

1
2
3
4
5
6
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

LATHROP'S REPLY TO RNP'S
RESPONSE AND TO
SAGEBRUSH'S RESPONSE TO
LATHROP'S MOTION TO
DISQUALIFY EFSEC COUNCIL
MEMBERS

14
15 The Response filed by RNP and the Response filed by the applicant, Sagebrush Power
16 Partners LLC, missed the point. The DNR has already received money from the applicant for the
17 project and DNR will have a say in deciding whether those payments continue. DNR has a clear
18 conflict of interest. There is authority in Washington that prohibits an agency as a whole, as
19 opposed to an individual within an agency, from engaging in conflicts of interest. See
20 *Guardianship Estate of Keffleler v. State of Washington, Department of Social and Health*
21 *Services*, 145 Wn.2d 1, 32 P.3rd 267 (2001). The citations identified by RNP in their brief at
22 pages 3, lines 14-15, deal primarily with ex parte situations where there is a conflict of interest.
23 Those citations are misleading and not relevant to the issues raised by Lathrop's motion. RNP's
24 citations do not support the proposition that an agency can be both an advocate and a decider.

25 Sagebrush asserts Lathrop's motion challenges the "the very existence of EFSEC". They
26 are right in that account. The EFSEC process is an arcane process established years ago that
completely ignores Washington's sophisticated land use laws, including the Growth
Management Act, LUPA, and the interplay between local, county, and state land use decisions.
The legislature established the make up of EFSEC in the 1970's when no one contemplated

1 EFSEC would be applied to a project on state land in which the state receives compensation.
2 The language in Sagebrush's brief that reads "the legislature mandated the makeup of EFSEC
3 and anticipated the participation of the member agencies as parties to protect the legislative
4 delegated interest to the agency" goes to the very heart of Lathrop's motion. That's exactly what
5 is inappropriate about this situation. DNR, because they are a member of EFSEC, has the ability
6 to ensure that a project that will generate money for DNR is approved. That is not a fair process.
7 Sagebrush also asserts that a party alleging the appearance of fairness must produce sufficient
8 evidence demonstrating bias such as a pecuniary interest on the part of the decision maker. *In re*
9 *Hayes*, 100 WA App 366, 996 P.2d 637 (2000). Lathrop has done that. DNR has already
10 received money from the applicant for payments the DNR will continue to receive if the project
11 goes forward. DNR's participation violates the Appearance of Fairness Doctrine.

12 Respectfully submitted this _____ day of _____, 2003.

13 _____
14 Jeff Slothower – WSBA #14526
15 Attorney for Intervenor F. Steven Lathrop

16 I:\Sagebrush\Response