings presents an uncertain and unclear standard of review. EFSEC makes only “recommendations” to the Governor with respect to a site certification application and preemption. The “final decision” is made by the Governor but such decision was made only in letter form. No specific findings of fact or conclusions or law were issued as a part of the “final decision”. No deference is extended to the agency under the circumstances of this case. *Cowiche Canyon Conservancy vs. Bosley*, 118 Wn.2d 801, 813-814, 828 P.2d 549 (1992) (deference is extended to agency determinations only when a statute is ambiguous.).

³² EFSEC and applicant both sought to characterize the issue of GMA applicability as a matter of statutory repeal of preemption authority under RCW 80.50.110. Growth Management Act (GMA) did not repeal preemption authority. The specific analysis is based upon statutory interpretation and the interplay of two state statutory regimens. Preemption is controlled by RC W80.50.110(2). The interplay of state statutes, however, is governed by RCW 80.50.110(1).

³³ RCW 36.70A.010 contains the following legislative findings with respect to land use planning under the Growth Management Act (GMA):

is a bottom up process built on public participation (RCW 36.70A.020(11) and .035); provision is made for the siting of essential public facilities (RCW 36.70A.200); and deference is afforded to local decision-makers (RCW 36.70.3201). A clear tension exists between energy facility site legislation and the mandates and purposes of Growth Management Act (GMA).

The interrelationship of state law provisions is expressly addressed by RCW 80.50.110(1), which recognizes that EFSEC legislation supersedes only those statutes and regulations "in effect" at the time of adoption of the statute. RCW 80.50.110(1) specifically provides:

If any provision of this chapter is in conflict with any other provision, limitation, or restriction, *which is now in effect* under any other law of this state, or any rule or regulation promulgated thereunder, this chapter shall govern and control such other law or rule or regulation promulgated

The legislature finds that uncoordinated and unplanned growth, together with the lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

Planning goals recognize that citizen participation in the process is critical to formulating long-term planning decisions. RCW 36.70A.020(11) and .035. Planning involves provision for "essential public facilities." RCW 36.70A.200. Kittitas County has adopted comprehensive plans and development regulations under GMA. Included in the GMA planning were specific provisions related to wind energy resource overlays. KCC 17.61A. Those procedures were adopted and not appealed by any party.

thereunder shall be deemed superseded for purposes of this chapter.

(Italics added). The clear and unambiguous language of the statute provides that RCW Ch. 80.50 shall only prevail over conflicting state laws and regulations “in effect” at the time of enactment. Unambiguous statutes should be construed according to their plain language. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 179, 157 P.3d 847 (2007); *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). This statutory language is consistent with the established principle that “. . . the statutory provision that appears latest in order of position prevails unless the first provision is more clear and explicit than the last.” *State v. J.P.*, 149 Wn.2d 444, 452, 69 P.3d 318 (2003); *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990). Washington courts will not read one statute in such a way as to “render another provision inoperative”. *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Growth Management Act (GMA) was not “in effect” at such time. RCW 80.50.110(2) specifically recognizes that subsequently adopted legislation will prevail over the statutory scheme for EFSEC.³⁴

³⁴ The legislature specifically limited prioritization of RCW Ch. 80.50 state level statutes and regulations “. . . now in effect.” On the other hand, RCW 80.50.110(2) incorporates

2. State Agencies Are Required to Comply With Provisions of Growth Management Act (GMA) – RCW 36.70A.103.

In 1990, the Washington Legislature enacted the Growth Management Act (GMA) in response to its findings that

. . . uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.

RCW 36.70A.010. GMA calls for local – as opposed to state level – decision making with respect to growth management. *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 511, 139 P.3d 1096 (2006). The GMA does not embrace a single approach to growth management: rather, “the GMA acts exclusively through local governments, and is to be construed with a requisite flexibility to allow local governments to accommodate local needs.” *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 126, 118 P.3d 322 (2005).

potential future amendments to “energy facilities included under RCW 80.50.060 as now or hereafter amended.”

Growth Management Act (GMA) specifically recognizes that “. . . [s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted. . .”. RCW 36.70A.103.³⁵ EFSEC is a state agency. RCW 80.50.030. It is also significant that DNR (as a property owner) is a de facto applicant for site certification.

The siting of “essential public facilities” is specifically addressed and structured by RCW 36.70A.130. That provision expressly provides:

The provisions of Chapter 12, Laws of 2001, 2nd Sp. Sess. do not affect that State’s authority to site any other essential public facility under RCW 36.70A.200 *in conformance with local comprehensive plans and development of regulations adopted pursuant to Chapter 36.70A RCW.*

(Italics added). The procedure for siting “essential public facilities” is contained in RCW 36.70A.200 which provides, in relevant part, as follows:

(1) The comprehensive plan of each county and city that is planning under RCW 36.70A.040 shall include a process for identifying and siting essential public facilities. Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities, and state or regional transportation facilities as

³⁵ EFSEC concluded that RCW 36.70A.103 was limited in application to only state agencies when they occupy “the position of an applicant proposing development, except where specific legislation explicitly declares otherwise.” Council Order No. 826 at 28. (AR 14257-14332). Reliance is placed on WAC 365-195-765(2). The operative language of RCW 36.70A.103, however, does not contain such limitation. The analysis also fails because Department of Natural Resources (DNR) is a property owner reflected in the application for site certification.

defined in RCW 47.06.140, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.

Kittitas County adopted the required regulations for siting wind farms as essential public facilities. That process was followed and consistent with Growth Management Act (GMA). RCW 36.70A.200(5) states that “. . . no local comprehensive plan or development regulation may preclude the siting of essential public facilities.” Kittitas County does not preclude the siting of alternative energy facilities. Such facilities are authorized throughout the rural area, but subject to site specific considerations. The uncontroverted fact is that Kittitas County has specifically sited a facility – Wild Horse Wind Energy Project.

3. Growth Management Act (GMA) Specifically Recognizes That Land Use Decisions Are Best Made At The Local Level And Mandates That Substantial Deference Be Afforded Local Decision Makers.

Growth Management Act also includes a fundamental recognition with respect to land use decision making. A county’s amendments to its comprehensive plan and development regulations are presumed valid upon adoption. RCW 36.70A.320(1). The ultimate burden and responsibility

for planning and implementing the County's future rests with the community. RCW 36.70A.3201 provides, in pertinent part, as follows:

Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this Chapter requires local planning to take place within a framework of state goals and requirements *the ultimate burden in responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.*

GMA did not repeal RCW 80.50.110. RCW 80.50.110(1) clearly reflects that the provisions of RCW Ch. 80.50 supersede only conflicting state statutes and regulations "in effect" at the time of legislative enactment. Subsequently adopted state legislation will prevail in the event of conflict. GMA is equally clear in its directive that long term land use planning is based at the local level. RCW 36.70A.3201.

4. Preemption Authority Recognizes Deference To Local Laws and Regulations.

The siting of alternative energy resource facilities is not automatically subject to the jurisdiction of EFSEC. Energy facility developers may apply for either (1) local jurisdiction permitting, or (2) EFSEC certification under the provisions of RCW 80.50.060(2). Either process requires as a predicate consistency with local land use plans and regulations. RCW 80.50.090(2). Sagebrush filed a Site Certification

Application with EFSEC on January 13, 2003. EFSEC found that the original application was inconsistent with local land use plans and zoning ordinances. (AR 14076-14082).

EFSEC's statutory preemption authority has existed for 30 years. This authority, however, did not extend to preemption of comprehensive plans and development regulations adopted under GMA.³⁶

The application is vested to laws in effect at time of complete application. In this proceeding, Administrative Law Judge Torem, during Intervener Lathrop's cross examination of Mr. Wagoner, specifically applied a prior version of WAC 463-42-362 to which the Applicant did not object. In doing so Judge Torem referenced and indicated the applicant was vested to the statutes and Washington Administrative Code provisions ("Rules") in place when the application was filed. (see generally Adjudicative Hearing Transcript pages 375-376.) That determination must apply for all purposes.

³⁶ In the 2006 session, the legislature amended RCW 80.50.020(15) and (16), and added references to comprehensive plans and zoning ordinances adopted under the GMA. HB 2402, 59th Leg. (2006). HB 2402 became effective on June 7, 2006. On that date, EFSEC has already received the Applicant's application. The statute only applies prospectively, and is not applicable to the permit presently under consideration. Generally, a statutory amendment is like any other statute and applies prospectively only. *In re Detention of Brooks*, 145 Wash.2d 275, 284, 36 P.3d 1034 (2001). In Washington when a statute is silent on whether it applies retroactively or prospectively the presumption is that the statute is applied on a prospective basis. *In re Personal Restraint of Stewart*, 115 Wn.App. 319, 75 P.3d 521 (2003), *State v. Smith* 144 Wn.2d 665, 673, 30 P.3d 1245 (2001); *Robin Miller Construction Co. Inc. v. Coltram*, 110 Wn.App. 883, 890 43 P.3d (2002).

5. Rules of Statutory Construction Regarding Conflicting Statutes Militate in Favor of the Pervasive Authority Under Growth Management Act (GMA)

Under Washington's principles of statutory construction, the statutory provision that appears latest in order of position (i.e., the most recently enacted provision) prevails unless the first provision is more clear and explicit than the last. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). Growth Management Act (GMA) is the most recent legislation and the intent is clear that ". . . it is in the public interest that citizens, communities, local governments, and the private sector corporate and coordinate with one another in comprehensive land use planning." RCW 36.70A.010. Kittitas County followed this mandate. Growth Management Act (GMA) ". . . evinces the legislature's intent to discard the traditional land use system. . . . in favor of a scheme which stresses coordination, cooperation, and integration." *City of Des Moines v. Central Puget Sound Growth Management Hearings Board*, 97 Wn.App. 920, 929, 988 P.2d 993 (1999).

Growth Management Act (GMA) amendments have clearly recognized the primacy of local decision making and mandated deference to the decision making process. RCW 36.70A.3201. A broad range of discretion is afforded to local jurisdictions and such deference ". . .

supersedes deference granted by the APA and courts to administrative bodies in general. *Quadrant Corporation v. State Growth Management Hearings Board*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). EFSEC must defer to local decision makers in matters of local land use planning and decisions.

Requiring project approval at the county level is consistent with the purpose of the EFSEC statute and regulatory guidelines. Contrary to Sagebrush's argument, an applicant must make and process an application with local jurisdictions ". . . for permission under . . . land use plans and zoning ordinances . . ." WAC 463-28-030(1). A statutory provision may not be read in a manner that will "render another provision inoperative." *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

V. CONCLUSION

For these reasons, the court should reverse the Governor's approval of the Kittitas Valley Wind Power Project.

Dated this 17 day of April, 2008.

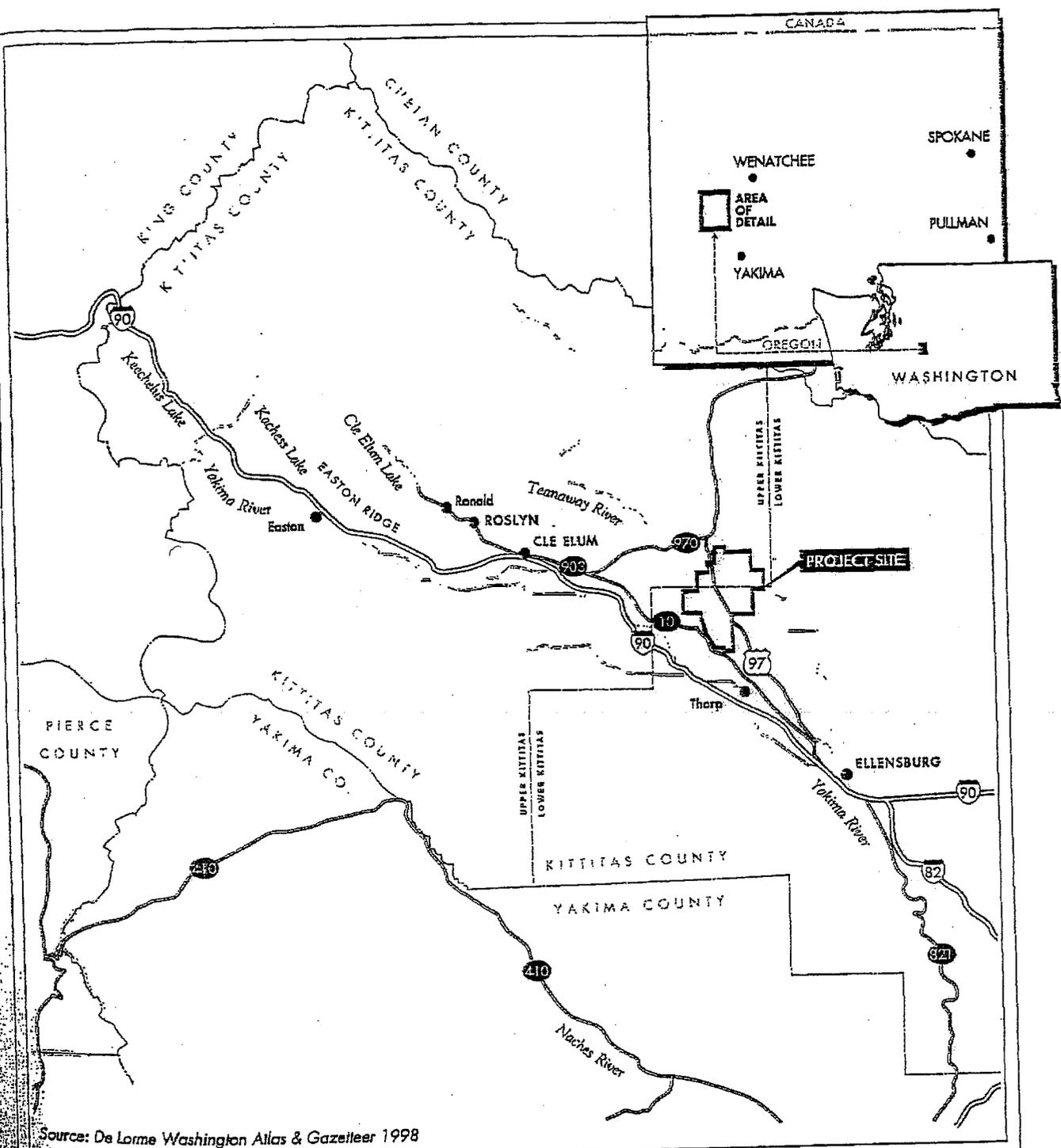
By: 
James C. Carmody WSBA 5205

By: 
Jeff Slothower WSBA 14526

Residents Opposed to Kittitas Turbines, et al.
v. EFSEC, et al.
Washington State Supreme Court No. 81332-9
Brief of Petitioners Residents Opposed to
Kittitas Turbines and F. Steven Lathrop

ATTACHMENT A

Graphic Scale: 1 inch = 10 miles



Source: De Lorme Washington Atlas & Gazetteer 1998

FIGURE I-1

VICINITY MAP

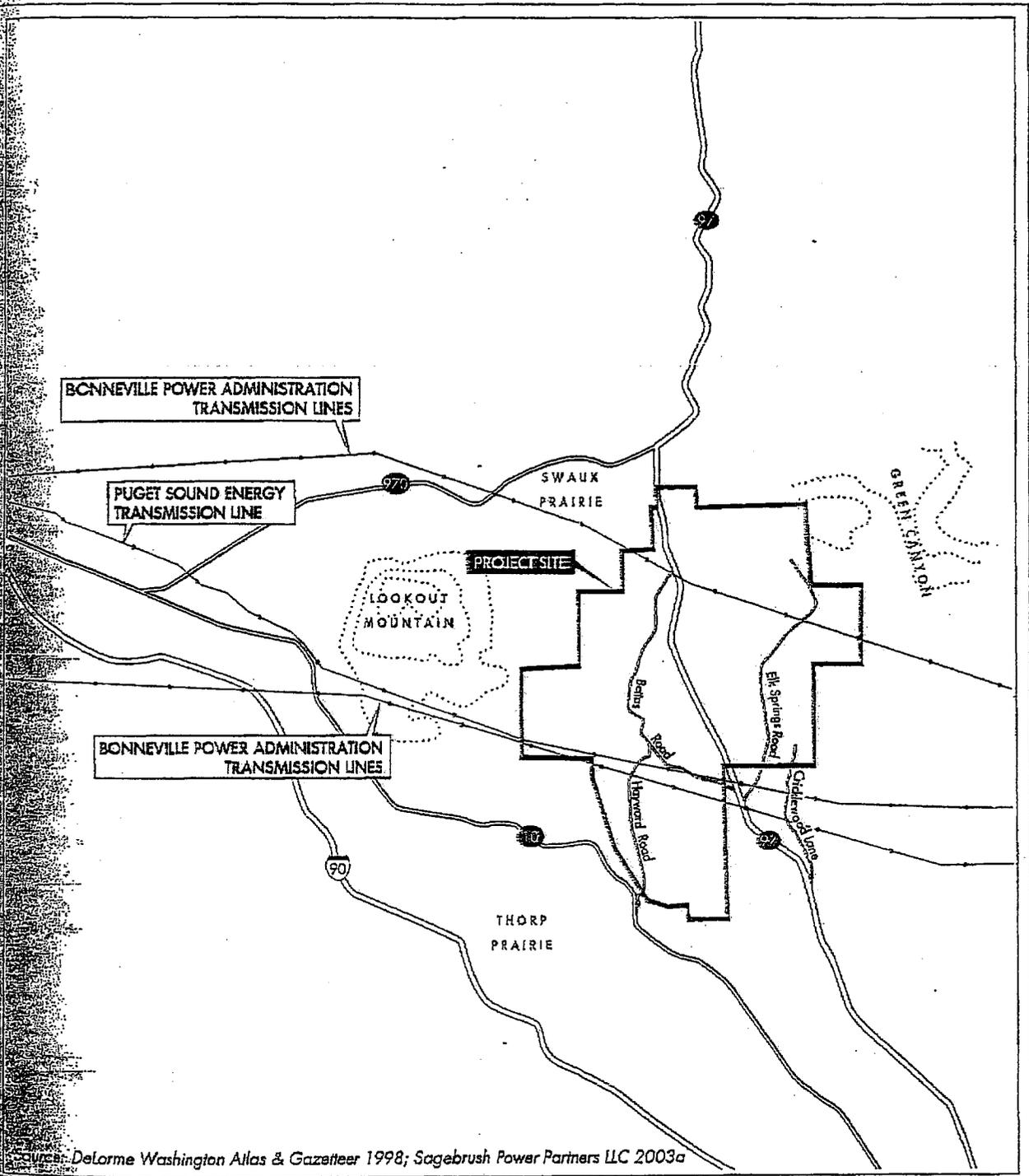


0 8
Approximate Scale in Miles

KITTITAS VALLEY WIND POWER PROJECT EIS

SHAPIRO
& ASSOCIATES, INC.

1017002.2T



Source: Delorme Washington Atlas & Gazetteer 1998; Sagebrush Power Partners LLC 2003a

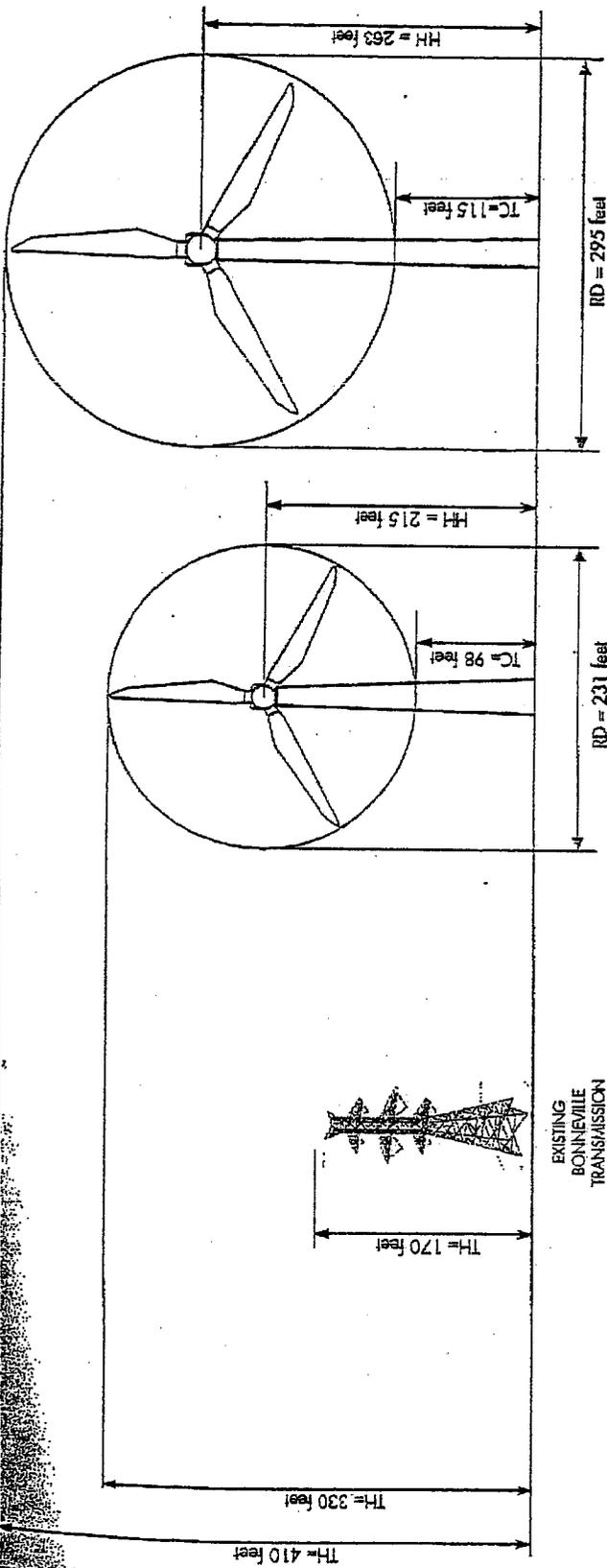
FIGURE 1-2

PROJECT SITE MAP



Residents Opposed to Kittitas Turbines, et al.
v. EFSEC, et al.
Washington State Supreme Court No. 81332-9
Brief of Petitioners Residents Opposed to
Kittitas Turbines and F. Steven Lathrop

ATTACHMENT B



max 65 turbines
330-foot turbine scenario

max 65 turbines
410-foot turbine scenario

Source: Sagebrush Power Partners LLC 2003a

FIGURE 2-2

- HH hub height
- RD rotor diameter
- TC tip clearance
- TH tip height

TYPICAL WIND TURBINE DIMENSIONS

SHAPIRO & ASSOCIATES, INC.

KITTITAS VALLEY WIND POWER PROJECT EIS

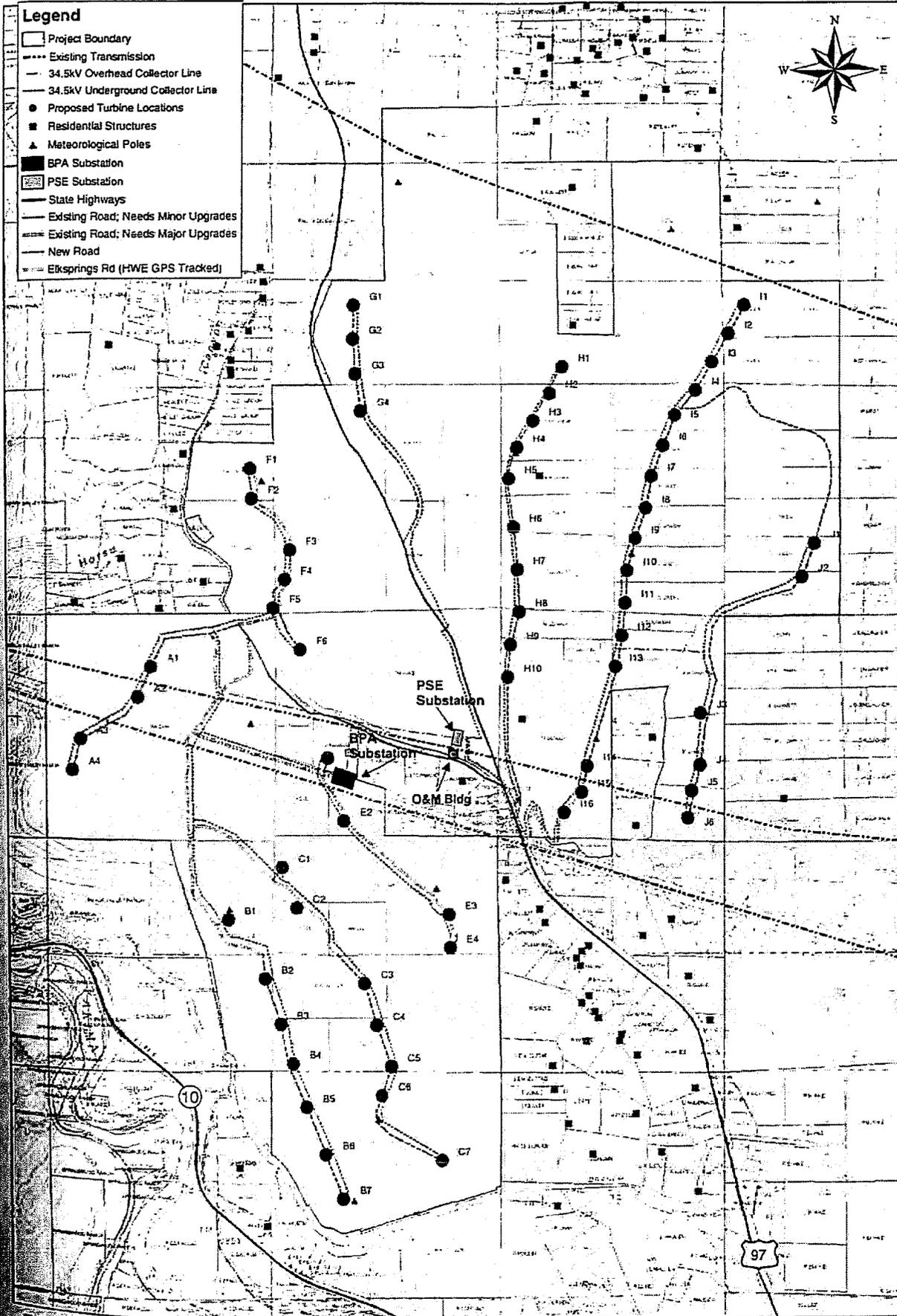
1017002.2T

Residents Opposed to Kittitas Turbines, et al.
v. EFSEC, et al.
Washington State Supreme Court No. 81332-9
Brief of Petitioners Residents Opposed to
Kittitas Turbines and F. Steven Lathrop

ATTACHMENT C

Legend

- Project Boundary
- Existing Transmission
- 34.5kV Overhead Collector Line
- 34.5kV Underground Collector Line
- Proposed Turbine Locations
- Residential Structures
- ▲ Meteorological Poles
- BPA Substation
- PSE Substation
- State Highways
- Existing Road; Needs Minor Upgrades
- Existing Road; Needs Major Upgrades
- New Road
- Elksprings Rd (HWE GPS Tracked)



EIS Figure 2-1:
 Kittitas Valley Wind Power Project
 Site Layout
 Source: Schafer 2005i

0 0.1 0.2 0.4 0.6 Miles