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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

INTERVENOR F. STEVEN
LATHROP'S REPLY TO
RESPONSES TO MOTION TO
STAY ADJUDICATIVE
HEARING

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15 Comes now Intervenor F. Steven Lathrop and in reply to the responses to Intervenor F.
16 Steven Lathrop's motion to stay and states as follows:

17 A. Reply to Applicant's response:

18 1. This motion is not dispositive; it could have been brought as a motion to
19 dismiss, but it was not. The motion speaks for itself and goes to substantive and procedural
20 issues which relate to the jurisdiction of EFSEC to consider pre-empting local land use
21 ordinances. The motion is for EFSEC to require the applicant to follow the law and to stay the
22 adjudicative hearing until Zilkha complies with local Kittitas County land use ordinances relating
23 to wind farms. As the minutes of its regular meeting of August 11, 2003 reflect, applicant
24 compliance with GMA is not a new consideration by EFSEC. Finally, an objection to
25 jurisdiction can be raised at anytime and cannot be waived.

26 2. The applicant's citation to RCW 34.05.467 does not apply. That statute
might apply if the stay was sought from a superior court.

1 3. After having itself applied to EFSEC to stay the proceedings and in the
2 face of WAC 463-28-030(2) which calls for a stay of proceedings to allow for compliance with
3 local land use regulations, the applicant’s argument that the EFSEC rules do not authorize a stay
4 lacks all semblance of credibility, let alone legal basis. EFSEC has the ability to make
5 procedural rules with respect to processing an application. Those include, but are not limited to,
6 the setting of an adjudicative hearing, the continuing of an adjudicative hearing, and other
7 procedural matters relating to an adjudicative hearing including staying an adjudicative hearing
8 while certain events occur.

9 4. Most telling is the applicant’s failure to supply any authority that is
10 counter to the substance of the motion.

11 B. F. Steven Lathrop’s reply to Intervenor CTED’s response to the motion for stay.

12 1. Intervenor, Mr. Lathrop, is surprised by Intervenor CTED’s response. It
13 asserts that EFSEC cannot “bulldoze” over either state or local laws, even though it proposes to
14 do exactly that. It also states that “efforts” taken somehow make up for ignoring the law. No
15 where, however, does it cite to any authority that counters the clear statement in GMA that all
16 state agencies are subject to its requirements, no exceptions even for EFSEC. Its present position
17 is totally inconsistent with that of being the state agency charged with ensuring compliance with
18 GMA. More importantly, it presents exactly the direct conflict of interest and appearance of
19 fairness situation Mr. Lathrop complained of at the outset of these proceedings. CTED is acting
20 as both advocate and decision maker on the same application.

21 2. This is a simple issue of statutory construction, and CTED cannot and
22 does not support its statement about what the legislature intended as to GMA’s dominance over
23 EFSEC’s enabling statute. Two long standing rules of statutory construction in Washington
24 apply and resolve the question. First, words in statutes are given their plain meaning and,
25 second, when construing conflicting statutes, the newer statute takes precedence over the older
26 statute. Thus, in RCW 36.70A.103, State agencies include EFSEC and the word “shall” is
mandatory and imparts upon EFSEC mandatory compliance with local comprehensive plans and
development regulations and amendments adopted pursuant to GMA. These rules of statutory
construction make it clear that the adoption of GMA supersedes RCW 80.150.110. In construing

1 RCW 80.150.110 and RCW 36.70A.103, the rules of statutory construction dictate that the latter
2 statute, RCW 36.70A.103 eliminated EFSEC's authority to preempt local land use requirements.

3 3. But, what is most disturbing about CTED's response is that, as a member
4 of EFSEC, it has at least constructive knowledge that EFSEC has, for years, been in possession
5 of an opinion from the State Attorney General that supports the granting of Mr. Lathrop's
6 motion. AGO 1977 No. 1, dated January 5, 1977, deals directly with preemption of local land
7 use regulations in the face of conflicting legislative enactments. While the heavily qualified
8 conclusion at the time was in support of preemption, it could have as easily been contrary to
9 preemption, even then. However, its logic and authority confirm that the passage of GMA in
10 1990 and its amendment in 2002 settled the issue. EFSEC has long been aware that its
11 preemption rights were suspect and cannot now ignore that it no longer has the jurisdiction to
12 preempt local land use regulations. EFSEC must stay these proceedings unless and until the
13 applicant complies with GMA and local land use regulations as imposed and applied by Kittitas
14 County.

15 For these reasons Intervenor F. Steven Lathrop's motion to stay should be granted.

16 Dated this _____ day of August, 2004.

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18 _____
19 Jeff Slothower WSBA # 14526
20 Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.
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