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7 **BEFORE THE STATE OF WASHINGTON**  
8 **ENERGY FACILITY SITE EVALUATION COUNCIL**

9 In the Matter of  
10 Application No. 2003-01

11 SAGEBRUSH POWER PARTNERS, LLC,

12 KITTITAS VALLEY WIND POWER  
13 PROJECT

DECLARATION OF COUNSEL  
FOR INTERVENOR F. STEVEN  
LATHROP

14 My name is Jeff Slothower. I am an attorney licensed to practice law in the State of  
15 Washington. I represent Intervenor F. Steven Lathrop in this matter. I testify herein based upon  
16 my own information and belief.

17 A. Disqualification of Mr. Ifie and the Department of Natural Resources.

18 1. The applicant, Zilkha Renewable Energy d/b/a Sagebrush Power Partners LLC,  
19 submitted to the Kittitas County Planning Department a Development Activities Application  
20 dated June 10, 2003. A true and correct copy of the actual application and selected exhibits are  
21 attached hereto and incorporated herein by reference as Exhibit "1".

22 2. The Development Application submitted to the Kittitas County Planning  
23 Department by Sagebrush Power Partners LLC indicates the Kittitas County Windpower Project  
24 will be constructed on a land area of approximately 5,000 acres in Kittitas County, Washington.  
25 Approximately one-fourth of the proposed wind turbines will be located on land owned by the  
26 Department of Natural Resources, a political division of the State of Washington.

3. In addition, Zilkha Renewal Energy LLC has already paid to the Washington  
State Department of Natural Resources \$28,261.88 as rent for the land owed by the Department

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1 of Natural Resources. (Exhibit 1, P. 25). The land leased to Zilkha is owned by the State of  
2 Washington by and through the Department of Natural Resources and held in trust for a variety  
3 of uses, including the common schools of the State of Washington. (Ch 79.01 RCW). The  
4 Washington State Department of Natural Resources is a land manager for the State of  
5 Washington with the express goal of turning a profit for the benefit of the State of Washington.  
6 In fact, Zilkha Renewable Energy LLC, prior to this application being approved, has already paid  
7 the Department of Natural Resources \$28,261.88.

8 4. It is Intervenor F. Steven Lathrop's position this constitutes a conflict of interest  
9 that should preclude the Washington State Department of Natural Resources or any of its  
10 employees and/or designees from participating in the decision on whether to locate and site wind  
11 generating turbines in Kittitas County, Washington as requested by Zilkha in this application.  
12 This conflict not only is an actual conflict of interest in that the Department of Natural Resources  
13 has a pecuniary interest in the outcome of the determination the Energy Site Evaluation Council  
14 will make but it also violates the Appearance of Fairness Doctrine. In making this assertion,  
15 Intervenor is aware of RCW 80.50.030(3) which indicates the Energy Site Evaluation Council  
16 shall consist of directors, administrators, or their designees of certain enumerated departments  
17 including the Department of Natural Resources. However, it is impossible to reconcile the  
18 requirement that the Department of Natural Resources participation in this decision process with  
19 well established law prohibiting representatives of the State of Washington from engaging in a  
20 conflict of interest and violations of the Appearance of Fairness Doctrine.

21 5. The Appearance of Fairness Doctrine has been established in Washington so  
22 public hearings and decisions are not only are fair but appear to be fair. *Smith v. Skagit County*,  
23 75 Wn. 2d 715, 453 P.2d 832 (1969). The underlying rationale for the doctrine is the importance  
24 of public confidence in the system to have hearings and proceedings which appear to be fairly  
25 conducted. *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 870, 480 P.2d 489 (1971). The  
26 Appearance of Fairness Doctrine goes beyond consideration of actual conflict of interest or bias  
by decision makers. Under the Appearance of Fairness Doctrine, no actual bias or conflict of  
interest need be shown.

6. There are three situations courts look at in analyzing the Appearance of Fairness  
Doctrine. One, have there been ex parte contacts between the decision makers and a person

1 supporting or opposing the project. Two, does the decision maker have an interest in the matter  
2 under consideration. Three, has the decision maker prejudged an application before the public  
3 hearing on the matter. *Flech v. King County*, 16 Wn.App. 668, 558 P.2d 254 (1977).

4 7. In this matter, the Department of Natural Resources owns one quarter of the land  
5 the project encompasses and has already began receiving rent from the applicant. The  
6 Department of Natural Resources' participation violates the second prong of the Appearance of  
7 Fairness Doctrine. The Department of Natural Resources has a pecuniary interest in the  
8 application. The Department of Natural Resources will benefit financially if the application is  
9 approved. The Department of Natural Resources' participation as a decision maker on this  
10 application is a clear violation of the Appearance of Fairness Doctrine.

11 B. Disqualification of Mr. Fryhling and the Department of Trade and Economic  
12 Development.

13 8. The Department of Trade and Economic Development has sought to intervene.  
14 CTED, based upon its application, seeks to intervene to support the application and to ensure that  
15 state energy policy, purportedly encouraging renewable energy resources, is followed.

16 9. With CTED as an intervenor as well as a decision maker, there is a conflict of  
17 interest. One of the decision makers is a representative of CTED. CTED is publicly advocating  
18 the approval of this application prior to the public hearing. CTED, as an agency, has prejudged  
19 this application before the matter has come before an appropriate body for public hearing. This  
20 violates the Appearance of Fairness Doctrine and should serve as a basis for the disqualification  
21 of CTED and its designated representative from the Energy Facility Site Evaluation Council in  
22 this matter.

23 C. Request for Clarification/Objection to limitations on Intervenors ability to respond to  
24 issues.

25 9. Intervenor F. Steven Lathrop seeks clarification of whether Intervenor, as a party,  
26 is entitled to respond to and present either supporting or controverting evidence concerning  
issues and evidence presented by the applicant or a party which are not yet identified but which  
may come up as this matter progresses. Intervenor understands Intervenor has intervened on

1 certain issues, but, as evidence is developed, Intervenor believes Intervenor should have the  
2 ability to respond to any evidence presented. It would appear that the most efficient way to  
3 proceed would be for the parties to develop a list of the issues. The list of issues would have to  
4 contain a provision which allows the list to be modified or updated upon publication of the EIS  
5 in September. Once the list is developed then the intervenors should have the ability to identify  
6 issues that they focus on. However, an individual intervenor should have the ability to comment  
7 on, respond to or present evidence on any issue. In the alternative, Intervenor objects to and  
8 desires to be heard on any limitations placed on an intervenor to respond to or present  
9 controverting evidence on issues raised by the applicant and/or other parties to this process,  
10 including other intervenors.

11 I hereby certify or declare, under penalty of perjury under the laws of the State of  
12 Washington that the foregoing is true and correct.

13 Signed at Ellensburg, Washington this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

14 \_\_\_\_\_  
15 Jeff Slothower – WSBA #14526  
16 Attorney for Intervenor F. Steven Lathrop

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18 E:\Sagebrush\declaration of counsel