

NO. 88089-1

SUPREME COURT OF THE STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA GORGE, INC. and
SAVE OUR SCENIC AREA,

Petitioners,

v.

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

Respondents, and

WHISTLING RIDGE ENERGY LLC,
SKAMANIA COUNTY, and KLICKITAT COUNTY
PUBLIC ECONOMIC DEVELOPMENT AUTHORITY,

Intervenor-Respondents.

**RESPONSE BRIEF OF INTERVENOR-RESPONDENTS
SKAMANIA COUNTY and KLICKITAT COUNTY
PUBLIC ECONOMIC DEVELOPMENT AUTHORITY**

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GLOSSARY

County	Skamania County
Counties	Skamania County and Klickitat County Public Economic Development Authority
EFSEC	Energy Facility Site Evaluation Council
FOG	Friends of the Columbia Gorge, Inc., and Save Our Scenic Area
GMA	Growth Management Act, Ch. 36.70A RCW
Gorge Commission	Columbia River Gorge Commission
Scenic Area	Columbia River Gorge National Scenic Area
Scenic Act	Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544, <i>et seq.</i>
SCC	Skamania County Code

1. INTRODUCTION

Skamania County and Klickitat County Public Economic Development Authority request that the Court affirm the state's decision to approve the Whistling Ridge Energy Project. The Counties support the applicant and state's briefing, but write separately to emphasize the Project's local importance, lack of basis for further mitigation, and consistency with County land use ordinances, as County zoning permits all 35 wind turbines outright.

Whistling Ridge will provide locally generated renewable energy and economic stimulus in a county struggling with economic obstacles. The pull-out of traditional resource dependent industries and ongoing recession are amplified in Skamania County as the federal government owns about 850,000 acres, or 85% of the land base. In addition, the Columbia River Gorge National Scenic Area Act protects 80,000 acres, State Forest Trust Lands encompass 60,000 acres, and private commercial forest lands encompass 40,000 acres. Three percent of the land base remains for residential, industrial and commercial uses.

This limited land base constrains County revenue and employment opportunities. The County's unemployment rate is 12.9%, with poverty most entrenched in the mid-County area, where 55-65% of the school children rely on subsidized school lunches, and domestic violence rates are high. County resources for addressing these issues are limited. Without federal funding stemming from the spotted owl listing which decimated the local timber industry, three of the County's four school

districts would close, and the County would lay off half its work force. Whistling Ridge is a 150 million dollar capital investment in locally produced renewable energy which could almost double the tax base.

The state considers these factors when reviewing energy projects, balancing them with its review of wildlife, aesthetic, and other issues. The Project adequately addresses these siting factors, and FOG has failed to meet its burden of proof to demonstrate reversible error. After four years of permitting and litigation, the Counties request Court affirmation of EFESC's approval.

2. RESTATEMENT OF ISSUES

The Counties incorporate the restatement of issues as set forth in the state's briefing.

3. STATEMENT OF THE CASE

3.1. Project Summary

Whistling Ridge is a 75 megawatt wind energy development project. Located outside the Scenic Area, the Project would be sited on 1,152 acres, with a permanent footprint of fewer than 57 acres.¹ The vast majority of the land would remain in forestry operation,² with County zoning permitting the 35 turbines outright.

¹ AR 00038, AR 00104; *see also* AR 00160.

² AR 00122, AR 00124.

3.2. In a Small Place, Even One Project Makes a Difference

Rural poverty, due to its relative isolation, is less visible than its urban counterpart. But, it is no less intractable. Skamania County did not always face these entrenched challenges.

From 1970 through 1991, the National Forest produced 350 million board feet of lumber per year.³ This resulted in about 10 million dollars in revenue to the County and schools in today's dollars.⁴ The State Forest Trust lands produced two million dollars each year, on average, for the County, throughout the 80's and early 90's.⁵ Then the Spotted Owl was listed as an endangered species, and production shut down. In less than a decade, timber harvests went from 350 million board feet to under ten million.⁶ The County went from four full time mills running multiple shifts to one mill, and from 800 full time family wage jobs in the forest to fewer than 24.⁷ With the corresponding drop in tax base, the County has depended on federal funding ever since.⁸

Without federal funding, the County would have laid off half its workforce, County schools would lose 40% of their funding, and three of the four school districts would be shuttered.⁹ In the mid-County region,

³ AR 18823.

⁴ AR 18823.

⁵ AR18823-18824. Receipts are now about \$100,000 annually. AR 18824.

⁶ AR 15914.

⁷ AR18823-18824; *see also* AR 15915 (1,200 timber related jobs dropped to fewer than 20 in ten years). The County waited to intervene in this proceeding until the last possible moment to minimize legal costs. AR 16305, *see generally* AR 16303-16309.

⁸ Congress has continued to provide rural funding to address logging receipt curtailment resulting in large part from the Spotted Owl's listing. AR 18824.

⁹ AR 18824.

55-65% of the children require subsidized school lunches,¹⁰ and County domestic violence rates are high.¹¹

The unemployment and underemployment in the center of the county has a lot of impacts on the county in terms of service levels. We even have a domestic violence shelter in our county, and in November [2010] alone we had 77 bed nights in that shelter. So we have a very severe economic problem, especially in the center of our county.¹²

If 77 bed nights are extrapolated annually, the figure approaches 1,000 annually. This is in a county with 3,755 households.¹³

Skamania County struggles to address these challenges. Some job gains started to occur in the past decade, but then the recession hit. Consequently, with 12.9% unemployment,¹⁴ and lagging behind more urbanized areas of the state, economic development remains an imperative. This is why state and local economic development agencies support Whistling Ridge, including:

- Skamania County Economic Development Council;¹⁵
- Klickitat County Public Economic Development Authority;¹⁶ and,
- Washington State Department of Commerce.¹⁷

¹⁰ AR 18992-18993.

¹¹ AR 18992.

¹² AR 18992.

¹³ AR 16651; AR 16651 (population just shy of 11,000).

¹⁴ AR 18825.

¹⁵ AR 14798-14803, AR 15909-15917.

¹⁶ AR 15420-15431, AR 15918-15921.

¹⁷ AR 15880-15888; *see also* generally, summary of Scenic Area economic development efforts, AR 15891-15908.

As these agencies recognize, the Project offers an opportunity to improve the economic situation. With roughly 3,755 households, Skamania County's population is small.¹⁸ Consequently, a single project makes a difference. Only when County size is considered, coupled with the challenges the County faces, is the Project's local economic significance appreciated.

Whistling Ridge could almost double the tax base. The Project is estimated to add \$609,400¹⁹ to \$1,000,000²⁰ in property tax revenue. The County collects only \$1.4 million through property taxes.²¹ Skamania County also has a relatively small labor market. While not all 143 construction positions or the nine directly created permanent jobs from Project operation²² will be filled with County residents, the employment is needed, and will have more impact than in a larger jurisdiction.²³ Given the County's situation, even modest employment gains matter. FOG has continually marginalized Whistling Ridge's significance.²⁴ Yet, not only is the employment significant for a small community, the benefits are even more apparent when indirect impacts from a \$150 million capital investment²⁵ are considered. In summary:

¹⁸ AR 16651.

¹⁹ AR 14858.

²⁰ AR 18970.

²¹ AR 18970:21-24; AR 18992:12-15.

²² AR 14857.

²³ AR 19766 (decrease of only 30 construction and mining positions led to a 27.3% decrease in employment in that field in 2010).

²⁴ AR 15910.

²⁵ AR 14852.

- Direct/Indirect (including induced) Construction Employment: 170 jobs, with a \$21.4 million annual payroll.
- Local Construction Procurement Generated (Direct/Indirect): \$15.8 million.
- Employment Generated (Direct/Indirect): \$1.9 million annual payroll. In-County annual business revenue generation to increase as much as \$17.1 million.
- Sales Tax: \$46,600 annually and \$126,000 in one-time sales tax revenues during construction.²⁶

FOG discounted these benefits, asserting before EFSEC that stopping the Project just means the investment dollars go elsewhere, resulting in an economic “wash.”²⁷ Even if FOG had substantiated this theory, there is no economic “wash” for Skamania County should FOG succeed in using litigation to drive out the Project.

FOG has consistently stood in the way of resolving these economic issues. This stance has involved litigating against economic initiatives, including forcing other wind projects located outside the Scenic Area into settlements involving cash payments in amounts FOG would not disclose before EFSEC.²⁸ Due to FOG’s present litigation, four years since application submittal, the capital investment Skamania County’s first and only wind project represents has yet to occur.

²⁶ AR 14852

²⁷ AR 15830.

²⁸ AR 15916 (“FOCG has made a cottage industry out of challenging land use and economic development efforts.”); AR 19032-19036 (FOG testified on settlements reached with two other wind energy developers).

3.3. Project Location

The Project is outside Scenic Act jurisdiction, within an area which includes “industrial agriculture, regional utility, commercial and industrial development,”²⁹ and electrical transmission lines.³⁰ As EFSEC found:

A series of dams now slow the river, generate power for the Northwest and permit commercial barge transportation. Heavily traveled highways and rail lines follow both sides of the Columbia River, and commercial barge traffic shares the river with divers, fishers and windsurfers. Industrial, commercial and residential development exists along the river. Electric and natural gas transmission lines, requiring clear cuts through forests [for] their rights-of-way are visible in the vicinity of the proposed project and directly through the proposed site.³¹

For over a century, the site has been managed for forestry use and subjected to a planned harvest schedule, and lacks old growth habitat.³² Nevertheless, despite the Project's limited impact and small footprint, extensive habitat mitigation is required.³³ And, although outside the Scenic Area, to address aesthetic impacts, over County and applicant objection, the state eliminated turbines and turbine corridors.³⁴

²⁹ See AR 28672.

³⁰ AR 00038 (BPA transmission lines "traverse the site.").

³¹ AR 28667-28668.

³² AR 00124; AR 04266.

³³ AR 28677-28678.

³⁴ AR 28674.

3.4. Review Process

The Project has been under review for over four years.³⁵ Review has included preparation of an Environmental Impact Statement, which was not appealed, an almost two-week long adjudicative hearing held within the County, a land use hearing (also held within the County), public meetings (held at several locations), a site tour, and an almost 40,000 page record,³⁶ all for a Project which the County zoning code permits outright.³⁷ The Project has been thoroughly vetted and mitigated.

Given FOG's failure to meet its burden to demonstrate reversible error for what it characterizes as a "small" project,³⁸ the approval of Skamania County's only commercial scale wind project should be upheld.

4. LEGAL ANALYSIS

4.1. Experimental Mitigation and Power Curtailment is Unwarranted

4.1.1. Siting Criteria: No Basis for Further Mitigation

EFSEC considered and mitigated aesthetic impacts, including by eliminating turbines and turbine corridors.³⁹ EFSEC's siting criteria

³⁵ AR 00020 (Application originally submitted in March, 2009).

³⁶ AR 28127-28555 (Final Environmental Impact Statement, Appendices start at AR 23690, and continue through AR 28119); AR 16662, 23099 (adjudicative hearing commenced on January 3, 2011, and closed on January 20, 2011); AR 01482, 01133 (land use hearing agenda and public notice); AR 36757-37308 (minutes/transcripts of EFSEC meetings 2009-2011); AR 01245 (site tour notice); AR 1-37317 (Record filed with the Court).

³⁷ Section 4.2.2 of this brief.

³⁸ FOG's Opening Brief, p. 1.

provide generally for addressing aesthetic impacts,⁴⁰ but lack the specificity required for imposing further mitigation. Generalized guidance may not be used to impose unreasonable and experimental radar-activated safety lighting or to further reduce Project power production by reducing turbine blade spin.⁴¹ And, there is no basis in any other law for EFSEC to impose such mitigation. As such, FOG cannot meet its burden to show the state somehow erred by not mandating these measures.

4.1.2. Scenic Act: No Basis for Further Mitigation

FOG, while referencing the state's general siting factors on aesthetics, in actuality bases its mitigation arguments on the Scenic Area.

Affected viewing sites include hundreds of residences, multiple federal and state highways within the **Columbia River Gorge National Scenic Area**, numerous recreational sites, local rural communities such as Willard, and **urban areas** such as White Salmon.⁴²

Contrary to FOG's argument, the nearest potential residence is 4,000 feet from any turbine,⁴³ far exceeding the four times turbine height setback

³⁹ AR 28674.

⁴⁰ RCW 80.50.010(2); WAC 463-47-110(1)(b).

⁴¹ See e.g., *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75-76, 851 P.2d 744 (1993) (ascertainable standards required for mitigation). See also AR 16096 (“Because concerns exist today about radar-activated lighting system vendors’ ability to provide adequate assurances concerning system failure, it is unclear whether this is a viable mitigation measure yet.”)

⁴² FOG's Opening Brief, pg. 44, FN 80, emphasis added, see also pgs. 1-3, including FN three, and pgs. 43-45.

⁴³ AR 28339. The Environmental Impact Statement identifies two residences as 2,000 and 2,560 from Tower A1, but the A1-A7 turbine corridor was not approved. The next closest "potential future" residence is 4,265 feet from Tower B16. AR 28339, 28359.

(effectively 1,320 feet or more, depending on turbine height) incorporated into EFSEC's recommendation and the Governor's approval of the Kittitas Valley wind energy facility, which this Court unanimously upheld.⁴⁴ The **highways** FOG notes above are identified due to their presence within the Scenic Area;⁴⁵ FOG's position on aesthetic impacts within recreational areas and rural communities from this logging site is not substantiated, a failure FOG may not cure on reply;⁴⁶ and "urban areas" are federally exempted under the Scenic Act, as addressed below.

In short, without evidentiary support on a significant impact to a specific location, much less identification of a specific aesthetic requirement, FOG cannot meet its burden of proof and overcome the deference the Court provides to EFSEC in interpreting its siting criteria, including criteria generally addressing aesthetic impacts.⁴⁷ Scenic Area presence in no way alters this burden, as the Project is entirely outside its boundaries. In fact, language was added to the Scenic Act before its adoption to specifically address this exact situation. Based on this

⁴⁴ *Residents Opposed to Kittitas Turbines v. Kittitas County*, 165 Wn.2d 275, 291 and FN 5, 320-321, 197 P.3d 1153 (2008).

⁴⁵ The applicant supplied detailed information about the limited wind turbine visibility from these highways and from the Columbia River itself if 50 turbines were constructed. AR 16202-16204, 16213-16217, 16219-16220, 16231, 16233. Visibility of the smaller Project approved by the Governor will be even less.

⁴⁶ *Johnson v. State*, 164 Wn. App. 740, 753, 265 P.3d 199 (2011); RAP 10.3(c).

⁴⁷ *Residents Opposed to Kittitas Turbines v. Kittitas County*, 165 Wn.2d at 321-322.

language, even if there were significant impacts, Scenic Area presence could not be utilized to require further mitigation.

4.1.2.1. Scenic Act Jurisdictional Reach is Limited

The Scenic Act has dual purposes: to protect the environment and Gorge economy.⁴⁸ A key component in achieving these objectives was the Scenic Act's establishment of the Scenic Area boundary line:

Nothing in this Act shall ... establish protective perimeters or buffer zones around the Scenic Area or each special management area. The fact that activities or uses inconsistent with the management directives for the Scenic Area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas.⁴⁹

This language is clear on its face, so resorting to the legislative background is unnecessary. If a statute's meaning is plain, the court gives effect to that meaning as "an expression of legislative intent,"⁵⁰ and does not make policy, or legislate.⁵¹ Even if there were ambiguity, extensive background on the origins of this language is within the administrative record.

The above "hard boundary" language was part of the 1986 legislative compromise allowing Scenic Act passage which established

⁴⁸ 16 USC §544a (1) and (2).

⁴⁹ 16 USC §544o (a)(10), emphasis added.

⁵⁰ *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-11, 43 P.3d 4 (2002).

⁵¹ *Viking Properties v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

boundary lines and exempt urban areas to which the Scenic Act did not apply.⁵² Former Governor and Senator Daniel J. Evans, who cosponsored the Scenic Act, addressed statute development.⁵³

Together with my colleague Slade Gorton and Senators Hatfield and Packwood of Oregon I was a cosponsor of the authorizing legislation that established the National Scenic Area. On February 6, 1986, the four Northwest Senators introduced S. 2055, a bill to establish the Columbia Gorge National Scenic Area. The legislation represented a balance between efforts to protect the scenic and natural resources of the Gorge and maintaining the historic economies of the area. We recognized the Columbia Gorge's economy was dependent on maintaining the viability for working forests, extractive resources and one of the region's critical transportation and energy transmission corridors. The legislation was developed in order to protect the Gorge from uncontrolled development, but also protect the historic way of life of the Oregonians and Washingtonians that live in that area.⁵⁴

Governor Evans explained that the Scenic Act was drafted to address a federal case using the National Environmental Policy Act to impose "buffer zones around congressionally-protected areas."⁵⁵ The language was added to ensure that would not occur with the Scenic Act.

The members of the Oregon and Washington congressional delegations worked long and hard to enact legislation establishing the Columbia River Gorge National Scenic Area. The Scenic Area is an outstanding contribution to the legacy we are leaving to future generations. **But it has**

⁵² AR 18820-18822; RCW 43.97.025 (state agencies must comply with the Act); *see also* AR 23235-23237.

⁵³ AR 19694-19695.

⁵⁴ AR 19694-19695.

⁵⁵ AR 19695.

boundaries, which represent limits to the area we sought to protect. The EFSEC should respect these boundaries, and should not attempt to apply the Scenic Area's proscriptions indirectly through the application of Scenic Area visual management criteria to projects outside the Scenic Area. The EFSEC's responsibility under the State Environmental Policy Act is to consider the environmental impacts of a project. In my view, this responsibility means no more - or less - because of the existence of the Columbia River Gorge National Scenic Area.⁵⁶

Thus, even if the Scenic Act were not clear on its face as to its limited jurisdictional reach, the background is. Scenic Area presence provides no basis for mitigation outside its boundaries.

4.1.2.2. Commerce Recognizes Distinct Boundaries

The Washington State Department of Commerce concurs with this

"hard boundary" approach:

The development standards in the NSA Management Plan were adopted to guide development within the NSA. If the same standards that are appropriate for the NSA are used for areas outside the NSA, the same projects will be approved, and none other, regardless of the policy goals of the county or city elected officials. That is why we are concerned.⁵⁷ ...

Applying standards developed to guide development within the NSA to the WREP project would ... **establish a protective perimeter or buffer zone around the scenic area, in direct contradiction to the law.** And if, as a result, the WREP should be rejected on this basis, county policy goals, and state goals and policies regarding both

⁵⁶ AR 19695, emphasis added.

⁵⁷ AR 15883.

renewable energy development and economic development in general would be thwarted. ... The Act set boundaries for a purpose, including the purpose of allowing development outside the Scenic Area that would not be approved in it. The Act set aside special management areas within the Scenic Area with even stricter standards, and exempted the urban areas to encourage economic growth there. The urban areas have land use ordinances that allow both commercial and industrial uses. Over the years, these communities have experienced difficult economic times, with the collapse of the timber and fishing industries, and now from the recent recession.⁵⁸

Importing the Scenic Act to land use proposals outside the statute's jurisdictional reach “would create great uncertainty about future economic development for private property owners in the areas outside the boundaries of the Scenic Area” and stifle investment.⁵⁹ This could jeopardize economic development initiatives the Department of Commerce, Washington Investment Board, and Skamania County Economic Development Council have partnered on.⁶⁰ The Scenic Act was drafted to ensure this did not occur.

4.1.2.3. Local Land Use Regimes Recognize Distinct Boundaries

Scenic Act jurisdictional limitations are reinforced by County regulations, which the Gorge Commission (the bi-state Commission

⁵⁸ AR 15884-15885, emphasis added.

⁵⁹ AR 15886.

⁶⁰ See AR 15891-15907.

which oversees Scenic Area protection) has approved.⁶¹ Consistent with federal law, the County's land use regime does not use the Scenic Act to impose setbacks on projects outside the Scenic Area. The County's Scenic Area aesthetic protocols, guidelines and regulatory requirements are incorporated into SCC Title 22 which applies only to the Scenic Area and **“to no other lands within the county....”**⁶² Similarly, in neighboring Klickitat County, its energy overlay zone, adopted following a settlement with FOG, permits wind development outright outside the Scenic Area and includes no Scenic Area setbacks.⁶³

Any other approach, if used in other permitting situations, would impair the County's economic future, with potential ramifications for major urban areas of Clark County and Multnomah County (*e.g.*, Washougal, Camas and areas in southeast Vancouver, as well as Gresham and Troutdale). At the Gorge's west end, in full view of any number of key viewing areas sits the entire town of Washougal and the stacks of the Camas Paper mill.⁶⁴ On the east end, right on the Scenic Area boundary, is the Maryhill Winery & Amphitheatre, and in the

⁶¹ AR 18821:19-22.

⁶² AR 18821:17-22; *see also* 16 USC §544e(c)(2) (“Upon approval of a land use ordinance by the Commission it shall supersede any regulations for the county developed by the Commission, subject to valid existing rights.”).

⁶³ AR 19027:6-15; AR 19038-19039; *see also* RCW 36.70A.130, recognizing the overlay approach and heightening the review standard for projects reviewed through such an overlay. In 2009, the legislature adopted this language through a rare, unanimous vote. Chapter 419, Laws of 2009, also referred to as SB 5107.

⁶⁴ AR 18822.

distance, wind turbines.⁶⁵ There is no basis for prohibiting the paper mill or stopping urban renewal, just as there is no basis for curtailing wind power production or imposing experimental radar technology on a Project located within a limited portion of the County's land base which is privately held and outside the Scenic Area.

4.1.3. EIS: No Basis for Further Mitigation

Even if EFSEC erred in interpreting its siting factors or the Scenic Act, the claimed impacts are unsubstantiated. The unappealed EIS found the Project lacked significant aesthetic impacts.

The Project would cause some visual impact to surrounding areas where turbines were visible, including some areas inside the Columbia River Gorge National Scenic Area. However, the visual impact analysis showed that the anticipated level of visual impact would not be higher than low to moderate at any of the viewpoints examined.⁶⁶

The presence of the Project would cause low to moderate visual impacts to viewpoints within the Scenic Area. Congress has determined that the National Scenic Act is not to be used to regulate activities outside of the Scenic Area boundary.⁶⁷

Attachment 2 of this brief is Table 3.9-2 from the EIS detailing this analysis. Visual impacts are described as "Low," "Low to Moderate," and "Moderate."⁶⁸ At not one of these locations are high impacts found.

⁶⁵ AR 18822.

⁶⁶ AR 28418, emphasis added.

⁶⁷ AR 28416, emphasis added.

⁶⁸ AR 28399.

The Project is completely outside the Scenic Area. The Scenic Act's regulatory structure is complete within its jurisdiction, and does not regulate activities beyond its borders. Neither the state's siting criteria nor federal law authorize further mitigation. FOG has not met its burden of proof to demonstrate reversible error in EFSEC's refusal to require experimental mitigation and power curtailment.

4.2. Land Use Consistency

EFSEC is to make a determination on whether there is "compliance with land use plans and zoning ordinances" consistent with RCW 80.50.090(2), which provides for determining consistency with the zoning **or** the relevant plan.⁶⁹ If there is an inconsistency, EFSEC is authorized to preempt local zoning,⁷⁰ which the County never objected to.⁷¹ However, preemption was unnecessary as the County determined the Project was consistent with its zoning code and Comprehensive Plan, a determination which is deferred to.⁷² EFSEC agreed with the County.⁷³

⁶⁹ WAC 463-26-110.

⁷⁰ RCW 80.50.110; *Residents Opposed to Kittitas Turbines v. Kittitas County*, 165 Wn.2d 275, 197 P.3d 1153 (2008) (upholding EFSEC preemption authority).

⁷¹ *See e.g.*, AR 21216.

⁷² AR 11377-11378.

⁷³ AR 28659-28664.

4.2.1. County Consistency Certification: Prima Facie Proof of Consistency

Skamania County issued a Certificate of Land Use Consistency through Skamania County Resolution 2009-54.

Certification of Land Use Consistency Review for the amended application for the Whistling Ridge Energy Project. ... NOW THEREFORE, BE IT RESOLVED, the Board of County Commissioners, after due deliberation, adopts the Certificate of Land Use Consistency as a staff report to EFSEC, not a decision, and resolves that the Whistling Ridge Energy Project is consistent with the Skamania County land use plans and applicable zoning ordinances.⁷⁴

After entering findings regarding consistency, and adopting the Skamania County Planning Director's staff report (titled "Staff Report for Land use Consistency Review," which finds consistency)⁷⁵ the County Commissioners unanimously certified consistency.⁷⁶

Despite the Resolution's title and detailed findings, FOG disputed before EFSEC whether or not the County had found consistency.⁷⁷ FOG may not agree with the determination, but the County Commissioners and Planning Director both found the Project consistent with County land use plans and regulations. As the County is the entity charged with

⁷⁴ AR 11377-11378, emphasis in text. Resolution at AR 11377-11405.

⁷⁵ AR 11379-11405.

⁷⁶ The Resolution states it is to be interpreted as a staff report to EFSEC rather than a decision, to make clear the Resolution is not an appealable land use decision. AR 11378.

⁷⁷ AR 28660, *see also* AR 21221-21237, AR 21200-21202. FOG also appealed the consistency determination to the Gorge Commission, which dismissed for lack of jurisdiction. AR 18807-18817.

implementing and interpreting its own land use requirements, its interpretation is deferred to. "Considerable judicial deference is given to the construction of legislation by those charged with its enforcement."⁷⁸ "The interpretations of the zoning adjustor and the Board of Appeals on this question are based on their long familiarity and expertise in interpretation of the King County Zoning Code. These administrative interpretations should be given great weight by the court."⁷⁹ Under EFSEC requirements, the deference is still higher. The consistency determination creates a rebuttable presumption, or "prima facie proof of consistency," with the burden shifted to those challenging consistency.⁸⁰

4.2.2. County Zoning Permits Whistling Ridge

The Project is authorized by local zoning. The zoning code states, "[i]n the areas classified as Unmapped (UNM) all uses which have not been declared a nuisance by statute, resolution, or court of jurisdiction are allowable."⁸¹ The Project has not been declared a "nuisance," so is a permissible use. FOG, by failing to argue that the Project is inconsistent with zoning, has waived this issue, and consistency must be presumed.⁸²

⁷⁸ *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979).

⁷⁹ *East v. King County*, 22 Wn. App. 247, 256, 589 P.2d 805 (1978).

⁸⁰ WAC 463-26-090 ("[S]uch certificates will be regarded as *prima facie* proof of consistency and compliance with such land use plans and zoning ordinances absent contrary demonstration by anyone present at the hearing."), emphasis in text. The applicant's brief further addresses this review standard, citing to *Gogerty v. Dept. of Ins.*, 71 Wn.2d 1, 8, 426 P.2d 476 (1967) (describing presumption as applied during judicial review of an agency decision).

⁸¹ Skamania County Code 21.64.020, emphasis added. AR 22127

⁸² *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failure to present argument in opening briefing on alleged error constitutes waiver).

Even if FOG had not abandoned zoning consistency arguments, the County's interpretation of its code is deferred to.

4.2.3. Plan Consistency is Not Required

Because the code authorizes the Project, comprehensive plan consistency is not required. Under established Washington law, even a project permitted by the zoning code but inconsistent with the plan is approved.

A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance.⁸³

Because a comprehensive plan is not regulatory it is “**not error to issue ... [a permit] even though the project appeared to be in conflict with a policy statement contained in the plan.**”⁸⁴ This established appellate law has been repeatedly confirmed for over 50 years.⁸⁵

The County Comprehensive Plan is consistent. The Plan acknowledges “[i]t does not provide all the details”⁸⁶ and “is not a regulatory document,”⁸⁷ but simply a “guiding document.”⁸⁸ Thus, to the

⁸³ *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1956), internal cites omitted.

⁸⁴ *Id.* at 480, emphasis added.

⁸⁵ *See e.g., Noble Manor Company v. Pierce County*, 133 Wn.2d 269, 277, 943 P.2d 1378 (1997) (acknowledging *Ogden v. Bellevue's* 1956 analysis of vested rights doctrine); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 874-75, 947 P.2d 1208 (1997). The state's briefing provides further analysis.

⁸⁶ AR 22009.

⁸⁷ AR 21993.

⁸⁸ AR 21993.

extent there is a Plan inconsistency, because the Project is consistent with the zoning code, that is determinative and it is unnecessary for the County to amend its Plan or for EFSEC to preempt it.

4.2.4. The Plan and Project are Consistent

Although Plan consistency is not required, the Project is consistent. The Plan designates the site primarily as Conservancy, and recognizes “[l]ogging, timber management, agricultural and mineral extraction” are the “main use activities.”⁸⁹ “Conservancy uses are intended to conserve and manage existing natural resources in order to maintain a sustained resource yield and/or utilization.”⁹⁰ Appropriate uses include “[p]ublic facilities and utilities, such as ... utility substations, and telecommunication facilities,” along with “aircraft landing strips,” “logging and mining camps” and “surface mining” via conditional use permit.⁹¹ Wind development is no more intensive, is a resource-based use, and certainly is more compatible with maintaining existing, resource based forestry uses than aircraft landing strips and surface mines.

Public facilities and utilities are defined as those “[f]acilities which are owned, operated, and maintained by public entities which provide a

⁸⁹ AR 22012.

⁹⁰ AR 22012.

⁹¹ AR 22013.

public service required by local governing bodies and state laws.”⁹² While the Project is proposed by a private entity, much the way a private railroad engages in a “semi-public” activity,⁹³ the electricity will be sold to public utilities and transported on a publicly owned system, so is semi-public in nature. Energy generated will deliver a basic public service (the means to generate heat and light) required by local government and state law.⁹⁴ Where a local code interpretation that a privately owned wind farm is a public utility for purposes of a zoning classification is not unreasonable, it will be upheld.

[I]t is undisputed that the wind turbines that Windhorse intends to construct will generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission [and] inasmuch as petitioners have not shown that the determination that Windhorse is a public utility for zoning law purposes is unreasonable or not rationally based, it will not be disturbed.⁹⁵

Even if not included in the above listing of uses, the use is authorized by the zoning code (as addressed above) and thus consistent with Comprehensive Plan Policy LU 1.2, which provides for permitting similar

⁹² SCC 21.08.010, at AR 22071.

⁹³ *Freeman v. City of Centralia*, 67 Wash. 142, 149, 120 P. 886 (1912).

⁹⁴ RCW 19.29A.005(1)(a) (“Electricity is a basic and fundamental need of all residents....”); RCW 80.80.005 and Ch. 80.80 RCW generally (renewable energy mandate to utilities).

⁹⁵ *West Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown*, 53 A.D.3d 954, 956, 861 N.Y.S.2d 864 (2008). The use is appropriately a 'public utility' for determining zoning classification, as ownership makes no difference in determining setback and other such issues. Of course, in other circumstances, legal requirements often differ in how public and private utilities are regulated.

uses when authorized by the County's official controls or zoning code.⁹⁶ "Allowable uses" under the Comprehensive Plan are uses "which are permitted without review by the Planning Department except for compliance with setbacks, buffer requirements, critical area regulations, the State Environmental Policy Act and the Shorelines Master Program...."⁹⁷ As the zoning code permits the Project, under the Comprehensive Plan, it is an "allowable use."

FOG's implication that a use cannot be resource based unless it is a "GMA designated resource," reflects a fundamental misunderstanding of the Growth Management Act, Ch. 36.70A RCW.⁹⁸ GMA requires designation of certain natural resource lands, which it defines as including agricultural, forest, and mineral lands.⁹⁹ But, GMA does not preclude jurisdictions from having other natural resource based uses; it just does not afford GMA-specific protection for those uses. The lands the Project is proposed for siting on are not "GMA designated lands." As such, GMA has no applicability. Further, while GMA may afford protection to just three resources, it cannot be credibly argued wind is not a "natural resource," just like forests, minerals, the tides, or the sun. Whether the

⁹⁶ AR 22013.

⁹⁷ AR 22017 (Policy LU.6.1(a)); *see also* AR 22018 (Policy LU.6.2, recognizing zoning code drives the analysis of what is permitted).

⁹⁸ FOG's Opening Brief, pgs. 55-56.

⁹⁹ RCW 36.70A.170.

definition of natural resources is from Webster's dictionary¹⁰⁰ ("industrial materials and capacities (as mineral deposits and waterpower) supplied by nature") or Wikipedia, wind comes within the definition.¹⁰¹ But even if wind were not a natural resource, and deference were not owed the County in interpreting its Plan, the Project is consistent with and supports the existing forest use and is central to achieving the Plan's driving purpose.

The Plan's guiding vision is to preserve the County's economic base, its existing natural resource based industries, while being protective of the environment and supporting the local community.

Skamania County is strongly committed to protecting our rural character and natural resource based industries while allowing for planned future development that is balanced with the protection of critical resources and ecologically sensitive areas, while preserving the community's high quality of life.¹⁰²

Consistent with the Plan, the Project site is used for logging.¹⁰³ Forestry has economic vulnerabilities.¹⁰⁴ When land becomes less productive for forest and agriculture, it becomes vulnerable to land division and residential development.¹⁰⁵ By adding value to the land, the Project supports maintenance of the site for forest use, which is an environmental benefit compared to sprawling residential development, and provides an

¹⁰⁰ Merriam-Webster, online dictionary.

¹⁰¹ AR 28663, FN 21.

¹⁰² AR 22000.

¹⁰³ AR 04266.

¹⁰⁴ AR 18823:19-25, AR 18824:1-5.

¹⁰⁵ AR 14787-14791.

economic and socio-economic benefit, building resilience into the state and local economies. As such, the Project is consistent with the Plan.

4.3. The Moratorium Does not Apply to Whistling Ridge

EFSEC correctly determined County moratoria had no relevance to land use consistency. At the time EFSEC approved Whistling Ridge, although the Project was within an area subject to a moratorium,¹⁰⁶ the moratorium did not apply to Whistling Ridge. The moratorium applied to:

- Building/mechanical/plumbing permits on 20+ acre parcels created since 2006;
- Platting activity; and
- State Environmental Policy Act Checklists related to forest practice conversions.¹⁰⁷

Whistling Ridge parcels were created before 2006, the Project did not require a plat, and the County is not processing State Environmental Policy Act review, as EFSEC is the lead agency, and has prepared an Environmental Impact Statement for which no Checklist is required.¹⁰⁸

Moratoria are temporary, emergency measures which automatically lapse by operation of statute after six months.¹⁰⁹ Thus, not only was there never a moratorium on the Project, but with statutory lapse,

¹⁰⁶ Although in existence since the 1800's, the County did not adopt its first zoning code until 1989 and 1991. AR 21996; AR 14685-14686. This is partly because the sparsely populated County is 85% National Forest, so there was less need to do so. AR 18823.

¹⁰⁷ AR 14789.

¹⁰⁸ WAC 197-11-315(1) (Checklist not required when environmental impact statement prepared); RCW 80.50.180 (EFSEC conducts environmental review).

¹⁰⁹ RCW 36.70.795.

absent affirmative action by the County,¹¹⁰ there can be no moratorium. EFSEC properly deferred to the County's land use consistency determination and found the moratorium inapplicable.

5. CONCLUSION

EFSEC reviews projects to meet the state's power needs and address environmental impacts.¹¹¹ And, it is state energy policy to "promote energy self sufficiency through the use of indigenous and renewable energy resources..."¹¹² The Project is consistent.

Other than the specific directions given to EFSEC in its own enabling statute (Chapter 80.50 RCW), there is probably no more succinct statement about the kind of energy facilities that the Council should hope to recommend - projects that use indigenous and renewable energy resources, that are reliable, in the public interest, and with limited environmental impacts. The WREP [Whistling Ridge] fits the bill.¹¹³

As the state's Commerce Department noted, after seeing devastation from Gulf oil drilling, a bursting coal ash pond in Tennessee, and spewing nuclear radioactivity in Japan, the agency did not hesitate to support a project "whose benefits are large and ... detriments minimal."¹¹⁴

¹¹⁰ FOG appealed moratorium lapse. *Save Our Scenic Area v. Skamania County, et. al.*, Court of Appeals, Div. II, 44269-8, Clark County Superior Court No. 12-2-03496-0.

¹¹¹ RCW 80.50.010; WAC 463-14-020.

¹¹² RCW 43.21F.010(3).

¹¹³ AR 21974 (State Dept. of Commerce, Energy Division, addressing state energy siting objectives).

¹¹⁴ AR 21976.

The Project is consistent with these overarching state energy siting objectives and EFSEC's siting criteria. As FOG has not met its burden to demonstrate reversible error, the Counties request that the Court uphold the state's approval authorizing much needed capital investment in locally produced renewable energy in Skamania County.

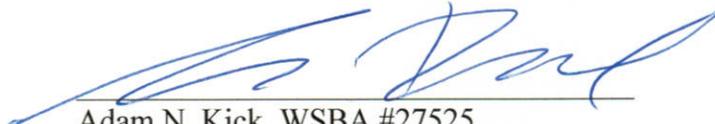
RESPECTFULLY SUBMITTED this 11th day of April, 2013.

LAW OFFICES OF
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CERTIFICATE OF SERVICE

I certify that on April 11, 2013, I served the foregoing Response Brief of Skamania County and Klickitat County Public Economic Development Authority on the parties listed below by email and First Class U.S. Mail, postage prepaid:

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Allyson Adamson

Attachment 1

Correspondence,
Former Governor and Senator Daniel J. Evans
to EFSEC, AR 19694-96

RECEIVED

JAN 18 2011

ENERGY FACILITY SITE
EVALUATION COUNCIL

Daniel J. Evans
5215 N.E. 45th Street
Seattle, WA 98105

January 15, 2011

Jim Luce
Chairman
Energy Facility Site Evaluation Council
P.O. Box 43172
Olympia WA 98504-3172

RE: Whistling Ridge Energy Project, EFSEC Application No. 2009-01

Dear Chairman Luce and Council Members:

I am writing this letter to comment on an application you presently are considering, and more particularly on the representations made by one of the parties in the proceeding regarding the effect on the application of the Columbia River Gorge National Scenic Area Act. I represented the State of Washington in the United States Senate in the 1980s, during Congressional consideration of the National Scenic Area Act. Together with my colleague Slade Gorton and Senators Hatfield and Packwood of Oregon I was a cosponsor of the authorizing legislation that established the National Scenic Area.

On February 6, 1986, the four Northwest Senators introduced S. 2055, a bill to establish the Columbia Gorge National Scenic Area. The legislation represented a balance between efforts to protect the scenic and natural resources of the Gorge and maintaining the historic economies of the area. We recognized the Columbia Gorge's economy was dependent on maintaining the viability of working forests, extractive resources and one of the region's critical transportation and energy transmission corridors. The legislation was developed in order to protect the Gorge from uncontrolled development, but also protect the historic way of life of the Oregonians and Washingtonians that live in that area.

A key feature of the S. 2055 was the so-called buffer zone language. Specifically, section 17(g) of the bill as introduced read as follows:

Congress does not intend that establishment of the Scenic Area and designation of Special Management Areas lead to the creation of protective perimeters or buffer areas around the Scenic Area or each Special Management Area. The fact that activities or uses inconsistent with the management directives for the Scenic Area or Special Management Areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the Scenic Area or Special Management Areas.¹

¹ Section 17, Senate Bill 2055, 99th Cong., 2d Sess., (1986), *introduced at* 132 CONG. REC. S1146 (daily ed. Feb. 6, 1986).

As introduced, this provision of the bill nearly was identical to a provision in the Washington Wilderness Act, which I also co-sponsored and which was passed by Congress shortly before we began work to draft S. 2055. At the time, the issue of buffer zones around congressionally-protected areas was of great concern to the members of the Senate Energy and Natural Resources Committee. In 1982, the Ninth Circuit Court of Appeals decided California v. Block, 690 F. 2d 753 (9th Cir. 1982), in which the Court affirmed a lower court injunction against any development that would "change the wilderness character" of any lands adjacent to congressionally-designated wilderness areas until subsequent consideration of the wilderness values of such land in accordance with the National Environmental Policy Act. The Ninth Circuit's Block decision was mentioned repeatedly in the Energy and Natural Resources Committee's report on the Washington Wilderness Act. The Committee included the buffer zone language and so-called release language to insure against the following scenario:

In short, this language means that the Forest Service cannot be *forced* by any individual or group through a lawsuit, administrative appeal, or otherwise to manage lands not recommended for wilderness designation in a "de facto" wilderness manner.²

On June 17, 1986, the Senate Energy and Natural Resources Committee conducted a legislative hearing on S. 2055. Brian Boyle, who at the time was serving as Washington State Commissioner of Public lands, testified at the hearing. Commissioner Boyle supported language in the bill clarifying the buffer zones are not created or implied around special management areas, and urged the committee to strengthen the so-called buffer zone language in the bill.³ Conversely, conservation organizations -- specifically the Friends of the Columbia Gorge -- recommended that the buffer zone language be deleted altogether.

On August 4, 1986, we presented amendments to S. 2055, including the removal of "intent" addressing buffer zones, in the Congressional Record.⁴ On August 14, 1986, the Senate Energy and Natural Resources committee voted to report S. 2055 to the full Senate for consideration. Nevertheless, we continued to negotiate changes to the bill and the Committee voted to accept a substitute amendment, and 56 "technical amendments." The Committee meeting was contentious and both Committee Chairman James McClure and Subcommittee Chairmen Malcolm Wallop opposed the legislation. The Committee did not file a Committee Report to accompany the bill in large part because of their opposition.

On October 8, 1986, the United States Senate took up consideration of S. 2055. Negotiations had continued since Energy and Natural Resources Committee consideration of the legislation, and numerous changes had been made to the draft legislation. Senator Hatfield, who was the senior member of the Oregon and Washington congressional delegations, was the floor manager for the bill. Senator Hatfield offered a substitute amendment to the bill, which Senator McClure and I cosponsored. As

² S. 837, Senate Committee Report 98-461, at p. 20. 99th Cong., 1st Sess. (1984).

³ *Columbia Gorge Nat'l Scenic Area Act: Hearing on S. 2055 Before the Subcomm. on Public Lands, Reserved Water and Resource Conservation*, 99th Cong., 2d Sess. 68 (1986).

⁴ Amendment to S. 2055, 99th Cong., 2d Sess., 132 Cong. Rec. S15, 705-13 (1986), § 17.

recommended by Lands Commissioner Boyle, the so-called "floor substitute" amendment contained savings provisions that were substantially strengthened from earlier versions of the bill, including a provision that read in pertinent part as follows:

(a) Nothing in this Act shall --

...

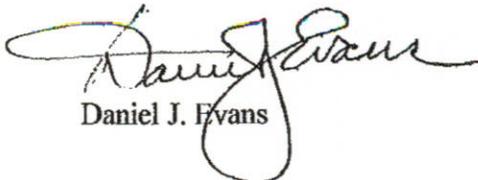
(10) establish protective perimeters or buffer zones around the Scenic Area or each Special Management Area. The fact that activities or uses inconsistent with the management directives for the Scenic Area or Special Management Areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the Scenic Area or Special Management Areas.⁵

The Senate passed S. 2055 on a voice vote, thus sending the bill to the House of Representatives for its consideration. The House of Representatives took up consideration of the Senate-passed legislation. It was not uncommon, however, for the House of Representatives to pass legislation such as this with a House bill number, which it did. Thus S. 2055 became H.R. 5583. The House version of the bill contained several modifications which its sponsors referred to as "technical amendments." Significantly, at no time did the House of Representatives change the so-called buffer zone language. The House passed H.R. 5583 on October 16, 1986. The bill had been referred jointly to the House Agriculture Committee and the House Committee on Interior and Insular Affairs. Neither committee published a Committee Report on the legislation. The Senate concurred with the House amendments on October 17, 1986. President Reagan signed the bill into law on November 17, 1986.

The members of the Oregon and Washington congressional delegations worked long and hard to enact legislation establishing the Columbia River Gorge National Scenic Area. The Scenic Area is an outstanding contribution to the legacy we are leaving to future generations. But it has boundaries, which represent limits to the area we sought to protect. The EFSEC should respect these boundaries, and should not attempt to apply the Scenic Area's proscriptions indirectly through the application of Scenic Area visual management criteria to projects outside the Scenic Area. The EFSEC's responsibility under the State Environmental Policy Act is to consider the environmental impacts of a project. In my view, this responsibility means no more -- or less -- because of the existence of the Columbia River Gorge National Scenic Area.

Thank you for your consideration of my comments on this application.

Sincerely,



Daniel J. Evans

⁵ Section 17, Act of November 17, 1986, Public Law 99-663, 100 Stat. 4300, codified at 16 U.S.C. 544o.

Attachment 2

Environmental Impact Statement,
Aesthetic Impacts, Excerpt
AR 28399

**Table 3.9-2
 Summary of Existing Scenic Quality Assessment and Project Visual Impacts**

Viewpoint	Within or Outside of Scenic Area ^a	Distance from Nearest Turbine (miles)	Existing Scenic Quality		Anticipated Level of Visual impact
			Visual Quality	Viewer Sensitivity	
Viewpoint 1: State Highway 141/Pucker Huddle (Figure 3.9-3)	SA	3.99	Low	Moderate	Low to Moderate
Viewpoint 3: Husum, Highway 141 north (Figure 3.9-4)	--	4.76	Moderate to Moderately High	Moderate	Moderate
Viewpoint 4: Ausplund Road, Cook-Underwood Road (Figure 3.9-5)	KVA	1.23	Moderate	Moderate	Moderate
Viewpoint 5: Willard (Figure 3.9-6)	--	1.35	Moderately Low to Moderate	Moderate	Moderate
Viewpoint 7: Mill A (Figure 3.9-7)	--	1.62	Moderately Low	Moderate	Low to Moderate
Viewpoint 11: I-84 Westbound (Figure 3.9-8)	KVA	8.39	Moderate	Moderate	Moderate to Low
Viewpoint 12: Koberg Park (Figure 3.9-9)	SA	6.60	Moderately High	Moderate	Moderate
Viewpoint 13: I-84 Eastbound (Figure 3.9-10)	KVA	3.43	Moderately High	Moderately Low	Moderate to Low
Viewpoint 14: Viento State Park (Figure 3.9-11)	SA	3.99	Moderately High to High	Moderate to High	Moderate to High
Viewpoint 15: Frankton Road (Figure 3.9-12)	SA	4.51	Moderate	Moderate	Moderate
Viewpoint 17: Providence Hospital (Figure 3.9-13)	SA	5.07	Moderately Low	Low	Low
Viewpoint 19: Columbia River Highway (Figure 3.9-14)	SA	6.46	Moderately High	Moderate	Low
Viewpoint 23: Ausplund Road End (Figure 3.9-15)	SA	0.64	Moderate	Moderate	Moderate

^a -- += not in Scenic Area; SA = within Scenic Area; KVA = Key Viewing Area within Scenic Area.