

BEFORE THE STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of:)
 Application No. 2004-01)
)
 WIND RIDGE POWER PARTNERS, LLC,) Prehearing Conference
)
 WILD HORSE WIND POWER PROJECT) Pages 1 - 35
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A prehearing conference in the above matter was held in the presence of a court reporter on February 8, 2005, at 1:35 p.m., at 925 Plum Street, Room 308, in Olympia, Washington, before Energy Facility Site Evaluation Councilmembers.

* * * * *

The parties were present as follows:

WIND RIDGE POWER PARTNERS, LLC, Darrel Peeples, Attorney at Law, 325 Washington Street N.E., Suite 440, Olympia, Washington 98501; and Timothy McMahan, Attorney at Law, Stoel Rives, LLP, 805 Broadway Street, Suite 725, Vancouver, Washington 98660.

COUNSEL FOR THE ENVIRONMENT, John Lane, Assistant Attorney General, 1125 Washington Street S.E., P.O. Box 40100, Olympia, Washington 98504-0100.

KITTITAS COUNTY, James E. Hurson, Kittitas County Prosecutor, Kittitas County Courthouse, Room 213, Ellensburg, Washington 98926.

Reported by:

Shaun Linse, CCR #2029

1 Appearances (cont'd):
 2 FRIENDS OF WILDLIFE AND WIND POWER, David A.
 3 Bricklin, Attorney at Law, Bricklin Newman Dold, LLP,
 4 1424 Fourth Avenue, Suite 1015, Seattle, Washington.
 5 DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC
 6 DEVELOPMENT, Tony Usibelli, Assistant Director, and Mark
 7 Anderson, Senior Energy Policy Specialist, Energy Policy
 8 Division, P.O. Box 43173, Olympia, Washington 98504-3173.
 9 F. STEVEN LATHROP, Jeff Slothower, Attorney at
 10 Law, Lathrop, Winbauer, Harel, Slothower & Denison, LLP,
 11 1527 Robinson Canyon Road, P.O. Box 1088, Ellensburg,
 12 Washington 98926.
 13 ECONOMIC DEVELOPMENT GROUP OF KITTITAS COUNTY,
 14 Debbie Strand, Executive Director, 1000 Prospect Street,
 15 P.O. Box 598, Ellensburg, Washington 98926.
 16 * * * * *
 17 JUDGE TOREM: It is now 1:35 in the
 18 afternoon on Tuesday the 8th of February 2005. We will
 19 commence this prehearing conference as scheduled. We have
 20 three items to take care of today.
 21 We're going to discuss a proposed Prehearing
 22 Order No. 4 which would tentatively be labeled as Council
 23 Order No. 808. That would address any electronic filing
 24 instructions and deadlines.
 25 We will have secondly an update from

1 Mr. Peeples on the Applicant's intentions to establish
 2 land use consistency for this project and hear hopefully
 3 from Mr. Hurson as well.
 4 Finally, we'll schedule a status conference
 5 to determine if the hearing itself scheduled for next
 6 month will be a go or not. That will be at a time to be
 7 chosen on February 22, 2005 unless folks have an objection
 8 to that date.
 9 Let's establish who's here. We already know
 10 that the entire Council from the previous roll call is
 11 here, but because that's not part of the record let's
 12 establish that again.
 13 Mr. Mills, could you just establish who is
 14 representing the Council today.
 15 MR. MILLS: Chair?
 16 CHAIR LUCE: The Chair is present.
 17 MR. MILLS: Community Trade and Economic
 18 Development?
 19 MR. FRYHLING: Richard Fryhling.
 20 MR. MILLS: Department of Ecology?
 21 MS. ADELSMAN: Hedia Adelsman.
 22 MR. MILLS: Department of Fish and Wildlife?
 23 MS. TOWNE: Chris Towne.
 24 MR. MILLS: Department of Natural Resources?
 25 MR. IFIE: Tony Ifie.

1 MR. MILLS: Utilities and Transportation
 2 Commission?
 3 MR. SWEENEY: Tim Sweeney.
 4 MR. MILLS: Kittitas County?
 5 MS. JOHNSON: Patti Johnson.
 6 MR. MILLS: All members are present. There
 7 is a quorum.
 8 JUDGE TOREM: Thank you, Mr. Mills. Let me
 9 note before we go into saying the rest of the parties that
 10 are present today, that there is a letter formally
 11 reappointing Mr. James Luce as the Chair. It's dated
 12 January 31, 2005 and signed by our Governor Christine
 13 Gregoire indicating she's pleased to reappoint him to
 14 EFSEC, and his term of office is effective January 12,
 15 2005 and will continue at the Governor's pleasure. So
 16 there's a copy of that letter available from Ms. Makarow
 17 for anybody that wishes to see it just so we know formally
 18 that Mr. Luce despite his farewell at the last meeting is
 19 back again. We've maintained, if not land use
 20 consistency, Chair consistency in this matter.
 21 Now let's note Counsel for the Environment
 22 is here present today in the room. I would like the rest
 23 of the folks that are here for the Wild Horse project
 24 starting from my right to let us know if you're here for
 25 that, so that Shaun Linse, our court reporter, can note it

1 down.
 2 We have? `
 3 MS. STRAND: Debbie Strand, Economic
 4 Development Group of Kittitas County.
 5 MR. USIBELLI: Tony Usibelli with the
 6 Washington State Department of Community Trade and
 7 Economic Development.
 8 JUDGE TOREM: For the Applicant?
 9 MR. PEEPLES: Tim McMahan and Darrel Peeples
 10 representing the Applicant, and I believe probably Chris
 11 Taylor is on the phone.
 12 Chris, are you there?
 13 MR. TAYLOR: Yes, I am.
 14 JUDGE TOREM: Any others in the audience
 15 here today?
 16 MR. WILLIAMS: Scott Williams with Puget
 17 Sound Energy.
 18 MR. ANDERSON: Mark Anderson, CTED.
 19 JUDGE TOREM: All right. Mark Anderson for
 20 CTED. We've got Mr. Lane.
 21 Others on the telephone? Mr. Hurson, are
 22 you there?
 23 MR. HURSON: Jim Hurson, Kittitas County and
 24 Darryl Piercy, our CDS Director, is with me also.
 25 JUDGE TOREM: Any others present today?

1 MR. GAGLIANO: Troy Gagliano with Renewable
 2 Northwest Project.
 3 JUDGE TOREM: Renewable Northwest Project
 4 was who?
 5 MR. GAGLIANO: Troy Gagliano.
 6 JUDGE TOREM: All right. Mr. Gagliano,
 7 thank you.
 8 Mr. Slothower, Mr. Lathrop, are you there?
 9 MR. GARRETT: Ed Garrett with ROKT.
 10 JUDGE TOREM: For ROKT?
 11 MR. GARRETT: Yes.
 12 JUDGE TOREM: Mr. Slothower, Mr. Lathrop,
 13 are you on the phone?
 14 MR. SLOTHOWER: This is Jeff Slothower. I
 15 am. Mr. Lathrop is not.
 16 JUDGE TOREM: All right. Thank you. Any
 17 other parties or persons interested in the Wild Horse
 18 project?
 19 All right. Hearing none, let's turn to the
 20 first order of business then, the electronic filing
 21 instructions and deadlines. We circulated I believe in
 22 early part of last week a proposed order, and I wanted to
 23 hear from the Council first and then from the parties
 24 because that's who's going to serve whether the proposed
 25 draft that Ms. Makarow and I put together would allow for

1 the quick filing and response to deadlines electronically
 2 that are going to occur if the hearing goes forward with
 3 motions to strike that would be due I believe next Tuesday
 4 with motions and responses due in next Friday.
 5 Mr. Chairman, did you have initial comments?
 6 CHAIR LUCE: No comments. I've reviewed the
 7 electronic service requirements as set forth on Page 3 of
 8 4 and the draft prehearing. My question would be, and I
 9 think you've answered it, Ms. Makarow, are you comfortable
 10 with the electronic requirements set forth?
 11 MS. MAKAROW: Yes, staff did have input in
 12 developing this draft, so we are comfortable with what is
 13 laid out in it.
 14 CHAIR LUCE: If staff is comfortable, I'm
 15 comfortable.
 16 JUDGE TOREM: Any other members of the
 17 Council wish to comment on the proposed draft?
 18 Ms. Towne.
 19 MS. TOWNE: Just a quick one. The last item
 20 scheduled for status conference, again, in the interest of
 21 efficiency and cost savings why not schedule it for the
 22 23rd when we will be gathering to head to Montesano? We
 23 could do it in the afternoon.
 24 JUDGE TOREM: Ms. Makarow, do you want to
 25 address that?

1 MS. MAKAROW: Unfortunately the 22nd is our
 2 deadline to be able to cancel room reservations for the
 3 hearings.
 4 MS. TOWNE: Never mind.
 5 MS. MAKAROW: We will be setting up a phone
 6 line.
 7 JUDGE TOREM: Mr. Peeples, did you have any
 8 input on this particular draft?
 9 MR. PEEPLES: It's fine. We're basically
 10 doing it anyway. Everybody is filing electronically
 11 anyway, so it's fine.
 12 JUDGE TOREM: The distinction here, of
 13 course, would be this would actually count for service and
 14 replace the hard copies.
 15 MR. PEEPLES: Right.
 16 JUDGE TOREM: Mr. Lane, any input?
 17 MR. LANE: No objections.
 18 JUDGE TOREM: Mr. Slothower?
 19 MR. SLOTHOWER: That's fine to us.
 20 JUDGE TOREM: It's fine with you?
 21 MR. SLOTHOWER: Yes.
 22 JUDGE TOREM: Mr. Hurson?
 23 MR. HURSON: Frankly I haven't reviewed it.
 24 I'm assuming if we have consistency, the County wouldn't
 25 be involved in the hearing anyway.

1 JUDGE TOREM: Fair enough. Ms. Strand, any
 2 input on this?
 3 MS. STRAND: No problem.
 4 JUDGE TOREM: Mr. Usibelli?
 5 MR. USIBELLI: Fine.
 6 MS. MAKAROW: This is Irina Makarow, EFSEC
 7 Staff. I would just like to make one comment with respect
 8 to what Jim Hurson just stated that the County would not
 9 be involved. There would probably have to be a resumption
 10 of the land use hearing for the Council to hear any new
 11 evidence or receive any additional documents from the
 12 County and the Applicant on that issue.
 13 JUDGE TOREM: I think if the hearing goes
 14 forward on March 7, it could occur at that time and prior
 15 to the rest of the adjudication occurring.
 16 MS. MAKAROW: Correct. Yes.
 17 JUDGE TOREM: As that occurs then we'll have
 18 a motion from the County and the Applicant, and we'll
 19 absorb that in its schedule as necessary. I would think
 20 if that prediction is correct, Mr. Hurson, the Council
 21 would be freed up much sooner than the five days allotted
 22 to the hearing in this case, so we could absorb that
 23 without any problem.
 24 MR. PEEPLES: Your Honor, I would just like
 25 to point out that that's exactly what was done in the

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1 Wallula project. We had the land use hearing, and then we
 2 went immediately to the other hearing.
 3 JUDGE TOREM: So long as we have sufficient
 4 notice to provide to the county residents, so that they
 5 can participate as needed and as to their desires that
 6 should be sufficient.
 7 Ms. Towne.
 8 MS. TOWNE: You seem to infer in your
 9 comments a minute ago that the e-service would replace the
 10 hard copy service, and yet both for parties and EFSEC hard
 11 copy service is also required subsequent to.
 12 JUDGE TOREM: Correct. For clarification,
 13 what I mean is as to the date of service that it may not
 14 be received to the hard copy; that the electronic receipt
 15 would be sufficient. As you will note there will be at
 16 least one original copy mailed to EFSEC, so the signatures
 17 could be there and distributed.
 18 MS. TOWNE: Yes, thank you.
 19 JUDGE TOREM: All right. Any other comments
 20 from the parties or other observers today on this proposed
 21 order? All right. Hearing none, let me ask the Council
 22 if there's a motion to approve this as written?
 23 MR. IFIE: So move.
 24 MS. TOWNE: Second.
 25 JUDGE TOREM: It's been moved by I believe

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1 Mr. Fryhling.
 2 MR. IFIE: Mr. Ifie.
 3 JUDGE TOREM: By Mr. Ifie and seconded by
 4 Ms. Towne. Any further discussion, Councilmembers?
 5 Mr. Chair, would you like to call for the
 6 question then.
 7 CHAIR LUCE: Question is called for. All in
 8 favor say aye.
 9 COUNCILMEMBERS: Aye.
 10 CHAIR LUCE: All opposed?
 11 Hearing none opposed, the motion is passed
 12 unanimously.
 13 JUDGE TOREM: All right. So you can expect
 14 to see, parties, a draft order issued hopefully early next
 15 week electronically probably itself, and then you will get
 16 the hard copies containing this provision.
 17 Let's move onto the Applicant's update on
 18 land use consistency. Mr. Peeples, if you will come up to
 19 the table.
 20 MR. PEEPLES: Just briefly if Council wants
 21 to have any other questions, Tim McMahan is here who has
 22 been directly involved much more than I have in the local
 23 land use process, and Jim Hurson is on the phone. I think
 24 it's fair to say that we believe we will have land use
 25 consistency. We believe we will know for sure by the

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1 22nd.
 2 Tim, why don't you come up and go over what
 3 progress has been made, and, Jim, once he gets done why
 4 don't you pipe in if you have anything in addition.
 5 MR. McMAHAN: Tim McMahan here, Stoel Rives
 6 Law Firm on behalf of the Applicant. The County did
 7 convene a joint and consolidated hearing with the Planning
 8 Commission, Board of County Commissioners on the 25th and
 9 the 26th of January. There have been several continued
 10 hearings since then. Last night the Planning Commission
 11 did in fact move forward to the Board of County
 12 Commissioner's recommendation to approve the Wild Horse
 13 Project under the County's wind farm ordinance. I would
 14 say that we've had very good and timely support from
 15 County staff in moving the project along.
 16 Embedded with the recommendation approval
 17 are definitely some concerns that we need to work out with
 18 staff and with the Board of Commissioners, but we believe
 19 we're very productively engaged with the County, and the
 20 hearing will commence with the Board of County
 21 Commissioners on the 16th of February and then continue on
 22 probably to the 17th of February.
 23 One question I guess I would have for Jim
 24 Hurson is one concern we have is assuming we get through
 25 that hearing process if the Board of Commissioners would

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1 expect to take additional testimony at a later hearing
 2 date for the development agreement that sort of comes
 3 through with some amendments? Because that's the only
 4 concern that I really have on the schedule that interfaces
 5 with the EFSEC process. I'm sure that Jim has been doing
 6 some thinking about that, and you might want to find out
 7 from him his perspective on that element. That's one
 8 thing that I think could really throw off the schedule.
 9 JUDGE TOREM: All right. Mr. Hurson.
 10 MR. HURSON: The Planning Commission they
 11 did get their recommendation to the Board for approval.
 12 There are various conditions. They're set to go on the
 13 16th. I don't know until they have the hearing how long
 14 it's going to take for testimony, one night or two nights.
 15 As far as whether the Board would make the record open or
 16 not for further comment, it's unclear. I am assuming that
 17 the Applicant and the County staff will be discussing
 18 issues that the Planning Commission raised to see if
 19 there's some language suggestions that can come up to help
 20 streamline the process for when it gets before the Board.
 21 So that's kind of our intent over the next
 22 week is to try to work in that direction to see if we can
 23 narrow the focus of the issues and try to resolve issues.
 24 MR. PEEPLES: We will know by the 22nd,
 25 don't you think, Jim?

1 MR. HURSON: The 22nd we will probably have
 2 an idea where they are. I doubt that we will get the
 3 final documents done by then. The day before is a legal
 4 holiday, so the courthouse is closed. So I think we're
 5 starting on a Wednesday, and if it went Wednesday night
 6 and Thursday night, we have Friday, Monday is a holiday,
 7 and then that Tuesday would be the 22nd. We may be
 8 getting some indication from the Board on the 17th or they
 9 may set it over to like the 22nd for further discussion.
 10 But I think we will have a good sense for it.

11 If the Council wants to have a follow up on
 12 the 22nd to see where we are, I think that could make
 13 sense; although, I doubt it will be a matter of we have
 14 the final document prepared. At best we can give you a
 15 sense of where it is as far as your scheduling, and we'll
 16 probably have to have another follow up, you know, a few
 17 days after that for final decisions.

18 JUDGE TOREM: Mr. Hurson, I think that it's
 19 not the purpose of the Council to hold this follow up on
 20 the 22nd, so we know that the County Commissioners have a
 21 final document but simply to know whether any party needs
 22 a continuance of the hearing. As Ms. Makarow stated,
 23 there are financial incentives to aid Council and
 24 therefore the Applicant for continuing the hearing on that
 25 date if we need to because there would be a motion to file

1 for preemption or some other such extension of the time
 2 necessary to avoid that.

3 So if you're going to indicate obviously
 4 that the Board of County Commissioners has intention to
 5 approve the project and you're able to hammer out the
 6 details prior to the March 7th beginning of the hearing,
 7 that's what we need to know on the 22nd. If it blows up
 8 from either side along the way, and it's not foreseeable,
 9 well, so be it. This has happened with EFSEC proceedings
 10 before. We understand those are hard to control.

11 But if the Board of County Commissioners is
 12 in your opinion -- I'm not asking you actually for a
 13 prediction, but in your opinion that they are going to
 14 vote to approve it, then it doesn't have to be done by the
 15 22nd. If it's very clear to County staff that the
 16 Commissioners' vote is going to go against what the
 17 Planning Commission gave, it might be helpful to know that
 18 on the 22nd, so we can continue the hearing accordingly
 19 and allow for the motions and filing for preemption to
 20 come up; that the Applicant would have the opportunity to
 21 do that. Sound fair, Mr. Hurson?

22 MR. HURSON: We can get the input we can,
 23 but I'm obviously not a mind reader. So I assume that the
 24 Zilkha folks and the County staff can all discuss and see
 25 if we are getting the same impressions or direction.

1 JUDGE TOREM: I do recognize that you have
 2 two newly elected Board of County Commissioner
 3 representatives, so the degree of predicability there
 4 there's not much of a track record to go on, and I
 5 recognize the limitations on their ability to state
 6 otherwise prior to an actual vote. So with all that
 7 in mind anything you can give us as predictions or
 8 indications on the 22nd would help the staff, and we'll go
 9 forward from there.

10 But it appears that everything is headed
 11 toward a final resolution favorable to this project from
 12 the County's perspective to allow EFSEC to evaluate the
 13 project for siting without consideration of preemption.
 14 So, again, I think on behalf of the entire Council for
 15 giving us that project to review as opposed to one with
 16 preemption for the first time in 30 years we thank you in
 17 advance.

18 MR. HURSON: We're working on it.

19 JUDGE TOREM: Right. Mr. Hurson, anything
 20 further on this?

21 MR. HURSON: I don't believe so unless you
 22 have any other questions.

23 JUDGE TOREM: All right. Mr. Peeples.

24 MR. PEEPLES: Just Jim and I had one
 25 conversation last week I think you hit on. I think we'll

1 know, have a pretty good idea by the 22nd for any reason
 2 if we're not going to go. I think that's a pretty fair
 3 statement. The other thing is I think perhaps we ought to
 4 start thinking right now about filing a notice for land
 5 use hearing, and if we don't use it, we don't use it. But
 6 I think we need to file a notice for the land use hearing
 7 and plan to have it on the morning that we start the
 8 hearing which is March 7th.

9 MR. HURSON: I have no objection to that.

10 MR. PEEPLES: And if we don't go, we don't
 11 go.

12 JUDGE TOREM: All right. Very well.
 13 Council, any questions regarding this update on efforts to
 14 obtain land use consistency?

15 MS. ADELSMAN: It looks good.

16 MS. TOWNE: Wouldn't it be prudent because
 17 of the scheduling, financial impacts to abandon the 7th as
 18 the logical date and move it out a week or two at this
 19 point, given that we're not going to know until the 27th,
 20 and you probably aren't going to wait that long to reserve
 21 rooms?

22 JUDGE TOREM: We have the reservations from
 23 my understanding, Ms. Towne, so the only advantage we
 24 might gain by delaying the hearing a day is that gives us
 25 another day on the cancellation. We might start on the

1 8th and run for four days. That may be possible, but I
2 will leave that up to Ms. Makarow if we think that we need
3 to move things to the 23rd, if that gives us any further
4 indication. But it sounds as though we will know on the
5 22nd if we need to continue this one way or the other. If
6 it's going to be a negative implication that's predicted
7 for the Board of County Commissioners, they're going to be
8 making a motion to continue it. If we're together at the
9 status coverage on the 22nd, we can set a time for a
10 prehearing conference with that in mind, go ahead, and
11 probably nix the reservations in advance.

12 CHAIR LUCE: Let's hold them for the time
13 being.

14 JUDGE TOREM: Ms. Makarow, any input on
15 that?

16 MS. MAKAROW: We can certainly contact the
17 fairgrounds to see just how much we can stretch that 22nd,
18 but that was already a case-by-case negotiated agreement
19 that we have with them. They actually gave us an extra
20 week to be able to cancel the reservation without any
21 penalty.

22 JUDGE TOREM: Right. Any other parties,
23 observers, have any questions about the land use
24 consistency?

25 Hearing none, let's move onto the last item.

1 The status conference for February 22 we have been
2 discussing as part of the item. We can do this by phone.
3 We need not get together in person for folks that need to
4 travel to be here. What time of the day is -- Mr. Hurson,
5 maybe you could tell us is there any time of the day that
6 would be better for a feeling as to a prediction, or is
7 lunch time, one o'clock, two o'clock is that a better time
8 for anyone as far as Kittitas County's perspective?

9 MR. HURSON: I don't know if I have any
10 particular preference. I guess if you did it later like
11 mid afternoon at least then if the Board wanted to
12 schedule a meeting or a hearing earlier in the day or
13 early afternoon, there would be a little more time to sort
14 things out. I just don't know what the time is going to
15 be on the schedule of the Board right now.

16 JUDGE TOREM: Ms. Makarow, what's your
17 promise as to what time you contact the fairgrounds on the
18 22nd?

19 MS. MAKAROW: I believe their offices close
20 at 4:30, so before 4:30.

21 JUDGE TOREM: Would three o'clock in the
22 afternoon then be sufficient, Ms. Makarow, from your
23 perspective if we have a half-hour or 40 minutes of
24 discussion?

25 MS. MAKAROW: I think so.

1 JUDGE TOREM: Does anyone object to having
2 it at three o'clock in the afternoon just a telephone call
3 in?

4 Councilmembers, any conflict on the
5 schedules you're aware of?

6 Parties, anybody else want to object to
7 three o'clock? Otherwise, that's going to be it by
8 acclamation or by silence I suppose.

9 All right. By lack of objection we are
10 going to schedule it for three o'clock in the afternoon,
11 and Ms. Makarow will send around the notice as to what
12 telephone number to call into. We'll have a brief roll
13 call and just a quick status update, and from there the
14 parties will know whether we are going forward or not.

15 If you look at the other schedule that's
16 part of the draft prehearing conference order for today,
17 you can see where that fits in. We will have pending from
18 that date if there are any motions to strike testimony,
19 and today is the last day to file while rebuttal prefiled
20 testimony those will already have motions filed and
21 responses pending. If we get together after that holiday
22 Monday on the afternoon of the 22nd, we will not be
23 scheduled to release our rulings until the following
24 Friday; however, I will tell you if the Council and I have
25 had a chance to discuss any of the motions in advance and

1 we know the answer without it in writing, we can give it
2 to you at that time just to move things along a little bit
3 better. All right. So three o'clock.

4 Now, there's one other item that's in
5 existence that was handed to me as I came in today. It's
6 not on the agenda. But we have received a letter dated
7 today, February 8, and it's from the Department of Fish
8 and Wildlife. For those that are wondering as to how the
9 Department of Fish and Wildlife has been involved in this
10 proceeding and whether they were going to intervene, I
11 haven't read this eight-page document, but Ms. Makarow and
12 Mr. Fiksdal might be able to sum it up.

13 I believe that it would say that they are
14 not going to be intervening as an agency, and it
15 describes the efforts that have been made to keep their
16 employees and those contracted by EFSEC separate and what
17 we call the fire wall between the contracted issues and
18 the agency's own issues on the siting of the Wild Horse
19 project.

20 MS. MAKAROW: Not exactly. The letter is
21 from Fish and Wildlife staff who are contracting with
22 EFSEC, and it is a discussion of some of the issues that
23 they presented as comments to the Draft EIS, mitigation
24 that the Applicant is now proposing with respect to those
25 issues, and their position as to whether that mitigation

1 is acceptable or not. If the Department of Fish and
2 Wildlife decides to intervene that would come from another
3 group of Fish and Wildlife staff who are not associated
4 with these contractors, and the understanding I have is
5 that decision has not been made. That's up to the
6 Department of Fish and wildlife.

7 JUDGE TOREM: Just so the folks know who the
8 letter came from, it's from Mr. Ted Clausing signed as a
9 Regional Habitat Program Manager. So anyone that wants a
10 copy of this Ms. Makarow I believe should be able to
11 probably put it on the website.

12 MS. MAKAROW: It has been emailed to all the
13 parties, and as soon as I receive the original through the
14 mail, I'll be serving it in copy. But certainly we can
15 mail it earlier if they want.

16 The Councilmembers will be receiving a copy
17 of the letter also.

18 MS. ADELSMAN: Is it clear? Am I to
19 understand that the letter deals with the substance of the
20 mitigation and so on, not procedure? It has nothing to do
21 with any procedure stuff we're discussing; is that
22 correct?

23 MS. MAKAROW: Correct.

24 JUDGE TOREM: Sorry for the confusion. I've
25 been involved in a side conversation as to making sure

1 that those procedural Chinese walls, if you will, were in
2 place, and I just presumed that might be what the
3 substance of the letter was, but bad guess.

4 Any other business on the Wild Horse matter?

5 MS. TOWNE: Mr. Torem, for the record, two
6 weeks ago I guess I was sent an email by a Department of
7 Fish and Wildlife employee attaching a proposal for
8 mitigation. Simultaneous with my receipt of that email
9 which I hadn't even opened, both Ms. Makarow and Ms. Essko
10 communicated to me a stop, go no further, do not look at
11 the document because it should have been available to me
12 only in an adjudicative setting. I therefore emailed back
13 to the Department of Fish and Wildlife informing them of
14 that wise counsel and deleted the email from my machine.

15 JUDGE TOREM: And you avoided the ex parte
16 contact.

17 MS. TOWNE: That is correct. So I just
18 wanted everybody to know they may wonder why I don't know
19 what's going on at Fish and Wildlife since I purportedly
20 represent them, but that is why.

21 JUDGE TOREM: At least in this matter you
22 have a good excuse.

23 MS. TOWNE: That's right.

24 JUDGE TOREM: All right. Anything else on
25 Wild Horse?

1 MR. BRICKLIN: Yes, Mr. Torem. This is Dave
2 Bricklin.

3 JUDGE TOREM: Yes, sir.

4 MR. BRICKLIN: With regard to that letter
5 from Fish and Wildlife staff who are under contract to
6 EFSEC, my understanding is that they were on the EFSEC
7 side of that fire wall, so that they were suppose to be
8 off limits from the parties to the proceeding. But in
9 that letter that I read briefly, -- I received it today.
10 -- they make clear that they have in fact had
11 communication with one of the parties to this proceeding,
12 that is the Applicant, and apparently very excessively.

13 We had attempted on behalf of my client to
14 be in touch with those same individuals, and we were told
15 to lay off. You may not talk with them. They are on the
16 EFSEC side of the fire wall. So we didn't pursue that.
17 Now in this letter it turns out that the whole time we
18 were following the rules and making sure we didn't
19 communicate with them that the Applicant was.

20 JUDGE TOREM: So that there's not an
21 appearance that there's something that you've been told
22 one thing and the Applicant's been told another, my
23 understanding of the EFSEC statute and the rules that have
24 been implemented strictly allow for this kind of contact,
25 Mr. Bricklin, and I'll defer to Ms. Makarow because she's

1 been dealing with it a lot longer than I have.

2 But EFSEC contractors that we hire to
3 understand what the Applicant is proposing, maybe it's
4 obvious, would have to communicate with those applicants
5 to determine exactly what the project is and avoid any
6 mistaken presumption as to what exactly they're
7 evaluating. Again, I haven't read the letter, so I'm at a
8 disadvantage to know exactly what sort of communication
9 went on here. But in general that sort of contact is
10 permitted whether it's actually ex parte contact or not,
11 if you want to characterize it as such, but it is strictly
12 permitted under the law.

13 Ms. Makarow I'd defer to for some additional
14 comments necessary to address Mr. Bricklin's concerns.

15 MS. MAKAROW: Unfortunately I do not have a
16 copy of our statute before me, and maybe our Assistant
17 Attorney General can correct me. But I believe the cite
18 is to RCW 80.50.085 which clearly allows EFSEC staff and
19 by association of contractors who work for EFSEC on our
20 side of the fire wall to work with the Applicant to
21 resolve issues regarding siting of a project that is
22 before the Council, and it is under this statute that the
23 Fish and Wildlife contractors who are Ted Clausing and
24 Brent Renfrow on our side of the fire wall have been in
25 communication with the Applicant:

1 JUDGE TOREM: So, Mr. Bricklin.
 2 MR. BRICKLIN: I certainly don't question
 3 that EFSEC can obtain information from the Applicant, but
 4 it seems to me that if EFSEC is not just receiving the
 5 application and clearly is also in ongoing communications
 6 with the Applicant that that may be fine too. But if
 7 they're doing that, then other parties need to have access
 8 to EFSEC staff as well.

9 In this letter which summarizes some of
 10 those conversations that apparently is going on
 11 unbeknownst to us, there is information in here not just
 12 about what the project is but rather Zilkha's efforts to
 13 characterize their project in a way that minimizes the
 14 affects on wildlife in explaining why they think the
 15 project won't have significant effects attempting to rebut
 16 comments that were filed by others that's more than just
 17 describing what the project consists of. It's part of a
 18 debate.

19 Again, I don't question their right to
 20 provide that kind of analysis and information to EFSEC
 21 staff, but if they were allowed to do so, then we should
 22 have that ongoing opportunity as well.

23 JUDGE TOREM: Let me suggest, Mr. Bricklin,
 24 in the past there have been suggestions that EFSEC staff
 25 or contractors might be called to testify or be deposed,

1 and there is a EFSEC regulation that prohibits that sort
 2 of thing. Again, I don't have the citation to that right
 3 in front of me. But any evidence that's going to come in
 4 before the Council as part of the sworn testimony already
 5 is in the prefiled from the Applicant or perhaps from the
 6 Counsel for the Environment or from your organization or
 7 maybe will come in in the rebuttal testimony that's due to
 8 be filed today. Any of those folks can be cross-examined,
 9 and if there is any indication from the cross-examination
 10 that they're simply restating what they got from
 11 contractors behind the EFSEC fire wall, Council would
 12 entertain a motion as need to delve further into the
 13 original source of the comments and the work and have to
 14 evaluate whether it's appropriate under the EFSEC rule to
 15 allow that to occur or not.

16 But, again, keep in mind that the EFSEC rule
 17 does prohibit its staff which we've interpreted in the
 18 past to include contractors from being called to testify.
 19 It is sort of an odd statute that allows the staff to work
 20 with one party but not the others. That's easily
 21 acknowledged by anyone that's familiar with EFSEC's
 22 workings.

23 But let us know if you feel that it's
 24 prejudice, and you're not able to get some information or
 25 present your case accordingly. The Council wants to make

1 sure if they're approving or disapproving a siting project
 2 based on environmental, whether it be damages or mitigated
 3 damages, that they have the whole story. So I appreciate
 4 you raising the concern today. I'm not so sure what else
 5 we can do. I may have other staff members here that want
 6 to offer their counsel.

7 MR. BRICKLIN: I wasn't necessarily asking
 8 EFSEC to do anything today. I just wanted to raise that
 9 at the earliest possible moment that I was aware of the
 10 issue, and I will evaluate everything that you and
 11 Ms. Makarow have stated and other information. I think
 12 the burden is on me at this point if I want to pursue this
 13 issue to let you know how I want to pursue it but I did
 14 want to take this -- and I think we probably will. But I
 15 did want to at least -- I'm not asking you to do anything
 16 at this moment. I just wanted to make sure you were aware
 17 of the issue as soon as I was.

18 JUDGE TOREM: Let me suggest that if you
 19 have questions about it to get those from Ms. Makarow and
 20 perhaps to Ms. Essko as the Counsel for EFSEC and see what
 21 other questions they might be able to address before you
 22 put a whole lot of work into deciding that this is an
 23 issue of consequence or if it's simply one of those
 24 procedural oddities that go with EFSEC.

25 If it proves to be only that, and if it's

1 not consequential, I appreciate again you raising it. But
 2 if it is consequential, bring it to us in an appropriate
 3 fashion and let us deal with it to be sure that neither
 4 your organization that you're representing or any other
 5 party is prejudiced by this particular information coming
 6 out in the way it has.

7 MR. BRICKLIN: Okay.

8 JUDGE TOREM: Ms. Essko, anything you need
 9 to add?

10 MS. ESSKO: I was just going to point out
 11 that all the parties would have an opportunity to respond
 12 to that letter. I have not read it either. It just came
 13 out I think today, but every party will have an
 14 opportunity to respond to that. I just want to reiterate
 15 what Irina said about the statutory requirements of RCW
 16 80.50.085 in which the legislature requires Council staff.
 17 It doesn't just permit Council staff, but it requires
 18 Council staff to assist applicants in identifying issues
 19 presented by the application and requires that Council
 20 staff review all information submitted and recommend
 21 resolution to issues in dispute that would allow site
 22 approval. So as you think about this letter and what it
 23 may or may not mean that's the legislative mandate on
 24 which the Council is operating.

25 JUDGE TOREM: Mr. Bricklin, just let us know

1 if there's going to be something coming in, and any party
2 that wants to respond to this that thinks they need to
3 file additional prefiled testimony because of the date of
4 this coming out on the deadline for filing rebuttal
5 testimony let us know. At the latest let us know maybe at
6 the status conference on the 22nd, and we'll have the
7 Council take appropriate action to accommodate some very
8 limited if there's additional prefiled testimony or
9 rebuttal testimony to come. We can work with that I think
10 given the smaller number of parties in this proceeding and
11 hopefully what's going to turn out to be a smaller number
12 of issues.

13 Council, any other questions on this?

14 Mr. Bricklin, go ahead.

15 MR. BRICKLIN: Who just spoke before you?

16 MS. ESSKO: I'm sorry. I apologize. That
17 was me. That was Ann Essko.

18 MR. BRICKLIN: All right. Thank you.

19 JUDGE TOREM: Mr. Peeples.

20 MR. PEEPLES: Yes, I would like to ask for
21 clarification on this new prefiled testimony. I want to
22 clarify what the purpose of that prefiled testimony would
23 be.

24 JUDGE TOREM: Well, I won't know until
25 someone asks for it to be filed.

1 MR. PEEPLES: Would it be just with regard
2 to trying to rebut what is in the letter?

3 JUDGE TOREM: It may be, and it may be there
4 is no need for that but simply a question of
5 cross-examination. But, again, because these folks may
6 not able to be called as witnesses that are the authors of
7 the letter cross-examination may not be a sufficient
8 remedy for whatever wrong someone is proposing occurred to
9 them.

10 CHAIR LUCE: I want to just interject here.
11 This is Chair Luce. If I recall correctly from previous
12 cases that we've had, and Sumas comes to mind, and I'm not
13 sure it was Sumas. Council has in the past treated
14 contractors as an extension of staff, and it has not, if I
15 recall correctly, had either staff or contractors
16 generally called as witnesses.

17 JUDGE TOREM: Correct.

18 CHAIR LUCE: What we have in situations like
19 this permitted was when a letter such as this came in as
20 Ms. Essko said the letter is a matter of public record,
21 and then parties who wanted to comment on whatever was
22 contained in that letter could offer comments as they
23 wanted, and that would seem to be an appropriate thing to
24 do. However, I don't think we've ever characterized it as
25 filing a brief or filing a motion or anything like that.

1 JUDGE TOREM: I'm simply opening the door,
2 Chair Luce, that if the impacts of this letter is such
3 that it can only be remedied by that type of a request,
4 then a request can be entertained.

5 CHAIR LUCE: We haven't read the letter, and
6 so therefore we're all speculating on something that no
7 one understands what it is yet.

8 JUDGE TOREM: Correct. So, Mr. Peeples, I
9 don't mean to alarm your client that all of a sudden there
10 could be another bulk of prefiled testimony requested or
11 required. But if the request comes in from another party,
12 we will evaluate it and hear from the Applicant and other
13 parties that are concerned and set appropriate
14 limitations. The goal is simply to get the Council all
15 the information it needs to make a full and accurate
16 determination.

17 CHAIR LUCE: I view this just as an
18 extension of the EIS process basically.

19 JUDGE TOREM: Quite probably it will be, but
20 it may be that Mr. Bricklin feels otherwise once he's had
21 a chance to go fully through the letter. If he wishes to
22 make a request for some sort of --

23 CHAIR LUCE: Sometimes counsel from all
24 facets and representing all sorts of different parties
25 feel differently about all sorts of different things, and

1 they have to act accordingly.

2 JUDGE TOREM: All I want to make clear is
3 that if anyone feels that his letter is some sort of
4 bombshell at the last minute, tell us. Let us evaluate
5 the request, and we'll try to do justice and allow
6 everybody to get the information they need for the first
7 week of March. That's all.

8 Mr. Bricklin, anything else?

9 MR. BRICKLIN: That's fine. Thank you.

10 JUDGE TOREM: All right. Thanks.
11 Anything else on the Wild Horse project as
12 proposed?

13 All right. The last thing that I want to
14 note for everyone else here is that the next meeting of
15 EFSEC is scheduled I believe for a month from today on
16 March 8. If the Council goes forward on the week of March
17 7th through 11th for the hearing on Wild Horse, one of two
18 things will occur. Either that meeting will be
19 rescheduled or on the afternoon of Tuesday the 8th the
20 Wild Horse proceedings will cease for some period of time,
21 and we will hold that meeting for those that want to
22 attend in person in Ellensburg at the fairgrounds, and we
23 will have a call-in number if the telephone technology can
24 be obtained for the rest of the folks there. I'll leave
25 that up to staff. But we'll know on the 22nd whether

1 we're still going to Ellensburg for that week, and, if so,
2 what's going to happen with the actual regular EFSEC
3 meeting; whether it will be accommodating within the
4 hearing schedule or moved to another date.

5 MR. FIKSDAL: Judge Torem, this is Allen
6 Fiksdal. That was going to be an item that I was going to
7 bring up under the other agenda items in this agenda that
8 we're at today.

9 JUDGE TOREM: All right. So more to follow.
10 If there is nothing further, then this prehearing
11 conference is adjourned, and we will go to back to the
12 regular EFSEC meeting at 2:12 in the afternoon.

13 * * * * *

14 (Whereupon, the prehearing conference was
15 adjourned at 2:12 p.m.)
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AFFIDAVIT

I, Shaun Linse, CCR, Certified Court Reporter,
do hereby certify that the foregoing transcript
prepared under my direction is a true and accurate
record of the proceedings taken on February 8, 2005,
in Olympia, Washington.

Shaun Linse, CCR
CCR NO. 2029