



TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

II. COUNTERSTATEMENT OF THE CASE .....4

    A. Facts About Jefferson County PUD and Its Operations. ....4

    B. Facts Relating to Peterson Lake. .... 7

    C. Facts Relating to the Illegal Tax Allegations and the  
        PUD’s Laches Defense. .... 8

    D. Facts Relating to The Tax Refund Claims..... 13

III. ARGUMENT..... 14

    A. Public Utility Districts Have Two Legislatively-  
        Granted Functions, and Jefferson County PUD’s  
        County- and Region-Wide Water Conservation and  
        Planning Activities Do Not Duplicate Port Townsend’s  
        Water-Related Activities. .... 14

    B. The Fact That the City May Engage in Some Watershed  
        Planning Activities Does Not Mean Those Duplicate  
        the District’s Activities on Behalf of the Whole County  
        and Region. .... 20

    C. The District Properly Used Tax Revenues for the  
        Peterson Lake Property..... 22

    D. The Proviso in RCW 54.04.030 Prohibiting the Use of  
        Property Taxes Applies Only to the Initial Acquisition  
        of a Utility..... 25

    F. This Court Can Also Affirm the Trial Court’s Grant of  
        Summary Judgment to the District Based on the  
        Doctrine of Laches..... 36

G.	The Tax Refund Claims Are Barred Due to Their Failure to Meet the Statutory Prerequisites for Obtaining a Tax Refund. ....	40
IV.	CONCLUSION .....	43

## TABLE OF AUTHORITIES

### Cases

<i>Agrilink Foods, Inc. v. Dep't of Revenue</i> , 153 Wn.2d 392, 396-97, 103 P.3d 1226 (2005) .....	31
<i>Bayha v. Public Utility Dist. No. 1 of Grays Harbor County</i> , 2 Wn.2d 85, 97 P.2d 614 (1939).....	18, 27, 33, 38, 39
<i>Bowie v. Department of Revenue</i> , 172 Wn.2d 1, 11 n.7, 248 P.3d 504 (2011).....	31
<i>Buell v. Bremerton</i> , 80 Wn.2d 518, 522, 495 P.2d 1358 (1972).....	42
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 423, 103 P.3d 1230 (2005).....	32
<i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 94 P.3d 961 (2004).....	44
<i>City of Moses Lake v. Grant County</i> , 39 Wn. App. 256, 261, 693 P.2d 140 (Div. III 1984).....	20
<i>Clark v. Horse Racing Comm'n</i> , 106 Wn.2d 84, 91, 720 P.2d 831 (1986).....	17
<i>Coluccio v. King County</i> , 82 Wn. App. 45, 49-51, 917 P.2d 145 (1996) .....	48
<i>Davidson v. State</i> , 116 Wn.2d 13, 26, 802 P.2d 1374 (1991).....	42, 44
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	16
<i>Duckworth v. City of Bonney Lake</i> , 91 Wn.2d 19, 22, 586 P.2d 860 (1978).....	20

<i>Garrison v. Wash. State Nursing Bd.</i> , 87 Wn.2d 195, 196, 550 P.2d 7 (1976).....	28
<i>G-P Gypsum Corp. v. State Dept. of Revenue</i> , 169 Wn.2d 304, 309-10, 237 P.3d 256 (2010) .....	21
<i>Gross v. City of Lynnwood</i> , 90 Wn.2d 395 401 583 P.2d 1197 (1978).....	41
<i>Hartman v. Washington State Game Comm'n</i> , 85 Wn.2d 176, 179, 532 P.2d 614 (1975).....	20
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 138, 580 P.2d 246 (1978).....	16
<i>Hubbard v. Spokane County</i> , 103 Wn. App. 671, 14 P.3d 806 (Div. III 2000).....	19, 20
<i>In re Det. of Martin</i> , 163 Wn.2d 501, 508, 182 P.3d 951 (2008).....	32
<i>In re Estate of Little</i> , 106 Wn.2d 269, 283, 721 P.2d 950 (1986).....	17
<i>Jepson v. Dept of Labor &amp; Indus.</i> , 89 Wn.2d 394, 403, 573 P.2d 10 (1977).....	30, 37
<i>Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453</i> , 48 Wn. App. 743, 740 P.2d 889 (1987).....	42
<i>M.W. v. Department of Soc. And Health Servs.</i> , 149 Wn.2d 589, 597-98, 70 P.3d 954 (2003) .....	21
<i>Miller v. Tacoma</i> , 138 Wn.2d 318, 324, 979 P.2d 429 (1999).....	31
<i>Peninsula School Dist. No. 401 v. Public School Employees of Peninsula</i> , 130 Wn.2d 401, 407, 924 P.2d 13 (1996).....	31
<i>Potter v. Washington State Patrol</i> , 165 Wn.2d 67, 78, 196 P.3d 691 (2008).....	41

<i>Public Utility Dist. No. 1 v. Superior Court in and for Whatcom County,</i> 199 Wash. 146, 158, 90 P.2d 737 (1939) .....	15, 33, 35, 36
<i>Public Utility District No. 1 of Benton County v. Benton County,</i> 185 Wash. 339, 340-41, 54 P.2d 1011 (1936).....	23
<i>R.D. Merrill Co. v. State,</i> 137 Wn.2d 118, 140, 969 P.2d 458 (1999).....	30
<i>Ski Acres, Inc. v. Kittitas County,</i> 118 Wn.2d 852, 957, 827 P.2d 1000 (1992).....	32
<i>State ex rel. Berry v. Superior Court,</i> 92 Wash. 16, 159 P. 92 (1916) .....	20
<i>State v. Costich,</i> 152 Wn.2d 463, 477, 98 P.3d 795 (2004).....	34
<i>State v. Grays Harbor County,</i> 98 Wn.2d 606, 656 P.2d 1084 (1983).....	24
<i>State v. Kelley,</i> 168 Wn.2d 72, 83, 226 P.3d 773 (2010).....	48
<i>State v. Otis,</i> 151 Wn. App. 572, 582, 213 P.3d 613 (2009).....	21
<i>State v. Wright,</i> 84 Wn.2d 645, 529 P.2d 453 (1974).....	11, 30
<i>Stone v. Chelan County Sheriff's Dep't,</i> 110 Wn.2d 806, 810, 756 P.2d 736 (1988).....	17
<i>Vita Food Products v. State,</i> 91 Wn.2d 132, 587 P.2d 535 (1978).....	30, 37
<i>Whatcom County v. Langlie,</i> 40 Wn.2d 855, 863, 246 P.2d 836 (1952).....	20, 21
<i>Wilson Court Limited Partnership v. Tony Maroni's, Inc.,</i> 134 Wn.2d 692, 698, 952 P.2d 590 (1998).....	41

Rules

RAP 10.4(e)..... 1

Statutes and Regulations

Chapter 1, Laws of 1931..... 14, 32

Laws of 1931, Chapter 1, § 1.....2, 15

Laws of 1931, Chapter 1, § 11..... 15

RCW 39.34.190(1) .....21

RCW 39.34.190(2)(b).....6

RCW 43.09.210 .....21

RCW 54.04.020 .....2, 15

RCW 54.04.030 1, 2, 3, 4, 14, 16, 17, 18, 20, 25, 27, 28, 29, 30, 31, 32, 33,  
.....34, 35, 41 43, 44

RCW 54.15.310 .....35

RCW 54.16.010 .....6, 35

RCW 54.16.030 .....6, 21

RCW 54.16.040 .....6

RCW 54.16.050 .....6

RCW 54.16.080 .....10

RCW 54.16.090 .....6

RCW 54.16.310 .....6, 35

RCW 54.16.320 .....	6
RCW 54.16.360 .....	6
RCW 54.16.390 .....	6
RCW 84.68 .....	42
RCW 84.68.020 .....	40
RCW 84.69 .....	42
RCW 84.69.020 .....	40, 41, 42
RCW 84.69.020(6) .....	41
RCW 84.69.030 .....	40, 42
RCW 84.69.030(1) .....	41
RCW 84.69.030(2) .....	41
RCW 84.69.100 .....	42
RCW 84.69.130 .....	41, 42, 45
 <u>Other Authorities</u>	
Washington Constitution, Art. VIII, § 7 .....	21
Webster's New Collegiate Dictionary (8 <sup>th</sup> ed. 1974), at 842 .....	26

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is the latest chapter in a more than fifteen-year personal battle waged by appellant Ted Shoulberg and his attorney seeking to invalidate a property tax levied by Public Utility District No. 1 of Jefferson County (“Jefferson County PUD”, the “District”, or the “PUD”) on Port Townsend property owners for their share of the PUD’s county-wide water conservation and planning activities. In 1996, they failed to persuade the Washington Attorney General to rule the PUD’s tax invalid under RCW 54.04.030, and, most recently, failed to persuade the trial court in this case, which rejected the very same arguments and granted summary judgment in favor of the PUD. *See* Memorandum Opinion Re Motions for Summary Judgment (Supp. CP 845-62) (Appendix A to this Brief).

As they have for the past fifteen years, appellants<sup>1</sup> refuse to accept the fact that Jefferson County PUD separately budgets for, operates, and segregates its expenses between two distinct statutory functions engaged in by the PUD. First, the PUD operates and accounts for its water and sewer utility operations as a distinct business in which it serves and charges its own water and sewer customers. Second, the PUD separately engages in, and accounts for, its expenditures for county-wide and region-

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<sup>1</sup> Appellants are sometimes referred to in this Brief as “Shoulberg”. RAP 10.4(e).

wide water conservation and planning activities performed pursuant to statutory authority on behalf of all citizens of Jefferson County.

These two distinct PUD functions are expressly authorized by the PUD laws, which provide:

**The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, *and* to supply public utility service, including water and electricity for all uses.**

Laws of 1931, Chapter 1, § 1. RCW 54.04.020 (historical and statutory note) (emphasis added) (Appendix B to this Brief).<sup>2</sup>

The District's funding mechanisms reflect these two distinct statutory functions. The PUD's water and sewer utility operations pay for themselves and are not supported by tax revenues.<sup>3</sup> The PUD's county- and region-wide water conservation and planning activities are funded by tax revenues generated through the taxing authority granted to the PUD.<sup>4</sup>

Indispensable to Shoulberg's argument is a determination that the word "utility" or the phrase "or part thereof" in RCW 54.04.030 (Appendix C to this Brief) necessarily encompasses not only a utility

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<sup>2</sup> That PUDs have these two different statutory functions has been the law for 70 years, and was expressly recognized by the Attorney General 15 years ago. (CP 152-53) (discussed in Section II-C, *infra*).

<sup>3</sup> Clerk's Papers ("CP") 239-43; Supplemental Clerk's Papers ("Supp. CP") 706-07; Supp. CP 847; Report of Proceedings of the Hearing of June 9, 2010 ("RP") at 5.

<sup>4</sup> CP 239-43; Supp. CP 706-07; 847; RP at 5.

entity, but also any and all utility “activities” or “services” like water resource planning and conservation. That interpretation, however, is possible only by ignoring basic principles of statutory construction, inserting words that are not in the statute, and skewing the statutory language to achieve a strained and unnatural reading that is inconsistent with its historical context. Memorandum Opinion (Supp. CP 845-62) (Appendix A).

As demonstrated below, Shoulberg’s reading of RCW 54.04.030 fails for a number of reasons. First, the PUD’s efforts with respect to water resource planning and conservation are not duplicative of utility functions provided by Port Townsend because, by statute, the PUD and the City serve different constituents and purposes when they engage in these activities. The unique role legislatively granted to the District to conserve water resources on behalf of the people of Washington, in general, and the citizens of Jefferson County, in particular, differentiates the PUD’s role from Port Townsend’s restricted activities on behalf of only its City water customers. Second, even if that were not the case, Shoulberg’s argument fails because the tax prohibition language of RCW 54.04.030 applies only to prevent the use of tax revenues from within a city to pay for the acquisition costs of a duplicative utility or part of a utility. It does not apply to utility activities or services, operating

expenses, or maintenance costs that happen to be incurred by a PUD and by a city-owned utility. The trial court concluded that the PUD prevailed on both the “legal analysis” and the “factual analysis” in this case. (Supp. CP 862) (Appendix A).

In addition, since a trial court’s ruling on summary judgment can be affirmed on any theory established in the pleadings and supported by proof, even where the trial court did not rely on the theory, Jefferson County PUD will also address its arguments in the trial court for application of the doctrine of laches, as well as Shoulberg’s failure to follow the required procedures for perfecting tax refund claims under RCW 84.69, thus requiring the dismissal of all tax refund claims. The Court does not need to address these two defenses if (as it should) it affirms the trial court decision on the basis that RCW 54.04.030 does not prohibit the District from levying the taxes at issue here.

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. Facts About Jefferson County PUD and Its Operations.**

Jefferson County PUD is a municipal corporation organized under Washington law in 1939, following a vote of the people authorizing its existence. (CP 239-40). The PUD has a full-time equivalent staff of nine employees. (CP 240). It is a small public utility currently providing water

and sewer services to approximately 3,500 customers in Jefferson County. (CP 239-40).<sup>5</sup>

The PUD engages in two different functions, each of which is separately budgeted and accounted for: (1) providing basic water and sewer utility services to its rate-paying water and sewer customers; and (2) engaging in activities that are not basic water and sewer utility services—those relating to electricity, telecommunications, and county-wide and region-wide water conservation and planning activities provided to all county residents, such as: regional water resource studies and planning; resource coordination; environmental mitigation; aquifer protection; property acquisition for water resource planning, forest and wildlife protection; pollution prevention; and employing a Regional Resource Manager for water and sewer. (CP 239-47; CP 531-43; Supp. CP 704-07).<sup>6</sup> The District, thus, engages in a number of county-wide and region-wide water and sewer activities on behalf of all Jefferson County residents, which the PUD is specifically authorized by statute to perform. (CP 239-47; CP 531-43; Supp. CP 704-07).<sup>7</sup>

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<sup>5</sup> It should be noted that the Complaint for Declaratory and Injunctive Relief never mentions or claims any duplication of sewer utility services by the PUD. (CP 1-8). Instead, it seeks relief only with respect to its water utility services. (CP 7).

<sup>6</sup> Electricity and telecommunications services are not at issue here because Port Townsend does not operate electric or telecommunications utilities.

<sup>7</sup> These include, for example: (1) participation as the Jefferson County designated entity in the Satellite Management Agency (“SMA”) with regard to region-wide water services,

Jefferson County PUD derives its income from two separate and distinct sources. First, its basic water and sewer utility services generate income in the form of user fees for the utility services provided, and are referred to as “operating income.” (Supp. CP 706-07). Expenses associated with these utility services are accounted for as “operating expenses,” and are paid from “operating income.” (CP 239-43; Supp. CP 706-07). Second, the PUD also derives income from real property taxes levied on all Jefferson County residents, and classifies that income as

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RCW 54.16.010; (2) providing water and sewer studies for other parties and entities within Jefferson County, RCW 54.16.010 and RCW 54.16.310; (3) funding and participating in aquifer protection studies and activities, RCW 54.16.010; RCW 54.16.050; and RCW 54.16.360; (4) participation in County Water Utility Coordinating Committee activities, RCW 54.16.010; RCW 54.16.030; RCW 54.16.050; RCW 54.16.090; and RCW 54.16.360; (5) participating and providing assistance for municipalities on site activities involving septic system monitoring for proper functioning, RCW 54.16.310; (6) participating in and funding regional water resource supply studies, RCW 54.16.010; RCW 54.16.030; RCW 54.16.050; RCW 54.16.090; and RCW 54.16.360; (7) employment of a Regional Resource Manager for water, sewer, and electric utility services, RCW 54.16.010; RCW 54.16.030; RCW 54.16.040; RCW 54.16.050; RCW 54.16.090; RCW 54.16.360; and RCW 54.16.390; (8) inspection and assumption of substandard water and sewer systems, RCW 54.16.310 and RCW 54.16.320; (9) participation in Water Resource Inventory Area (“WRIA”) 16 and 17 Planning Unit activities, RCW 54.16.010; RCW 54.16.030; RCW 54.16.050; RCW 54.16.090; and RCW 54.16.360; (10) acquisition and maintenance of land for water resource planning, forest and wildlife preservation, and for possible region-wide water storage use, RCW 54.16.010; RCW 54.16.030; RCW 54.16.050; RCW 54.16.090; RCW 54.16.360; and RCW 54.16.390; (11) engaging in studies, surveying, investigating, and planning activities for various electric energy purposes, water supply and irrigation purposes, both inside and outside Jefferson County, RCW 54.16.010; (12) compiling maps and plans regarding how various resources and utilities can operate most economically, including the natural order in which they should be developed, and how they may be joined and coordinated to make a complete and systematic whole, RCW 54.16.010; (13) as authorized by the County Board of Health, performing operations and maintenance, including inspections, of on-site sewage disposal facilities, septic tanks, and other waste water facilities, and for the control and protection, preservation, and rehabilitation of surface and underground waters, RCW 54.16.310; (14) engaging in environmental mitigation activities, including planning for and mitigating environmental impacts, RCW 54.16.390; (15) acquiring property and water rights to protect the water supply from pollution, RCW 54.16.050; and (16) participating in and expending revenue on cooperative watershed management for purposes of water supply, water quality, and water resource habitat protection and management, RCW 39.34.190(2)(b); RCW 54.16.360.

“non-operating revenue.” (CP 239-47; Supp. CP 706-07).<sup>8</sup> The PUD’s tax revenue was collected and budgeted separately from revenue from operations, and therefore can be segregated. (Supp. CP 847; RP at 5). The PUD’s operating revenues are sufficient to support all of its utility operations, according to its budgets. (Supp. CP 847; RP at 5).

**B. Facts Relating to Peterson Lake.**

The PUD’s Commissioners were presented with the opportunity to acquire and preserve Peterson Lake and the wilderness property surrounding it before it was offered to other private interests. (CP 243). Initially, the PUD considered whether an acquisition was in the best interests of its water utility customers, but determined the cost was prohibitive, there was no short or medium term need for any additional water resources, and that Peterson Lake was inconveniently located to the PUD’s facilities to make any use of water from that source. (CP 243). In addition, the property owners had no water rights to convey, and none exist today. (CP 243; Supp. CP 861-62). Because the acquisition of this resource was one that would benefit all of Jefferson County and the entire region to the extent it could be used to conserve water resources in the County and to potentially recharge underground streams and other water

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<sup>8</sup> The PUD separately accounts for expenditures made for: (1) its water and sewer utility service business, and (2) its regional and county-wide activities that are different from its water and sewer utility service business. (CP 239-43; Supp. CP 706-07).

sources important to the region, the PUD Commissioners proceeded to investigate its acquisition as a regional resource. (CP 243-44).

The PUD Commissioners requested public input and comments about its possible use of tax revenues to purchase the Peterson Lake property. (CP 244; CP 270-73). Following several public meetings, commentary from taxpayers, and discussions, the PUD Commissioners conducted a public hearing and, pursuant to Resolution 2006-001, approved the purchase of the Peterson Lake property for the total sum of \$2,225,000. (CP 245; CP 275-81). The Real Estate Purchase and Sale Agreement obligated the District to pay \$225,000 at closing and approximately \$223,000 annually for 20 years. (CP 245; CP 283-87).

Because of the regional and county-wide benefit of acquiring and preserving Peterson Lake, the PUD Commissioners determined the financial obligations of its acquisition are properly paid through tax revenues. (CP 245; Supp. CP 851; CP 860-62). There are no plans, nor have there even been any actual plans, to develop Peterson Lake as a water supply resource for the PUD. (CP 243; CP 539-40; Supp. CP 860-62).

C. **Facts Relating to the Illegal Tax Allegations and the PUD's Laches Defense.**

This lawsuit was filed on July 17, 2009. (CP 1-8). As early as August 25, 1995, however, attorney David A. Bricklin (appellants'

counsel below and in this appeal) wrote the Jefferson County Board of Commissioners “on behalf of my client Ted Shoulberg [one of the appellants] regarding a tax that has been illegally levied by Jefferson County on behalf of the Jefferson County PUD.” (CP 141-46). Mr. Bricklin’s letter stated he was writing on that date to both the County Commissioners and the State Auditor “in an effort to assure that justice is quickly done and that the City and County taxpayers obtain quick and lasting relief from this unjust and illegal tax.” (CP 141).

On August 30, 1995, a newspaper article was published in the Port Townsend newspaper, “The Leader,” describing Shoulberg’s claim that the PUD was levying an illegal tax, and that Shoulberg wanted those taxes “back for all property owners served by Port Townsend’s municipal water system,” and quoted Shoulberg as promising that:

If the county, the PUD, or the state won’t recognize this as a “class” claim, then if I have to I’ll go door-to-door and get every property to file with me.

(CP 102; CP 708).

Thereafter, on September 11, 1995, Jefferson County Prosecuting Attorney David Skeen wrote to Washington Attorney General Christine Gregoire indicating he had “received notice that a taxpayer in Jefferson County has challenged the authority of Jefferson County PUD #1 to levy

property taxes on citizens of the City of Port Townsend.” (CP 148-49).<sup>9</sup> Mr. Skeen’s letter requested “a legal opinion determining whether PUD #1 may levy and collect property taxes within the geographical boundary within the City of Port Townsend.” (CP 148).

On January 9, 1996, Assistant Attorney General Mary Jo Diaz responded to Prosecuting Attorney Skeen’s letter with a five-page, single-spaced letter (with a bcc: to Ted Shoulberg and David Bricklin) addressing the question: “May a public utility district which operates a water service levy and collect property tax on the citizens of a city which operates its own water service?” (CP 151). Ms. Diaz’s letter stated there were insufficient facts to determine whether the taxes actually collected by Jefferson County PUD were used to subsidize its water utility operations, (CP 151-55), but, significantly, concluded that:

A PUD is given broad powers to obtain the objectives of the act, including the power to raise revenue by the levy of an annual tax on all taxable property in the district. *See* RCW 54.16.080. ***There is no express restriction on the use of the tax, so presumably the tax may be used to achieve all of the PUD’s purposes under the act, that is, the provision of public utilities and the conservation of water and power resources.***

. . .

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<sup>9</sup> The trial court included in its summary of undisputed facts that “. . . In 1995, Mr. Shoulberg, asserted the position which he now asserts in this lawsuit.” (RP at 6).

The prohibition against taxation of property for utility purposes of citizens residing in a city providing the same service is set forth in a proviso. In accordance with the recognized rules of statutory construction, a proviso must be construed in light of the body of the statute, and in such a manner as to carry out the legislature's intent as manifested by the entire act and laws in pari material therewith. Provisos operate as limitations upon or exceptions to the general terms of the statute to which they are appended and, as such, generally should be construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions. (Citations omitted.) *State v. Wright*, 84 Wn.2d 645, 529 P.2d 453 (1974).

. . . [A] PUD has general authority to conserve the water and power resources for the people of the state, in addition to the provision of utility services. Conservation and planning are not 'utility services' moreover, and the mere fact that the City also "conserves" or "plans" would not trigger the proviso language and prevent the PUD from levying taxes within the city for these functions.

(CP 152-53) (emphasis added).

Shortly after the above efforts were undertaken—unsuccessfully—by Mr. Shoulberg and his counsel to have the PUD's tax levies on Port Townsend residents declared illegal, there was a Port Townsend City Council meeting held on February 5, 1996. (CP 102; 157-88). At that meeting, the City Council discussed Resolution No. 96-23. (CP 174-88). Resolution 96-23 was the culmination of studies conducted by the Port Townsend Public Works Department and consultants to the City, in conjunction with other governmental entities, to develop a strategic water planning policy with respect to the use of the City's surface and ground

water resources in conjunction with other providers of water, including Jefferson County PUD, to be consistent with county-wide planning policies. (CP 157-88). A draft of the Resolution was widely publicized, and Mr. Shoulberg was a primary proponent of it.<sup>10</sup>

Included in Resolution No. 96-23 is a recommendation entitled “Sustainable Development of New Water Resources:” that provides:

City staff is directed to work with the County, the PUD, and other existing and emerging water purveyors, to plan and develop long-term alternative water resources, *and to obtain from the PUD a commitment to target County-wide utility tax revenues (particularly those levied against City customers) toward this regional benefit.*

(CP 187) (emphasis added). A motion to adopt Resolution No. 96-23 was made by Councilmember Ted Shoulberg, seconded by another Councilmember, and adopted unanimously. (CP 165).

This lawsuit was filed more than 13 years later. (CP 1-8).<sup>11</sup>

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<sup>10</sup> During public hearing discussions of Resolution No. 96-23, the Port Townsend Public Works Director pointed out the September 1995 draft resolution of the same document was discussed at numerous meetings throughout the County and led to the final draft. (CP 161-62). He noted that then Councilmember Shoulberg presented it in January [1995] to the Water Utility Coordinating Council and at the Utilities Committee Tri-Area public meeting and, in November [1995] it was sent out as part of the minutes. (CP 161-62).

<sup>11</sup> The trial court entered a finding of fact that “. . . In 1996 Shoulberg, as a member of the Port Townsend City Council, proposed and supported Resolution No. 96-23, which supported use of the county-wide PUD tax for county-wide water resource development and planning. This lawsuit, in which Mr. Shoulberg is a plaintiff, was filed 13 years later.” (Supp. CP 847; RP at 6).

In sworn interrogatory answers, Jefferson PUD General Manager James G. Parker stated as follows with respect to the PUD's detrimental reliance and damages suffered as a result of Mr. Shoulberg's delay:

During the past fourteen years prior to the time plaintiffs filed this lawsuit, the PUD continued to spend public funds and incur obligations based on financial considerations that included the availability and use of the property-tax derived funds. This included long-term and short-term financial planning; annual budgeting; purchasing Peterson Lake; employing a Regional Resource Manager; devoting PUD personnel time and effort to various activities performed on a regional and/or county-wide basis, or for other parties in the County, for the benefit of the region, the County and/or those other parties; investigating and planning for PUD electric authority; becoming a member of Northwest Open Access Network and incurring financial obligations for telecommunications purposes, and issuing bonds and engaging in other borrowing to fund various activities.

(CP 232-35; *accord*, CP 245-46).

**D. Facts Relating to The Tax Refund Claims.**

This lawsuit sought declaratory and injunctive relief and tax refunds for the plaintiffs and the entire class of Port Townsend real property taxpayers. (CP 1-7). Plaintiffs did not pay taxes to Jefferson County PUD under protest. (RP at 6; Supp. CP 847). Further, they did not file an official claim for refund of the taxes levied by the PUD. (RP at 6; Supp. CP 847).

### III. ARGUMENT

A. Public Utility Districts Have Two Legislatively-Granted Functions, and Jefferson County PUD's County- and Region-Wide Water Conservation and Planning Activities Do Not Duplicate Port Townsend's Water-Related Activities.

RCW 54.04.030 (Appendix C) provides as follows (with the language at issue in bold type):

Chapter 1, Laws of 1931, shall not be deemed or construed to repeal or affect any existing act, or any part thereof, relating to the construction, operation and maintenance of public utilities by irrigation or water-sewer districts or other municipal corporations, but shall be supplemental thereto and concurrent therewith. No public utility district created hereunder shall include therein any municipal corporation, or any part thereof, where such municipal corporation already owns or operates all the utilities herein authorized: PROVIDED, that in case it does not own or operate all such utilities it may be included within such public utility district for the purpose of establishing or operating therein such utilities as it does not own or operate: **PROVIDED, FURTHER, That no property situated within any irrigation or water-sewer districts or other municipal corporations shall ever be taxed or assessed to pay for any utility, or part thereof, of like character to any utility, owned or operated by such irrigation or water districts or other municipal corporations.**

The phrase a utility “of like character” has been interpreted to mean “duplicate” utilities. *Public Utility Dist. No. 1 v. Superior Court in and for Whatcom County*, 199 Wash. 146, 158, 90 P.2d 737 (1939). Thus, RCW 54.04.030 prohibits a PUD from taxing City property owners to pay for any duplicate utility or part of a utility.

Washington public utility districts have two different legislatively-established functions: (1) water and power resource conservation for all citizens; and (2) providing water and electric utility service to their ratepayers. The original PUD Act provided:

The purpose of this act is to authorize the establishment of public utility districts **to conserve the water and power resources of the State of Washington for the benefit of the people thereof, *and* to supply public utility service, including water and electricity for all uses.**

Laws of 1931, Chapter 1, § 1; RCW 54.04.020 (historical and statutory note) (emphasis added) (Appendix B). The 1931 legislation mandated liberal construction of the laws relating to public utility districts.

*The rule of strict construction shall have no application to this act, but the same shall be liberally construed, in order to carry out the purposes and objects for which this act is intended.* When this act comes in conflict with any provision, limitation or restriction in any other law, this act shall govern and control.

Laws of 1931, Chapter 1, § 11; RCW 54.04.020 (historical and statutory note) (emphasis added). A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 138, 580 P.2d 246 (1978).

The language in the 1931 PUD Act is clear. The word **“and”** cannot be disregarded. It means there are two different PUD statutory

roles. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Stone v. Chelan County Sheriff’s Dep’t*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)). If the language of the statute is unambiguous, construction is unnecessary, and the words of the statute will be given their plain and ordinary meaning. *Clark v. Horse Racing Comm’n*, 106 Wn.2d 84, 91, 720 P.2d 831 (1986); *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986).

The trial court properly focused on the two purposes established in the 1931 PUD legislation, and its liberal construction mandate. (Supp. CP 849). Under basic statutory construction principles, this Court should do the same.

Shoulberg, however, argues there are not two separate statutory functions for PUDs – that it is all the same thing, all part of the District’s water utility, and that trumps the 1931 Act language. The Attorney General, however, rejected that construction. In response to Shoulberg’s initial challenge to the PUD’s authority to tax within Port Townsend under RCW 54.04.030, Assistant Attorney General Mary Jo Diaz stated in her letter of January 9, 1996:

**[A] PUD has general authority to conserve the water and power resources for the people of the state, in addition to the provision of utility services. Conservation and planning are not ‘utility services’ moreover, and the mere fact that the City also “conserves” or “plans” would not trigger the proviso language and prevent the PUD from levying taxes within the city for these functions.**

(CP 153) (emphasis added).

The trial court in this case reached the same conclusion. In ascertaining the intended purpose of RCW 54.04.030, Judge Taylor found particular significance in the fact that in performing a similar statutory construction analysis in *Bayha v. Public Utility Dist. No. 1 of Grays Harbor County*, 2 Wn.2d 85, 97 P.2d 614 (1939), the Washington Supreme Court “again started with a review of the same recitation from the preamble [of the 1931 PUD Act], . . .” Memorandum Opinion, at Supp. CP 856. The trial court went on to conclude:

*The use of the word “and” in the “statement of purpose” is of great significance, suggesting that the legislature thought the conservation of water and power resources for the benefit of the people of this state, by public utility districts, was as important as the power to supply actual utility services. With that in mind, the act is to be “liberally construed, in order to carryout [sic] the purposes and objects for which this act is intended.”*

Memorandum Opinion, (Supp. CP 861) (emphasis added).

Port Townsend has no comparable statutory directive, nor is it empowered to levy taxes throughout Jefferson County for the purpose of

implementing the statutory PUD mandate to conserve water and power resources for the people of the State of Washington. Thus, when the District engages in county-wide or region-wide water planning and conservation activities, it acts on behalf of a much wider constituency than the City of Port Townsend. The PUD's activities do not duplicate what Port Townsend does; they are not the basic utility services which Shoulberg argues would trigger the proviso language of RCW 54.04.030. Assistant Attorney General Diaz recognized this in 1996. The trial court recognized this in 2010. This Court should do so now.<sup>12</sup>

Having had his fundamental argument rejected on basic statutory construction principles by both the Attorney General and the trial court, Shoulberg now crafts a new argument, not raised below — that a statutory purpose statement is “without operative force.”<sup>13</sup> This is incorrect. As

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<sup>12</sup> Shoulberg cites *Hubbard v. Spokane County*, 103 Wn. App. 671, 14 P.3d 806 (Div. III 2000), for the proposition that because of the *de novo* nature of summary judgment review, the findings of the trial court are superfluous and should not be considered by the appellate court. Nothing in that case, however, precludes this Court from reviewing the trial court's Memorandum Opinion Re Motions for Summary Judgment or other “findings” to determine whether there have been errors of law. This is particularly true in a case like this where both sides filed cross-motions for summary judgment and maintained there were no factual disputes that precluded the trial court from entering judgment as a matter of law. In fact, this case was submitted to the trial court on essentially stipulated facts. See RP at 2-8. Moreover, in a Washington Supreme Court case cited in Hubbard, but not cited by appellants, *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 22, 586 P.2d 860 (1978), the Court expressly held that on review it may consider “factual concessions” made by the parties.

<sup>13</sup> Significantly, in making this argument, Shoulberg quotes from *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 261, 693 P.2d 140 (Div. III 1984), but fails to apprise this Court of the other cases cited by the *Grant County* Court as authority for the quoted statement. For instance, in *Whatcom County v. Langlie*, 40 Wn.2d 855, 863, 246 P.2d 836 (1952), the Court noted: “**The declaration of aims, purposes, and intent is a**

multiple Washington courts have held, a statement of purpose in an act is the primary insight into the intent of the legislature. *See, e.g., G-P Gypsum Corp. v. State Dept. of Revenue*, 169 Wn.2d 304, 309-10, 237 P.3d 256 (2010) (“A statute’s plain meaning should be “discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. . . . Moreover, an enacted statement of legislative purpose is included in a plain reading of a statute.”); *State v. Otis*, 151 Wn. App. 572, 582, 213 P.3d 613 (2009) (“To ascertain legislative intent, we look to the statute’s declaration of purpose.”); *M.W. v. Department of Soc. And Health Servs.*, 149 Wn.2d 589, 597-98, 70 P.3d 954 (2003) (analyzing statement of purpose encompassing two different concerns).

This Court should reject Shoulberg’s argument that the “dual role” language of the 1931 public utility district Act is meaningless. As in

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**constituent part of the act and is to be considered in construing, interpreting, and administering it.** . . . Such declarations and recitals, while not operative rules of action, may play a very important part in determining what action shall be taken.” (citations omitted and emphasis added) In an even more glaring omission, appellants do not reference *Hartman v. Washington State Game Comm’n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975), a case dealing with the purpose statement for a Game Commission regulation regarding **conservation** of game fish within Washington waters—a comparable purpose statement to that involved in the present case. In *Hartman*, the Court held: “Where the legislature prefaces an enactment with a statement of purpose . . . , **that declaration**, although without operative force in itself, **nevertheless serves as an important guide in understanding the intended effect of operative sections.** *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 159 P. 92 (1916); *Whatcom County v. Langlie*, 40 Wn.2d 855, 863, 246 P.2d 836 (1952). . . . **Thus, we look to the prefatory section to explicate the extent of authority intended to be delegated . . . , and that preface clearly pertains to matters of conservation, i.e., preservation, protection and perpetuation** so as not to impair the supply.” (Emphasis added).

numerous other cases construing legislative purpose statements, the statement of purpose in the 1931 PUD Act serves as an important guide in understanding the intended effect of other sections of the public utility statutes, including the water resource planning and construction powers granted to PUDs, and RCW 54.04.030. This statement of purpose authorizes Jefferson County PUD not only to provide water and sewer service to its rate-paying customers, but also, by its plain language, to engage in county-wide and region-wide efforts on behalf of the people of Washington, in general, and the citizens of Jefferson County, in particular, to conserve water and power resources in a manner broader and different in nature than efforts engaged in by Port Townsend.

**B. The Fact That the City May Engage in Some Watershed Planning Activities Does Not Mean Those Duplicate the District's Activities on Behalf of the Whole County and Region.**

Shoulberg spends considerable time arguing that Port Townsend does some watershed planning and, therefore, City residents cannot be taxed for the PUD's broader water resource conservation and planning activities. But this assertion ignores the 1931 PUD law and the numerous county- and region-wide activities in which the PUD engages pursuant to

statute (*See* footnote 7, *infra*), and fails to distinguish the City's constituency from the District's. (CP 240-45, CP 531-43; CP 704-07).<sup>14</sup>

Port Townsend's participation in watershed planning and related activities is limited to the defense of its own interests. One significant illustration of this limitation is that Port Townsend is financially restricted by RCW 39.34.190(1), which limits a city's participation in watershed planning activities to no more than 10% of its water-related revenues. PUDs like Jefferson County PUD, have no such monetary restrictions. As part of the county, Port Townsend, thus, benefits from the PUD's watershed planning and other water resource conservation activities performed, pursuant to law, on behalf of all citizens of the county.<sup>15</sup>

As the statutes show, the District has a two-pronged role, and its water conservation and resource planning purposes are, by law, on behalf of all the people of the county, the region, and the state, unlike the city's water-related activities. *See also* RCW 54.16.030 (authorizing public

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<sup>14</sup> Shoulberg seems to believe public utility districts have had no longstanding authority regarding water conservation and planning. That is not correct, as shown by the 1931 PUD Act itself and the many statutes pursuant to which the District provides these very services to all citizens (*see* footnote 7, *infra*). *See also Public Utility District No. 1 of Benton County v. Benton County*, 185 Wash. 339, 340-41, 54 P.2d 1011 (1936) (noting the water conservation powers were included not only in the 1931 statement of purpose, but also in the powers specified in the 1931 law.)

<sup>15</sup> If City taxpayers like appellants were not taxed for the services the District provides, there might well be an impermissible gift of public funds to private parties in violation of Washington Constitution, Art. VIII, § 7. Furthermore, the City might be in violation of RCW 43.09.210, which requires that services rendered by one public entity to another be paid for at their true and fair value. *State v. Grays Harbor County*, 98 Wn.2d 606, 656 P.2d 1084 (1983).

utility districts to acquire water works and irrigation plants and systems to furnish an ample supply of water not only to the district and its inhabitants, but also outside the county in which the district is located).

**C. The District Properly Used Tax Revenues for the Peterson Lake Property.**

Appellants devote many pages of their Brief to arguing the alleged impropriety of the PUD's acquisition of the Peterson Lake property, and the PUD's district-wide and region-wide water planning and conservation efforts, as purportedly done to expand the water supply for its own water customers. These arguments again disregard undisputed facts about the inability to use any water for any purpose from Peterson Lake. (CP 243; Supp. CP 861-62). These arguments also ignore the fact that Port Townsend is part of the greater water and ecological system of Jefferson County and the entire Olympic Peninsula region. To the extent the PUD's efforts preserve and protect sensitive areas and water resources from damage so that they might someday be used to enhance water availability for Jefferson County (including Port Townsend), the PUD's district-wide and region-wide efforts benefit even Port Townsend.

Shoulberg's strained arguments that Peterson Lake was purchased solely for the District's water utility customers is contrary to the evidence. As the record shows, and as determined by the trial court judge, the

Peterson Lake acquisition was made to preserve the pristine waters and surrounding land for county-wide and region-wide purposes. (CP 243-44; CP 539-40; Supp. CP 860-62). Regardless of Shoulberg's arguments, the facts demonstrate that when the PUD purchased the Peterson Lake property, it acquired no water rights as part of the purchase, nor are there likely to be any such water rights anytime in the foreseeable future. (CP 38-39; 539-40; RP at 6). Since the PUD acquired no right to use any of the water in Peterson Lake for its water utility customers, there has been no improper use of tax revenues for the PUD's own benefit.

The trial court expanded its conclusions as to Peterson Lake as follows, based on the declarations and documents in the record and not challenged or refuted by plaintiffs:

19. Petersen Lake is a small, spring-fed, pristine lake, which has been maintained by its original owners in an unimproved condition for decades. It contains no fish, and is inhabited only by native plants and animals. Public access is prohibited, and the lake is not used for any recreational purposes.

20. The PUD anticipates that it has adequate resources for its water utility for the next 20 years, and after that, growth in the county may require the expansion of existing water resources, or the acquisition of new sources.

(Supp. CP 848).

Appellants' Brief very selectively quotes from the record as to Petersen Lake. The material referenced by an "ellipsis" in a PUD news release quoted (Appellants' Opening Brief at 22) states:

Preserving the 2440 acres of forested open space alone helps maintain hydrologic function within the Chimacum basin by limiting the area of impervious surfaces. The lake itself is ecologically unique in that it is devoid of the invasive plant species that plague most public and private lakes. Since the property would be protected from future development it could serve as a laboratory for lake ecology and watershed projects and be used as a benchmark for lake health-an example to aspire to.

(CP 387). This aptly illustrates the purposes underlying the acquisition of Peterson Lake.<sup>16</sup>

The PUD Commissioners, having been given broad discretion by the Legislature to make decisions on the expenditure of tax revenues for PUD functions, purchased the Peterson Lake property after public hearings and after receiving public input. (CP 245; 275-81). Since all Jefferson County residents receive benefit from the strategic purchase of the Peterson Lake property, it is a legitimate expenditure of tax revenues.<sup>17</sup>

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<sup>16</sup> As demonstrated above, Shoulberg's arguments and innuendoes are contrary to the sworn testimony of the PUD General Manager and Regional Resource Manager (CP 239-47; CP 539-43). Shoulberg never asserted in the trial court that there were any disputed material issues of fact precluding summary judgment, and he cannot do so now.

<sup>17</sup> In *Bayha v. Public Utility Dist. No. 1 of Grays Harbor County*, 2 Wn.2d 85, 97 P.2d 614 (1939), the Supreme Court discussed the powers of public utility district commissioners: "***The legislature has seen fit to vest the commissioners of a public utility district with almost unlimited powers relative to the construction, purchase, etc.,***

The purchase of Peterson Lake does not “duplicate” water resource planning activities of the City of Port Townsend. Instead, it serves as a county-wide and region-wide resource. Therefore, it was and remains permissible to use tax revenues generated throughout Jefferson County, including revenues from Port Townsend property owners, to fund that county-wide and region-wide resource.<sup>18</sup>

**D. The Proviso in RCW 54.04.030 Prohibiting the Use of Property Taxes Applies Only to the Initial Acquisition of a Utility.**

This Court should also affirm the trial court decision because RCW 54.04.030 only prohibits taxing for initial acquisition costs of a duplicative utility.

The proviso language of RCW 54.04.030 is “to pay for any utility, or part thereof, of like character to any utility, owned or operated by [the City].” The term “to pay for” is not defined in RCW 54.04.030.

Absent ambiguity or a statutory definition, courts give the words of a statute their common and ordinary meaning. *Garrison v. Wash. State*

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*of utilities*, and in the sale of utility revenue bonds to finance such operations. ***This the legislature had the right to do, and we cannot therefore limit the powers granted, unless such limitation is plain, nor can we otherwise interfere with the exercise of the powers granted***, unless such powers are exercised capriciously and arbitrarily, or fraudulently.” *Bayha*, 2 Wn.2d at 98 (emphasis added).

<sup>18</sup> The same is true of water planning, water studies, conservation, and mitigation efforts engaged in by the PUD as part of its county-wide and region-wide mandate. Although these may indirectly benefit the PUD’s customers, those efforts are directed at and benefit all taxpayers within Jefferson County (including Port Townsend residents) by conserving and protecting the water resources for the benefit of all the people.

*Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). To determine the plain meaning of an undefined term, a court may look to the dictionary. *Garrison*, 87 Wn.2d at 196. Among the dictionary definitions of the term “pay” are the following: “**1 a: to make due return to for** services rendered or **property delivered**, **b: to engage for money: Hire** <you couldn’t pay me to do that>; **2 a.: to give in return for goods or service**, **b: to discharge indebtedness for: Settle** <pay a bill>, **c: to make a disposal or transfer of (money), . . . to discharge a debt or obligation.**” (Emphasis added). Webster’s New Collegiate Dictionary (8<sup>th</sup> ed. 1974), at 842.

Given the above dictionary definitions, to “pay for” a utility or part of a utility of “like character” means to exchange money or to discharge indebtedness in return for a duplicative utility or part of a duplicative utility. In other words, **“to pay for any utility, or part thereof, of like character”** means a county-wide public utility district may not tax property in a city for the purpose of purchasing or constructing a utility, or part of a utility, that would duplicate a utility already owned and operated by the city.

The proviso does not say that taxes may not be used to pay for any and all utility services or activities that may be duplicative. It says “to pay for any utility, or part [of any utility].” Shoulberg’s construction adds words to the statute that are not there, contrary to basic statutory

construction principles. It is not within a court's power to add words to a statute even if the court believes the legislature intended something else but failed to express it adequately. *Vita Food Products v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978); *Jepson v. Dept of Labor & Indus.*, 89 Wn.2d 394, 403, 573 P.2d 10 (1977).

Shoulberg's reading of the RCW 54.04.030 proviso also violates the strict construction given to provisos. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974). Exceptions to a statute are narrowly construed. *R.D. Merrill Co. v. State*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). This is particularly true where there is a liberal construction mandate. A statutory directive to liberally construe a statute implies a concomitant intent that its exceptions be narrowly confined. *Miller v. Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999); *Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996).

Shoulberg counters that if there is any doubt as to the meaning of a tax statute, such as RCW 54.04.030, the ambiguity must be construed against the taxing authority. In the very recent case of *Bowie v. Department of Revenue*, 172 Wn.2d 1, 11 n.7, 248 P.3d 504 (2011), however, the Washington Supreme Court rejected a very similar argument.

This is not a case controlled by precedent requiring us to construe ambiguous tax statutes in favor of the taxpayer. See, e.g., *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396-97, 103 P.3d 1226 (2005) (quoting *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 957, 827 P.2d 1000 (1992)). While a statute is ambiguous if it is “susceptible to two or more reasonable interpretations,” a statute *is not* ambiguous “merely because different interpretations are conceivable.” *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). And, as we have held (although in another context), a statute may possibly be unclear in its application to a specific situation, but this does not render it ambiguous. See *In re Det. of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008).

(Emphasis in the original). Simply because Shoulberg can conceive of his additional interpretation of RCW 54.04.030 does not render the statute ambiguous and trigger construction against the PUD. And that is particularly true where, as here, Shoulberg’s reading requires adding words to the statute and violates the construction given to provisos, especially where there is a liberal construction mandate.

In ascertaining the legislative intent and meaning of the proviso language of RCW 54.04.030, the trial court not only reviewed the language in the proviso itself, but also examined the legislative intent from an historical perspective.

These two old cases<sup>19</sup> are also important because they provide the historical setting in which this seldom-

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<sup>19</sup> The court was referring to *Public Utility Dist. No. 1 v. Superior Court for Whatcom County*, 199 Wn. 146, 90 P.2d 736 (1939), and *Bayha v. Public Utility Dist. No. 1 of Grays Harbor County*, 2 Wn.2d 85, 97 P.2d 614 (1939).

construed statutory provision was enacted, in the 1930's. The Court will take judicial notice of the fact that this was the time of the Great Depression, and also the time when the REA was enacted, which stands for Rural Electrification Act, or words to that effect. The electrification of rural areas in the west was being encouraged and promoted by the federal government, and the state of Washington responded with this enactment, which allowed the establishment of "public" utility districts, another kind of municipal corporation, for the purpose of bringing electricity to residents living outside incorporated cities and towns.

Prior to this enactment, incorporated cities had the right to own and operate water and electrical utilities, and outside of those municipalities, such services were provided by private companies. When new public utility districts were established, it made more sense for these fledgling public entities to purchase existing private water utilities and existing private electric utilities rather than develop their own from the ground up, and we see this happening in both of these cases in Whatcom County and in Grays Harbor County. *It is clear to this Court that the reason for the final proviso in RCW 54.04.030 is the anticipation of newly formed public utilities districts taxing the citizens of the most populated areas, i.e., the existing cities, and using that revenue to acquire competing electrical or water utilities. It was the outright acquisition of such existing private utilities, or portions thereof, that this proviso in the enactment sought to control. . . .*

(Memorandum Opinion, at Supp. CP 858-59 (emphasis added) (Appendix B)).<sup>20</sup>

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<sup>20</sup> The trial court could properly examine the circumstances leading to the enactment of the statute if there was any ambiguity. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Based upon the above historical context and the proviso language, the trial court reached the following conclusions:

3. The historical purpose of the final proviso in RCW 54.04.030 was to prohibit what occurred in the Whatcom County case, where Blaine and Sumas already operated either a water system, or an electrical system, or both, and the Whatcom County PUD wanted to tax the citizens in those municipalities in order to purchase competing private utilities. ***It was the purchase, or acquisition, of a private utility which the legislation was designed to prohibit.***

4. The purchase of Petersen [sic] Lake was a legitimate exercise of the PUD's general conservation powers, and its power to impose a district-wide tax to implement the conservation of water and power resources for all citizens. ***The use of tax revenues for such conservation and planning purposes does not constitute the use of tax revenue for utility services or acquisition.*** In accord with this opinion is the opinion letter of January 6, 1996, authored by Assistant Attorney General Mary Jo Diaz in a letter to the Jefferson County Prosecuting Attorney in response to very similar arguments made in 1995.

5. Even if you assume, arguendo, that the PUD has no such broad conservation and planning powers, ***the purchase of Petersen [sic] Lake was not the acquisition of an existing utility "of like character to any utility, owned or operated by [Port Townsend]," nor was it an acquisition to support the operation of such a utility. The lake property is not an existing water utility, nor is it a component of an existing water utility.*** It has never been developed in any way, carries with it no water rights whatsoever, and, as of the time of acquisition, as well as today, it is of no value or use other than the conservation of an existing, pristine resource.

(Memorandum Opinion, at Supp. CP 861-62 (some emphasis added)  
(Appendix B).

Appellants do not allege the District is using Port Townsend taxpayer dollars to acquire a water utility or any part of a water utility. Thus, the proviso language of RCW 54.04.030 has no application here.

Washington case law construing RCW 54.04.030 is consistent with this conclusion. Although several cases have been before the Washington Supreme Court to interpret the provisions of RCW 54.04.030, only the two cases the trial court commented on have specifically addressed the language at issue here. No case has ever adopted or suggested the expanded reading of RCW 54.04.030 Shoulberg advocates.

In *Public Utility Dist. No. 1 of Whatcom County v. Superior Court in and for Whatcom County*, 199 Wash. 146, 90 P.2d 737 (1939), the PUD filed a declaratory judgment action seeking a judicial determination that it had the right to levy a county-wide tax, including a tax on property within the Cities of Blaine and Sumas, to acquire electric and other utilities. The trial court held the PUD had no power to levy any tax upon property located within the Cities of Blaine and Sumas for the purpose of purchasing or constructing utilities that would duplicate the utilities already owned and operated by the Cities. *Id.*, at 157. The Washington Supreme Court affirmed.

From this section, *it clearly appears that it is not the intent of the law that a utility district may, within the boundary of a municipal corporation, duplicate utilities already owned or operated by the municipality, and assess the property within the boundaries of such municipal corporation for such duplication.* The territory embraced within the limits of the cities may be included within the utility district, because the cities do not own or operate all of the utilities contemplated by chapter 1, Laws of 1931, *but their property cannot be taxed to construct, purchase or support public utility districts already owned or operated by the cities.*

*Id.*, at 158-59 (emphasis added). Thus, construction or purchase of a utility was the Court's focus in interpreting the statute.

Shoulberg, of course, seizes upon the word "support", arguing that no expenditure that "supports" the PUD's activities may be funded by taxes. The word "support", however, does not appear in RCW 54.04.030, and this Court should not read it into the statute. *Vita Food Products v. State*, 91 Wn.2d at 134; *Jepson v. Dept. of Labor & Industries*, 89 Wn.2d at 403.

Furthermore, in using the word "support", the Court in the *Whatcom County PUD* case was not making a broad, sweeping statement that just any utility expenses that in any way "support" the PUD were prohibited by the statute, as Shoulberg would read it. Instead, the Court referred specifically to other expenses directly associated with the purchase or acquisition of an electric utility generation and distribution

system, namely: (1) “engineering services” (including the preparation of maps and surveys, preliminary valuations and operating schedules, and the formulation of a plan and system of development), (2) “legal services” (including valid organization of the PUD to enable it to acquire and place into operation the properties of the private electric companies in Whatcom County and (3) “expenditures for purposes of the condemnation of the properties of private electric companies” in Whatcom County. *Id.*, at 150-51. In fact, the trial court in that case ruled, and the Supreme Court affirmed on identical grounds, that those three categories of expenditures **“are for the primary purpose of acquiring an electrical distribution system**, and that no property located within the two cities named could be taxed to raise funds for the purposes referred to in the items quoted above.” *Id.*, at 151 (emphasis added).

Shoulberg’s attempt to equate the statutory term “or part thereof” with the word “support” is contrary to the words of the statute and the Supreme Court’s decision in the *Whatcom PUD* case. If the legislature had wanted to prohibit a PUD from taxing city residents for something other than the purchase or acquisition of a utility or part of a utility that duplicated a city utility, it could have done so, but did not. This Court should reject appellants’ attempt to insert different words into RCW 54.04.030.

The other case addressing the proviso in RCW 54.04.030 was *Bayha v. Public Utility Dist. No. 1 of Grays Harbor County*, 2 Wn.2d 85, 97 P.2d 614 (1939). In that case, a taxpayer sought to enjoin the PUD from purchasing the electric utilities of the Grays Harbor Railway & Light Company without submitting the matter to a public vote. In reversing the trial court's grant of an injunction preventing the purchase of those electric utilities, the Supreme Court discussed the language at issue in this case.

[T]he conclusion is inescapable that ***the legislature did not intend to limit the power of the commissioners of a public utility district in the purchase, etc. of utilities***, as provided in the act, **except as to those public utilities owned by a city or town**, or where a general indebtedness is to be incurred, which will run the general indebtedness of the district above the one and one-half per cent limit.

*Bayha*, 2 Wn.2d at 97-98 (emphasis added). Again, the Court's focus with respect to RCW 54.04.030 was on the purchase of a utility, and the Court's ruling expressly noted the limited character of that exception to the broad powers given to public utility district commissioners. *Id.*

No case has ever gone so far as to endorse, or even suggest, that Shoulberg's interpretation of the prohibition in RCW 54.04.030 is correct. His argument that the proviso prohibits tax funding of each and every type of utility service provided—even assuming the requirement of duplication could be met—is inconsistent with the language of RCW 54.04.030, basic statutory construction principles, the legislative purpose behind the PUD

statutes, and common sense. This Court should reject appellants' interpretation of RCW 54.04.030.

E. The Court Should Also Reject Appellants' Sewer Utility Arguments.

As noted above, the Complaint made no allegations regarding sewer utility services, but, instead, was limited to water. Appellants devote two sentences of their Brief to sewer issues. Their sewer arguments, however, rest on the same fundamental misconception as their water argument—that because the City has a sewer utility, the District's sewer-related activities are duplicative. (CP 298-99). That assertion is belied by the record, including county-wide and region-wide sewer services for non-PUD customers residing in Jefferson County performed pursuant to specific statutory authority granted to PUDs. (CP 241-42; 296-97).<sup>21</sup> It also disregards the limitation of the RCW 54.04.030 proviso to initial utility acquisition costs.

The Court should reject appellants' sewer-related arguments for the same reasons it should reject their water-related arguments.

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<sup>21</sup> These statutes include RCW 54.16.010 (providing water and sewer studies for other parties and entities within Jefferson County); RCW 54.16.310 (participating and providing assistance for municipalities on site activities involving septic systems monitoring for proper functioning; inspection and assumption of substandard water and sewer systems; and performing operations and maintenance, including inspections, of on-site sewage disposal facilities, septic tanks, and other waste water facilities as authorized by the County Board of Health under RCW 54.15.310). None of these activities are engaged in by the City of Port Townsend, nor is it authorized to provide such county-wide and region-wide services.

F. **This Court Can Also Affirm the Trial Court's Grant of Summary Judgment to the District Based on the Doctrine of Laches.**

A trial court's ruling on summary judgment can be affirmed on any theory established in the pleadings and supported by proof, even where the trial court did not rely on the theory.<sup>22</sup> In addition to affirming on the grounds in the trial court's Memorandum Opinion, this Court may also affirm the trial court's grant of summary judgment to the District based on the doctrine of laches.

Shoulberg has, since the mid-1990s, been fully aware of the basis for this lawsuit. He consulted numerous times with the same attorney representing him now, and threatened to file a class action lawsuit. (CP 102, 708) Instead of promptly filing this lawsuit, a decade and a half passed. During that time, Jefferson County PUD spent thousands of dollars of public funds and incurred millions of dollars of debt and other obligations based upon financial considerations that included the availability and use of property tax-derived funds. (CP 239-47).

The elements necessary to establish the affirmative defense of laches are: (1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable

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<sup>22</sup> *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008); *Wilson Court Limited Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998); *Gross v. City of Lynnwood*, 90 Wn.2d 395 401 583 P.2d 1197 (1978).

delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action. *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991); *Buell v. Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972); *Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453*, 48 Wn. App. 743, 750, 740 P.2d 889 (1987). These elements are clearly established here.

Shoulberg admitted in his discovery responses that he read the statutory provision at issue in this case and became aware of the issue that forms the basis for this case in the mid-1990s. (CP 210-11). He admitted first consulting an attorney regarding the subject of the PUD's levying a tax on his property or other property in Port Townsend 13 years previously (in approximately 1996). (CP 218). Shoulberg also admitted there had been numerous communications with his attorney on the subject of this lawsuit prior to the filing of the Complaint. (CP 218).

Documents confirm that Shoulberg's challenge to the PUD's authority to levy the property taxes they allege are illegal goes back to at least August 1995, including assertion of the same arguments by the same attorney representing Shoulberg in this lawsuit. (RP at 6; CP 210-11; Supp. CP 847; *See* Section II-C, *infra*.)

The salient facts establishing laches here can be summarized as follows:

- Shoulberg’s 14-year history of explicit knowledge of his claims, and his threats to bring suit against the PUD over the exact same allegedly illegal tax on precisely the grounds now raised in this case. (RP at 6; CP 210-11; Supp. CP 847).
- In 1995, Shoulberg retained legal counsel, asserted the same claims to the Jefferson County Prosecutor, the State Auditor, the Washington Attorney General, and others—none of which succeeded. (CP 101; 141-55; 190-200; 218; 229; 232-35).
- In 1996, Shoulberg proposed and voted for Port Townsend City Council Resolution No. 96-23,<sup>23</sup> a measure seemingly at odds with his earlier position, and with this lawsuit (CP 102; 157-88).
- Shoulberg took no action for a decade and a half until he (and his attorney from 1996) finally filed the present lawsuit in 2009. (RP at 6; Supp. CP 847).
- The PUD affirmatively demonstrated, through the uncontradicted declaration testimony of Jefferson PUD General Manager James G. Parker, that it has suffered damage as a result of Mr. Shoulberg’s 14-year delay in the form of incurring substantial debt and expenses (including the \$2.25 million acquisition of Peterson Lake), the loss of defense evidence with the passing of Commissioner Dana Roberts,<sup>24</sup> and other damages.<sup>25</sup> (CP 232-35; 239-47; Supp. CP 847-48, RP at 5-6).

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<sup>23</sup> Included within Resolution No. 96-23 is a recommendation entitled “Sustainable Development of New Water Resources,” that provides:

**City staff is directed to work with the County, the PUD, and other existing and emerging water purveyors, to plan and develop long-term alternative water resources, and to obtain from the PUD a commitment to target County-wide utility tax revenues (particularly those levied against City customers) toward this regional benefit.**

(CP 187) (emphasis added).

<sup>24</sup> Where material information would have been provided by witnesses who are now deceased, the prejudice necessary for the defense of laches is established. *Davidson v. State*, 116 Wn.2d 13, 26, 802 P.2d 1374 (1991).

<sup>25</sup> Although appellants concede the PUD’s use of real property tax revenues for telecommunications and electric power acquisition are permissible, a ruling against the

In the trial court, Shoulberg tried to avoid the application of laches by relying on the opinion in *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004), which stated that “absent highly unusual circumstances,” it would not apply the doctrine of laches to bar an action short of the applicable statute of limitations. *Id.*, at 611. The Court specifically noted, however, that the city had not presented any highly unusual circumstances. *Id.*

Unlike *Carrillo*, in this case, there are “highly unusual circumstances,” all established as uncontested facts, making the District’s laches defense applicable. Here, there is a 14-year long history of explicit knowledge of the basis, and threats, to bring suit against the PUD over the exact same allegedly illegal tax, on the exact same grounds. Mr. Shoulberg retained the same legal counsel, made claims to the Jefferson County Prosecutor, the State Auditor, the Washington Attorney General, and others, but then he took no action for a decade and a half until he finally decided to file this lawsuit.

Also clearly distinguishing this case from *Carrillo* is the fact the City of Ocean Shores could show no damages resulting from the delay. By contrast, the District affirmatively demonstrated that it has suffered

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PUD would saddle the PUD with extensive debt obligations for past expenditures (such as the Peterson Lake property), and create new financial obligations in the form of monetary tax refund claims, while significantly reducing tax revenues. (CP 232-35).

damage as a result of Shoulberg's 14-year delay, not only in its assumption of a significant twenty-year debt, but also because of the death of the PUD Commissioner with the most knowledge of the facts underlying appellants' claims. (CP 232-35).

The circumstances here fall squarely within the doctrine of laches under Washington law. If this Court does not affirm the trial court's summary judgment dismissal based on the reasoning in the trial court's opinion, it should nevertheless affirm the dismissal on the basis of laches.<sup>26</sup>

**G. The Tax Refund Claims Are Barred Due to Their Failure to Meet the Statutory Prerequisites for Obtaining a Tax Refund.**

RCW 84.69.030 provides:

No orders for a refund under this chapter shall be made except on a claim:

- (1) Verified by the person who paid the tax, the person's guardian, executor or administrator; and
- (2) Filed with the county treasurer within three years after the due date of the payment sought to be refunded; and
- (3) Stating the statutory ground upon which the refund is claimed.<sup>27</sup>

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<sup>26</sup> In the event of a remand, this Court should dismiss Shoulberg as a plaintiff and class representative because his claims are not typical of the class he purports to represent under CR23.

<sup>27</sup> Appellants originally asserted their tax refund allegations under both RCW 84.68.020 or RCW 84.69.020, but at the summary judgment briefing stage, abandoned their claims under RCW 84.68.020 (presumably because they did not pay their taxes under protest, as required by statute), and limited their assertion to a tax refund to the procedures set forth in RCW 84.69.030.

Shoulberg argues they do not need to satisfy the individualized verification procedures set out in RCW 84.69.030(1), nor do they first need to file their claims with the Jefferson County Treasurer (RCW 84.69.030(2)), because under RCW 84.69.020(6),<sup>28</sup> they must first obtain a judgment declaring the PUD property tax under RCW 54.04.030 to be illegal. Only afterwards, according to Shoulberg, will they request refunds pursuant to statute.

Appellant's argument is wrong under the plain words of the refund statute. The order of priority between the commencement of an "action" and the filing of a "claim for refund" is clearly set forth in RCW 84.69.130, which provides:

No action shall be commenced or maintained under this chapter ***unless a claim for refund shall have been filed*** in compliance with the provisions of this chapter, and no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund.

(Emphasis added).

RCW 84.69.130 refers to both an "action" and a "claim for refund;" the two are distinct. This statute precludes an action pursuant to

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<sup>28</sup> RCW 84.69.020 provides as follows: "On the order of the county treasurer, ad valorem taxes paid before or after delinquency shall be refunded if they were: . . . (6) Paid under levies or statutes adjudicated to be illegal or unconstitutional; . . ." RCW 84.69.020 provides only the grounds for a refund, not the procedures or timing for obtaining such relief.

RCW 84.69 unless a claim for refund has been filed pursuant to the requirements of RCW 84.69.030, and establishes the order in which the two actions must occur. First, the taxpayer must file a claim; second, and only after completing step one, the taxpayer may file an action. Further, RCW 84.69.130 limits recovery of taxes in an action to those grounds asserted in the claim for refund, also demonstrating that a tax refund claim must precede a tax refund lawsuit.

Shoulberg did not pay taxes to Jefferson County PUD under protest, nor did he file an official claim for refund of the taxes levied by the PUD. (RP at 6; Supp. CP 847). Shoulberg, therefore, commenced an action before filing a claim, contrary to the provisions of RCW 84.69.130.<sup>29</sup>

Because Shoulberg's tax refund claims, both on his own behalf and on behalf of the putative class, failed to satisfy the statutory requirements

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<sup>29</sup> Shoulberg argued below that the word "adjudicated" indicates that a court adjudication comes first under an RCW 84.69 refund. But he offers no reason why an "adjudication" under RCW 84.69.020 cannot be made by the Jefferson County Treasurer. In *Coluccio v. King County*, 82 Wn. App. 45, 49-51, 917 P.2d 145 (1996), the Court, in analyzing the requirement of an "adjudication" in another subsection of RCW 84.69.020, looked to Black's Law Dictionary to define "adjudication" and concluded that "adjudication" "did not limit the judicial or administrative bodies in which the adjudication may be obtained." *Id.* at 50-51.

Shoulberg also argued below that RCW 84.69.100 cures his failure to meet the claim filing requirements of RCW 84.69. RCW 84.69.100, however, says only that a written "protest" is not required to receive a tax refund "on a state, county, or district wide basis." This provision merely distinguishes RCW 84.69 from RCW 84.68 (requiring payment of taxes under protest as a condition to refund), and, moreover, the Complaint seeks a refund on a city wide basis, not a state, county, or district wide basis. The Court cannot read the word "city" into this statute where it is expressly excluded. *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010).

for asserting those claims, the claims should have been dismissed at the trial court level if the court had been required to reach that defense. If this Court does not affirm the trial court's summary judgment ruling on the grounds relied on by the trial court, it should, nevertheless, affirm the PUD's summary judgment dismissal on the basis of appellants' failure to satisfy the statutory prerequisites for seeking tax refunds.

#### **IV. CONCLUSION**

As the trial court noted, the word "and" in the 1931 PUD law is highly significant because it demonstrates the legislative intent that the authority of public utility districts to conserve the water and power resources for the benefit of the people of Washington was as important as the authority to supply utility services to their rate-paying customers. The liberal construction mandate in the 1931 law, and the strict construction given to provisos, further demonstrate that the District's reading of the proviso language of RCW 54.04.030 is correct.

As the record shows, the PUD's water resource planning and conservation activities are not duplicative of the water utility functions provided by Port Townsend because, by statute, the PUD and the City serve different constituents and purposes. The unique role legislatively granted to the District to conserve water and power resources on behalf of

all citizens differentiates the PUD's role from Port Townsend's restricted activities on behalf of its city water customers.

Furthermore, even if that were not the case, appellants' argument fails because the tax prohibition language of RCW 54.04.030 only prevents the use of city tax revenues to pay for the acquisition of a duplicative utility, not for county- and region-wide water conservation and planning activities, as authorized under the PUD Act. Under the circumstances of this case, in which appellants claim only the impropriety of the PUD's expenditure of tax proceeds for county-wide and region-wide water and sewer planning, conservation, and the acquisition of Petersen Lake property for public trust purposes, there is no violation of the tax prohibition proviso in RCW 54.04.030.

The Court does not need to address the District's additional defenses — laches and the failure to satisfy statutory tax refund requirements — if it affirms on the same basis as the trial court's decision. But, since a trial court's ruling on summary judgment can be affirmed on any theory established in the pleadings and supported by proof, this Court could affirm the decision below on those two additional grounds

This is a classic case for the application of the doctrine of laches. The requirements of knowledge of claim, unreasonable delay, and

resulting damage (both financial and loss of a key witness) are clearly established in the record.

In addition, appellants did not pay their taxes under protest, nor did they file tax refund claims before filing this action as required by RCW 84.69.130. Their tax refund causes of action, thus, fail to meet the strict requirements in the tax refund statute, and all of their refund claims should be dismissed on that ground as well.

For all the foregoing reasons, respondent Public Utility District No. 1 of Jefferson County respectfully requests this Court to affirm the trial court's grant of summary judgment in favor of the District.

Dated this 28<sup>th</sup> day of April, 2011.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By   
Donald S. Cohen, WSBA No. 12480  
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Attorneys for Respondent Public Utility  
District No. 1 of Jefferson County

# APPENDIX A

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JEFFERSON COUNTY  
RUTH GORDON, CLERK

**SUPERIOR COURT OF WASHINGTON  
COUNTY OF JEFFERSON**

TED SHOULBERG and CHARLES )  
HANIFORD, individually and on behalf of )  
the class of all persons similarly situated, )  
 )  
Plaintiffs, )  
vs. )  
PUBLIC UTILITY DISTRICT NO. 1 OF )  
JEFFERSON COUNTY, a Washington )  
Public Utility District, )  
Defendant. )

NO. 09-2-00289-3  
MEMORANDUM OPINION  
RE MOTIONS FOR SUMMARY  
JUDGMENT

I. INTRODUCTION:

This suit was filed on July 17, 2009 by Ted Shoulberg and Charles Haniford, "Individually and on behalf of the class of all persons similarly situated", against Public Utility District No. 1 of Jefferson County, a Washington public utility district. Those persons "similarly situated" are those persons who own real property in the city of Port Townsend (hereinafter "City") which is subject to a county-wide tax imposed by Jefferson County PUD, hereinafter "the PUD". During the intervening months since filing, the parties, through their counsel, as a result of extensive investigation and pre-trial discovery, have developed a large volume of materials in support of their respective positions.

Both parties have filed Motions for Summary Judgment, contending that the material facts are not in dispute, and that the Court should rule in their favor as a matter

**S. BROOKE TAYLOR**  
JUDGE  
Clallam County Superior Court  
223 East Fourth Street, Suite 8 CP000845  
Port Angeles, WA 98362-3015

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of law. After extensive briefing, oral argument was first heard on April 23, 2010, at the conclusion of which the Court requested additional briefing, and oral argument was resumed on June 9, 2010.

The Plaintiffs contend that the PUD cannot use tax revenue generated from property inside the City to support any of its utilities which are duplicated inside the City, which are a water utility and a sewer utility. The Plaintiffs contend that the PUD has used such tax revenue to acquire Petersen Lake for \$2.25 million, and that such an acquisition can only be done in support of the PUD's water utility, which is therefore violative of the Plaintiffs interpretation of RCW 54.04.030.

The Defendant contends that Petersen Lake was not purchased to support or augment its water utility, and even if it was, this would not constitute a violation of the Defendant's interpretation of RCW 54.04.030. In addition, the Defendant contends that the doctrine of laches prevents Plaintiff Ted Shoulberg from serving as a class representative, that the Plaintiffs' lawsuit is premature without satisfying various claims requirements, and that the position taken by Plaintiffs is violative of the uniformity of taxation requirement of Article VII, Section 1 of the Washington Constitution.

II. RELEVANT FACTS:

The parties have agreed during oral argument that the Court can find the following facts to be true:

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1. The Jefferson County PUD is a municipal corporation properly organized under the laws of the State of Washington, with a district which includes all of Jefferson County.
2. The PUD provides water and sewer service to residents living outside the city of Port Townsend.
3. The PUD is currently involved in the development of some electrical and telecom service within the district.
4. The City is a municipal corporation properly organized under the State of Washington, with authority to provide utility services within its boundaries.
5. The City is located entirely within the PUD district boundaries.
6. The City provides water and sewer services to its residents separate and apart from those services provided by the PUD.
7. The City has no electrical or telecom utility.
8. The Plaintiffs are residents of the City and customers of the water and sewer utilities provided by the City.
9. The PUD imposes an annual tax which is levied on all real estate within the district, including real estate within the City, which includes real estate owned by the Plaintiffs.
10. The PUD tax revenue is collected and budgeted separately from revenue generated by utility operations, and therefore can be segregated.
11. The PUD's operating revenues are sufficient to support all of its utility operations, according to its budget.
12. The PUD has used, and continues to use, tax revenue, for the purchase of Petersen Lake, which was consummated in 2006.
13. The acquisition of Petersen Lake was made at a cost of \$2.25 million, with a \$225,000 down payment, and payments of \$222,730 annually for 20 years, including interest at 6% per annum. No water rights were

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acquired with the purchase of Petersen Lake. The property consists of approximately 243 acres, of which the lake comprises approximately 25 acres.

- 14. The PUD budgets separate funds each year for county-wide financial obligations, including the Petersen Lake debt, and for "conservation and planning".
- 15. No tax revenue is currently budgeted or used for the direct support of any utility operations of the PUD which are duplicated by the City.
- 16. The Plaintiffs have not paid taxes to the PUD under protest.
- 17. The Plaintiffs have not filed official claims for refunds of taxes levied by the PUD.
- 18. In 1996 Plaintiff Shoulberg, as a member of the Port Townsend City Council, proposed and supported City Council Resolution No. 96-23, which supported use of the county-wide PUD tax for county-wide water resource development and planning. This lawsuit, in which Mr. Shoulberg is a plaintiff, was filed 13 years later.

In addition, based upon factual assertions set forth in the declarations and documents submitted by the parties, and not challenged or refuted by the adverse party, the Court finds the following facts to be true:

- 19. Petersen Lake is a small, spring-fed, pristine lake, which has been maintained by its original owners in an unimproved condition for decades. It contains no fish, and is inhabited only by native plants and animals. Public access is prohibited, and the lake is not used for any recreational purposes.
- 20. The PUD anticipates that it has adequate resources for its water utility for the next 20 years, and after that, growth in the county may require the expansion of existing water sources, or the acquisition of new sources.
- 21. The purchase of Petersen Lake was a substantial capital acquisition for a utility district the size of the PUD, with the purchase price roughly approximating its annual operating budget.

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22. Historically, the typical method of expansion by the PUD has been the acquisition of existing community water and sewer systems.

III. ANALYSIS:

The analysis of the issues in this case must begin with the original legislation providing for the establishment of public utility districts, which was Chapter 1, Laws of 1931, Rem. Rev. Stat., sections 11605 et. seq., now codified as RCW 54.04.010 – 54.04.180. This 1931 legislative enactment included a statement of purpose which reads as follows:

“Purpose of act. The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.”

Emphasis added.

In a note on “severability-construction”, the legislation stated as follows, in pertinent part:

“The rule of strict construction shall have no application to this act, but the same shall be liberally construed, in order to carry out the purposes and objects for which this act is intended.”

The statute contains one section which is at issue in this matter, and which reads as follows, with emphasis added:

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**“54.04.030. Restrictions on invading other municipalities.** Chapter 1, Laws of 1931, shall not be deemed or construed to repeal or affect any existing act, or any part thereof, relating to the construction, operation and maintenance of public utilities by irrigations or water-sewer districts or other municipal corporations, but shall be supplemental thereto and concurrent therewith. No public utility district created hereunder shall include therein any municipal corporation, or any part thereof, where such municipal corporation already owns or operates all the utilities herein authorized: PROVIDED, that in case it does not own or operate all such utilities it may be included within such public utility district for the purpose of establishing or operating therein such utilities as it does not own or operate: PROVIDED, FURTHER, that no property situated within any irrigation or water-sewer districts or other municipal corporations shall ever be taxed or assessed to pay for any utility, or part thereof, of like character to any utility, owned or operated by such irrigation or water districts or other municipal corporations.”

The incorporated city of Port Townsend has no electrical utility of its own, so the first provision in RCW 54.04.030 allows the PUD to include the city within its boundaries, which it has done, because the city “does not own or operate all such utilities”, i.e. those authorized by the other sections of the statute.

Of critical concern, however, is the last proviso, which prohibits a utility district from using tax revenue from a municipality located within its district boundaries “to pay for any utility, or part thereof, of like character to any utility, owned or operated by such irrigation or water districts or other municipal corporations.” The only thing that is clear about this provision is that it is not a model of clarity.

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The Plaintiffs contend that the Defendant utility district is limited in its activities to providing utility services and has no power to do anything else, and the purchase of Petersen Lake can therefore only be an acquisition made in support of its water utility. The Plaintiffs also contend that, assuming *arguendo*, the PUD has legal authority to engage in activities other than the provision of utility services such as general conservation measures as claimed by the PUD, the factual analysis leads to only one conclusion: Petersen Lake was acquired to support the PUD's water utility, a utility duplicated by Port Townsend, making the use of any Port Townsend tax revenue to pay for this acquisition a violation of RCW 54.04.030.

The PUD counters that, based on the legislative enactment's statement of purpose, it has broader powers than simply the provision of utility services to its customers, including the power to engage in conservation measures for the benefit of all of the county's citizens, and in the exercise of that broader power, the acquisition of Petersen Lake is a conservation measure, and was never designed to support its water utility.

The PUD further contends that, even if the Court were to find that this acquisition was made to support its water utility, the language of RCW 54.04.030 does not prohibit this, since they are not purchasing "any utility, or part thereof, of like character".

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Only two cases have ever interpreted this key proviso in RCW 54.04.030, and not surprisingly, both of those cases were decided by the Washington Supreme Court in 1939. Public Utility District No. 1 v. Superior Court for Whatcom County, 199 Wn. 146, 90 P. 2d 736 (1939); Bayha v. Public Utility District No. 1 of Grays Harbor County, 2 Wn. 2d, 85 P. 2d 614 (1939). It is also not surprising that in both cases, the citizens of municipalities within a larger county-wide utility district were bringing suit to prohibit the use of tax revenue from their citizens for the acquisition of a utility that was duplicated within those municipalities. These two cases, decided just seven months apart, more than 70 years ago, are instructive.

In the Whatcom County case, citizens of Blaine and Sumas brought suit for a declaratory judgment adjudicating whether the utility district could levy a tax on properties within those cities, and for what purposes. The utility district had been organized under the new 1931 statute, and had included within its boundaries the municipalities of Blaine and Sumas. The first question before the Court was whether the district was legally organized, and that was answered in the affirmative. The second question was whether the district could in fact include Blaine and Sumas within its boundaries, and that too was answered in the affirmative.

The third question dealt specifically with the language of RCW 54.04.030, and the possible duplication of utilities. The City of Blaine operated a water system of its own, and also an electrical distribution system using wholesale power purchased from

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Puget Sound Power and Light, and contended that the utility district could not tax property within the Blaine city limits for the acquisition of either such utility, since this would be a duplication. The City of Sumas operated an electrical distribution system within its boundaries, under a similar arrangement as Blaine, and made the same allegation. The PUD was proposing a district-wide tax to support acquisitions of electrical utilities, and others. The ruling of the trial court is summarized as follows in the appellate decision, at 151:

“Appellants assign error upon the entry of judgment holding that appellant district and its commissioners have no authority to levy any tax upon property within the limits of the cities of Blaine and Sumas, for the purpose of establishing, acquiring or operating an electrical distribution system, and that appellant district cannot levy a tax upon property within the boundaries of the city of Blaine for the purpose of establishing, acquiring or operating a water system. Appellants also assign error upon the refusal of the trial court to enter judgment, and prayed for in the complaint, holding that appellants have the right, and that it is their duty, to levy the taxes which are the subject matter of this action, uniformly upon all property in Whatcom County, including that located within the cities of Blaine and Sumas.”

The Supreme Court started its analysis with a review of the statute in question, and answered the first question as follows, at 153:

“This court has held that a county-wide public utility district may be organized, even though certain municipal corporations, whose territorial limits are embraced within the county, own and operate some of the utilities

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authorized by Chapter 1, Laws of 1931, above referred to." (citations omitted.)

"Neither Blaine nor Sumas either owns or operates all the utilities authorized by Chapter 1, Laws of 1931."

"We hold that the organization of appellant district was not invalid because it included within its limits cities of Blaine and Sumas."

After setting forth RCW 54.04.030 in its entirety, the Supreme Court ruled on the second, and more important, question, as follows, at pages 158-159:

"From this section, it clearly appears that it is not the intent of the law that a utility district may, within the boundary of a municipal corporation, duplicate utilities already owned or operated by the municipality, and assess the property within the boundaries of such municipal corporation for such duplication. The territory embraced within the limits of the cities may be included within the utility district, because the cities do not own or operate all the utilities contemplated by Chapter 1, Laws of 1931, but their property cannot be taxed to construct, purchase or support public utility district utilities already owned or operated by the cities. The budgets prepared by the appellant district did not attempt to segregate the amounts of the proposed expenditures to be made from monies raised from taxes levied upon the property within appellant district, nor do they show how much was to be expended for electrical distribution systems and how much for the construction of plants for the purpose of generating power. The trial court properly held that appellant district has no right to levy a tax upon the property within the corporate limits of Blaine and Sumas, for the purposes referred to in the portions of appellant's budget above quoted."

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“Appellants contend that any exemption of the cities of Blaine and Sumas from the utility district levy would constitute a violation of the fourteenth amendment of the constitution of the state, which provides in part: ‘all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.’”

“The exemption of property within a municipal corporation which already operates a public utility, from taxes levied to pay for the establishment of a utility of like character by another municipal corporation, is a reasonable classification, and applies to all municipalities similarly situated.”

Emphasis added.

The decision of the Supreme Court was unanimous.

In Bayha, *supra*, taxpayers in the city of Aberdeen brought suit to enjoin the Grays Harbor Public Utility District No. 1 from purchasing the electric utilities of the Grays Harbor Railway & Light Company, without first submitting the question of such purchase to the voters of the district for their approval. The city of Aberdeen itself was allowed to intervene. As in the Whatcom County case, the Grays Harbor PUD No. 1 was a public utility district newly organized under the 1931 statute, and was attempting to acquire the electric utilities owned by the Grays Harbor Railway & Light Company. Multiple questions were involved in the case, which are not important to this discussion. For purposes of this case, Aberdeen raised the issue of whether the utility district could purchase these electrical utility assets when the city itself had spent over \$125,000 on

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its own electric utility project, which would therefore mean a duplication of electrical utilities. The utility district planned to purchase this electrical utility for the sum of \$2,842,000, and to issue bonds as a source of payment funds.

In reviewing the trial court's decision, the Supreme Court again started with a review of the same enabling act at issue in the instant case. Of particular note is the fact that the Court began with a recitation from the preamble, as follows, at 94:

“Purpose of Act. The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.”

After reviewing the entire act, together with the statement of purpose, the Supreme Court reached its first conclusion, as follows, at 97:

“We think a sufficient answer to respondent's contention is found in a study of the entire act, and that from such examination the conclusion is inescapable that the legislature did not intend to limit the power of the commissioners of a public utility district in the purchase, etc., of utilities, as provided in the act, except as to those public utilities owned by a city or town, where a general indebtedness is to be incurred, which will run the general indebtedness of the district above the one and one-half per cent limit.”

The Court went on to say, at 98:

“The legislature has seen fit to vest the commissioners of a public utility district with almost unlimited powers

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relative to the construction, purchase, etc. of utilities and in the sale of utility revenue bonds to finance such operations. This the legislature has a right to do, and we cannot therefore limit the powers granted, unless such limitation is plain, nor can we otherwise interfere with the exercise of the powers granted, unless such powers are exercised capriciously and arbitrarily, or fraudulently."

Emphasis added.

The Court went on to consider the general enabling language in what is now RCW 54.04.010 and to rule as follows, at 99:

"Considering then, the intent as indicated by an examination of the entire act, the ordinary meaning of the words used in the proviso, the generally accepted rules of grammatical construction, the location of the proviso in the section relative to a general grant of power, and other factors appearing herein, we are of the opinion the word "none", as used in the proviso, refers to public utility owned by a city or town, and this being true, the proviso is not a general limitation on the powers of the commissioners to purchase, but is only a limitation on the powers of the commissioners to purchase a public utility owned by a city or town and does not therefore require an election as a prerequisite for the purchase by the district of a privately owned utility, where the purchase is to be financed by utility revenue bonds."

Having dealt with a review of the statute and the legality of the utility district's plan to purchase, the Court then focused on the issue of the duplication of services. The Court first concluded, at 104, as follows:

"The statute in question seems to be plain, and authorizes a public utility district to include therein any municipal

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corporation, for the purpose of establishing or operating therein such utilities as such municipal corporation does not *own or operate*.”

“It is evident, then, from the statute, that the question which must first be determined is whether or not intervener [Aberdeen] owns or operates a utility, for the purpose of furnishing electricity to the people of such city.”

The Supreme Court went on to affirm the trial court’s determination that Aberdeen was not operating an electrical utility, as such, and therefore there was no prohibition against the utility district acquiring one of its own. The decision was unanimous. Although the direct issue in the instant decision was not reached in Bayha, the case is important for its reliance upon the statement of purpose in the preamble to this legislation, even though it is not actually incorporated into the codified sections, and its refusal to restrict the powers granted to the PUD in any way not specifically spelled out in the statute.

These two old cases are also important because they provide the historical setting in which this seldom-construed statutory provision was enacted, in the 1930’s. The Court will take judicial notice of the fact that this was the time of the Great Depression, and also the time when the REA was enacted, which stands for Rural Electrification Act, or words to that effect. The electrification of rural areas in the west was being encouraged and promoted by the federal government, and the state of Washington responded with this enactment, which allowed the establishment of

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“public” utility districts, another kind of municipal corporation, for the purpose of bringing electricity to residents living outside incorporated cities and towns.

Prior to this enactment, incorporated cities had the right to own and operate water and electrical utilities, and outside of those municipalities, such services were provided by private companies. When new public utility districts were established, it made more sense for these fledgling public entities to purchase existing private water utilities and existing private electric utilities rather than develop their own from the ground up, and we see this happening in both of these cases in Whatcom County and in Grays Harbor County. It is clear to this Court that the reason for the final proviso in RCW 54.04.030 is the anticipation of newly formed public utilities districts taxing the citizens of the most populated areas, i.e., the existing cities, and using that revenue to acquire competing electrical or water utilities. It was the outright acquisition of such existing private utilities, on portions thereof, that this proviso in the enactment sought to control. Looking again at RCW 54.04.030, with “Port Townsend” inserted where appropriate, this purpose is more apparent:

“Chapter 1, Laws of 1931, shall not be deemed or construed to repeal or affect any existing act, or any part thereof, relating to the construction, operation and maintenance of public utilities by Port Townsend, but shall be supplemental thereto and concurrent therewith.”

“No public utility district created hereunder shall include therein Port Townsend, or any part thereof, [if] Port Townsend already owns or operates all the utilities herein

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authorized: PROVIDED, that in case Port Townsend does not own or operate all such utilities it may be included within such public utility district for the purpose of establishing or operating therein such utilities as Port Townsend does not own or operate.”

“PROVIDED, FURTHER, that no property situated within Port Townsend shall ever be taxed or assessed to pay for any utility, or part thereof, of like character to any utility, owned or operated by Port Townsend.”

Breaking the statute down in this manner, and looking at it in view of the historical context in which it was enacted, is very beneficial to this Court in analyzing the issues raised by the parties in this case. This Court has made a thorough review of the information and authorities provided by the parties, and has given a great deal of thought to the issues raised, perhaps taking more time to render its decision than the parties would like. Having said that, and with apologies for the delay, it is the opinion of this Court as follows:

1. The 1931 enactment in question was the result of political struggles and negotiations and was designed to allow the expansion of water and electrical services into rural areas, without prejudice to existing utilities being operated by the cities within those newly formed districts.

2. The use of the word “and” in the “statement of purpose” is of great significance, suggesting that the legislature thought the conservation of water and power resources for the benefit of the people of this state, by public utility districts, was as

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important as the power to supply actual utility services. With that in mind, the act is to be “liberally construed, in order to carryout the purposes and objects for which this act is intended.”

3. The historical purpose of the final proviso in RCW 54.04.030 was to prohibit what occurred in the Whatcom County case, where Blaine and Sumas already operated either a water system, or an electrical system, or both, and the Whatcom County PUD wanted to tax the citizens in those municipalities in order to purchase competing private utilities. It was the purchase, or acquisition, of a private utility which the legislation was designed to prohibit.

4. The purchase of Petersen Lake was a legitimate exercise of the PUD’s general conservation powers, and its power to impose a district-wide tax to implement the conservation of water and power resources for all citizens. The use of tax revenues for such conservation and planning purposes does not constitute the use of tax revenue for utility services or acquisition. In accord with this opinion is the opinion letter of January 6, 1996, authored by Assistant Attorney General Mary Jo Diaz in a letter to the Jefferson County Prosecuting Attorney in response to very similar arguments made in 1995.

5. Even if you assume, arguendo, that the PUD has no such broad conservation and planning powers, the purchase of Petersen Lake was not the acquisition of an existing utility “of like character to any utility, owned or operated by

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[Port Townsend],” nor was it an acquisition to support the operation of such a utility. The lake property is not an existing water utility, nor is it a component of an existing water utility. It has never been developed in any way, carries with it no water rights whatsoever, and, as of the time of acquisition, as well as today, it is of no value or use other than the conservation of an existing, pristine resource.

6. The issue of the wisdom of such a large acquisition by this PUD has not been presented to this Court, nor would it be appropriate to do so. For this Court to venture into that arena would be a clear violation of the separation of powers doctrine. That decision was a judgment call within the exclusive province of the Board of Commissioners.

7. Therefore, it is the opinion of this Court that the PUD prevails on both the “legal analysis” and the “factual analysis” in this case, and the PUD’s Motion for Summary Judgment will be granted, and the Plaintiff’s Motion for Summary Judgment denied.

DATED this 14<sup>th</sup> day of OCT., 2010.

Respectfully submitted,



S. BROOKE TAYLOR  
JUDGE

# APPENDIX B

West's RCWA **54.04.020**

**C** West's Revised Code of Washington Annotated Currentness  
Title 54. Public Utility Districts (Refs & Annos)  
Chapter 54.04. General Provisions (Refs & Annos)

→ **54.04.020. Districts authorized**

Municipal corporations, to be known as public utility districts, are hereby authorized for the purposes of chapter 1, Laws of 1931 and may be established within the limits of the state of Washington, as provided herein.

CREDIT(S)

[1931 c 1 § 2; RRS § 11606.]

HISTORICAL AND STATUTORY NOTES

**Purpose--1931 c 1:** "The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses." [1931 c 1 § 1.]

**Severability--Construction--1931 c 1:** "Adjudication of invalidity of any section, clause or part of a section of this act shall not impair or otherwise affect the validity of the act as a whole or any other part thereof.

The rule of strict construction shall have no application to this act, but the same shall be liberally construed, in order to carry out the purposes and objects for which this act is intended.

When this act comes in conflict with any provision, limitation or restriction in any other law, this act shall govern and control." [1931 c 1 § 11.]

**Source:**

RRS § 11606.

West's RCWA **54.04.020**, WA ST **54.04.020**

Current with 2011 Legislation effective through April 19, 2011

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# APPENDIX C

West's RCWA 54.04.030

**C** West's Revised Code of Washington Annotated Currentness  
Title 54. Public Utility Districts (Refs & Annos)  
Chapter 54.04. General Provisions (Refs & Annos)

**→ 54.04.030. Restrictions on invading other municipalities**

Chapter 1, Laws of 1931, shall not be deemed or construed to repeal or affect any existing act, or any part thereof, relating to the construction, operation and maintenance of public utilities by irrigation or water-sewer districts or other municipal corporations, but shall be supplemental thereto and concurrent therewith. No public utility district created hereunder shall include therein any municipal corporation, or any part thereof, where such municipal corporation already owns or operates all the utilities herein authorized: PROVIDED, that in case it does not own or operate all such utilities it may be included within such public utility district for the purpose of establishing or operating therein such utilities as it does not own or operate: PROVIDED, FURTHER, That no property situated within any irrigation or water-sewer districts or other municipal corporations shall ever be taxed or assessed to pay for any utility, or part thereof, of like character to any utility, owned or operated by such irrigation or water districts or other municipal corporations.

CREDIT(S)

[1999 c 153 § 64; 1931 c 1 § 12; RRS § 11616.]

HISTORICAL AND STATUTORY NOTES

**Part headings not law--1999 c 153:** See note following RCW 57.04.050.

**Source:**

RRS § 11616.

West's RCWA 54.04.030, WA ST 54.04.030

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COURT OF APPEALS, DIVISION  
OF THE STATE OF WASHINGTON

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TED SHOULBERG and CHARLES HANIFORD,  
Individually and on behalf of the class of all persons similarly situated,

Appellants,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF JEFFERSON COUNTY,  
A Washington Public Utility District,

Respondent.

---

CERTIFICATE OF SERVICE

---

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ORIGINAL

CERTIFICATE OF SERVICE

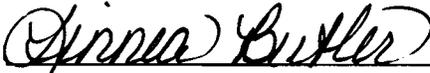
I, Linnea Butler, certify that on this 29<sup>th</sup> day of April, 2011, I caused to be served a true and correct copy of the following

1. BRIEF OF RESPONDENT; and
2. CERTIFICATE OF SERVICE

via **Legal Messenger** on the following individuals:

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Claudia M. Newman  
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Dated this 29<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
Linnea Butler, Legal Assistant