

Received
Washington State Supreme Court

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CASE NO. 917442

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
E AUG 14 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY, a
Washington municipal corporation,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

**AMICUS CURIAE MEMORANDUM OF PUBLIC UTILITY
DISTRICTS IN SUPPORT OF PETITION FOR REVIEW**

PLATT IRWIN LAW FIRM
Simon Barnhart, WSBA #34207
403 S. Peabody St.
Port Angeles, WA 98362
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Of Attorneys for Amici

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I. IDENTITY AND INTEREST OF AMICI

Amici are identified as follows:

PUD No. 1 of Chelan County 327 N. Wenatchee Ave. P.O. Box 1231 Wenatchee, WA 98807	PUD No. 1 of Clallam County 2431 E. Highway 101 P.O. Box 1090 Port Angeles, WA 98362
PUD No. 1 of Clark County P.O. Box 8900 Vancouver, WA 98668	PUD No. 1 of Douglas County 1151 Valley Mall Parkway East Wenatchee, WA 98802
PUD No. 1 of Grant County P.O. Box 878 Ephrata, WA 98823	PUD No. 1 of Grays Harbor County 2720 Sumner Ave. P.O. Box 480 Aberdeen WA 98520
PUD No. 1 of Jefferson County 310 Four Corners Road Port Townsend, WA 98368	PUD No. 1 of Lewis County 321 N.W. Pacific Ave. P.O. Box 330 Chehalis, WA 98532
PUD No. 1 of Mason County 21971 N. Highway 101 Shelton (Potlatch), WA 98584	PUD No. 3 of Mason County P.O. Box 2148 Shelton, WA 98584
PUD No. 2 of Pacific County P.O. Box 472 Raymond, WA 98577	PUD No. 1 of Skamania County P.O. Box 500 Carson, WA 98610
PUD No. 1 of Whatcom County 1705 Trigg Road P.O. Box 2308 Ferndale, WA 98248	PUD No. 1 of Cowlitz County 961 12 th Ave. P.O. Box 3007 Longview, WA 98632
PUD No. 1 of Snohomish County P.O. Box 1107 Everett, WA 98206	PUD No. 1 of Ferry County P.O. Box 1039 Republic, WA 99166

Amici are among the 28 public utility districts in the State of Washington, 24 of which serve a combined total of more than 973,000 residential and commercial electrical customers within the state using over 39,700 miles of transmission and distribution lines¹. As publicly owned electrical utilities with overhead transmission and distribution lines that cross over or are located near forest land within the state, amici are similarly situated to Petitioner Public Utility District No. 1 of Klickitat County, and are affected by the Court of Appeals' published decision in *State of Washington, Department of Natural Resources v. Public Utility District No. 1 of Klickitat County*, No. 31853-2-III, filed April 30, 2015. Amici are familiar with the issues involved in the review and with the scope of the arguments presented by the parties in their respective Petition for Review and Answer thereto.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE SIGNIFICANT CONSTITUTIONAL AND PUBLIC POLICY QUESTIONS

A. It Is a Significant Question of Public Policy Whether a Statute Can Impliedly Create a Cause of Action for One State Governmental Entity Against Another for Recovery of a Money Judgment to Replenish a Budget.

RCW 76.04.495 is a statute of considerable breadth. It permits “the state, a municipality, a forest protective association, or a fire

¹ See <http://www.wpuda.org/faqs> (statistics based upon 2013 operating year), and <https://www.snopud.com/AboutUs/qfacts.ashx?p=1350> (statistics compiled at year-end 2014 and indicate information for that calendar year), included in the Appendix.

protection agency of the United States” to recover “reasonable expenses in fighting the fire” from a “person, firm, or corporation ... whose negligence is responsible for the starting or existence of a fire which spreads on forest land.” RCW 76.04.495(1)(a). “Forest land” is defined in such a way that the statute applies equally to sagebrush and grass areas in Eastern Washington “when such areas are intermingled with areas supporting tree growth.” RCW 76.04.005(10) (defining forest land). In addition, the statute applies not only in cases of negligence, but can apply when forest debris piled in connection with the clearing of an electrical line easement contributes to the spread of a fire. RCW 76.04.495(1)(c).

Notably, the statute does not concern recovery for tort damages. Rather, it authorizes a cause of action by a governmental entity to recover from third parties those portions of its budget expended in fire suppression.

Adding to the breadth of the statute, the Court of Appeals has interpreted the phrase “person, firm, or corporation” in RCW 76.04.495 to include municipal corporations, thereby allowing one governmental entity to bring a cause of action under the statute against another governmental entity for recovery of those portions of its budget expended in fire suppression.

It is of substantial public interest whether the Legislature intended to authorize one governmental entity to replenish its budget through the use of a statutory suit against another governmental entity, as such authority potentially affects all governmental agencies and political subdivisions in the state, and all of the residents of the state subject to the various political subdivisions' taxing authority and service fees. Accordingly, the Court should grant review of the Court of Appeals' decision pursuant to RAP 13.4(b)(4).

B. The Court of Appeals Decision Implicates WASH. CONST. Art. VIII § 6, and That Issue Should Be Addressed By This Court.

The application of RCW 76.04.495 to municipal corporations and other governmental entities implicates WASH. CONST. Art. VIII § 6, Limitations on Municipal Indebtedness, by exposing those governmental entities to unexpected, excessive indebtedness in violation of the constitutional imposition of governmental debt limits.

Charges by the Department of Natural Resources (the "DNR") for fire suppression costs can include funds paid by the DNR to federal agencies, Indian tribes and other entities and private parties under interagency fire agreements that are very favorable to the participants. As those charges are not subject to legislative review or approval, there is little, if any, incentive for cost management. A money judgment under

RCW 76.04.495 awarded against a public utility district or other municipal corporation could place an enormous, disproportionate burden on its ratepayer/taxpayer citizens. Moreover, the state may receive federal funding for fire suppression independent of and in addition to amounts the DNR may recover from third parties. The Court of Appeals' interpretation of RCW 76.04.495 thus provides for a double recovery for the state from taxpayer sources.

The application of RCW 76.04.495 to municipal corporations and other governmental entities will place every PUD with overhead electrical lines, and other municipalities, at risk of bankruptcy. A large forest land wildfire can produce expenses in excess of what any PUD is able to insure against. Moreover, insurance for fire suppression costs is increasingly unavailable, or subject to occurrence and aggregate limits that may easily be eclipsed by the amounts that are presently being claimed for fire suppression costs.

It is well established that the Washington Constitution prohibits excessive indebtedness of municipal corporations. Pursuant to RAP 13.4(b)(3), the Court should grant review of the Court of Appeals' decision in the present matter, to determine whether a state agency may, through budgetary cost recovery via RCW 76.04.495, burden a municipal corporation with a debt in excess of its constitutional debt limit.

C. The Court of Appeals Decision Permitting Intra-Governmental Suits for Recovery of Budget Expenditures Implicates Legislative Authority and the Separation of Powers Doctrine.

This Court has described the separation of powers as one of the “cardinal and fundamental principles” of our state constitutional system. *Wash. State Motorcycle Dealers Ass’n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). “Our constitution does not contain a formal separation of powers clause.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). “Nonetheless, the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Id.* (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

Washington’s separation of powers jurisprudence guards the balance of powers between governmental branches and directly “protects institutional, rather than individual, interests.” *Carrick*, 125 Wn.2d at 136 (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986)). This legal tenet recognizes that “the damage caused by a separation of powers violation accrues directly to the branch invaded,” weakening its ability to check the other branches. *Id.* Consequently, this Court tests for separation of powers violations by asking “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Brown*, 165 Wn.2d at

718 (internal quotation marks omitted) (*quoting Carrick*, 125 Wn.2d at 135).

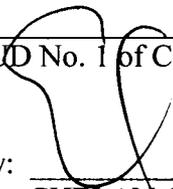
The effect of the Court of Appeals' decision is that an agency of the executive branch of state government may undermine the budgetary authority and autonomy of a political subdivision of the state, in violation of this state's cardinal and fundamental principle of the separation of powers. Accordingly, the Court should grant review of the Court of Appeals' decision pursuant to RAP 13.4(b)(3) and (4).

III. CONCLUSION

The question of whether the Legislature intended RCW 76.04.495 to permit intra-governmental suits for the purpose of recovering portions of a governmental agency's budget expended on fire suppression is of substantial interest to the public and involves a question of law under the Constitution of the State of Washington, and should be determined by this Court.

RESPECTFULLY SUBMITTED this 24th day of July, 2015.

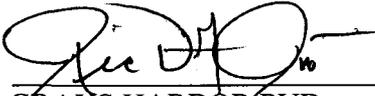
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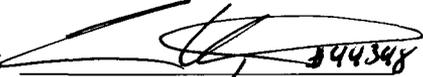
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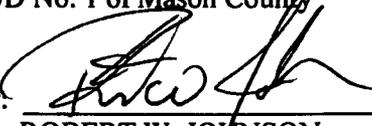
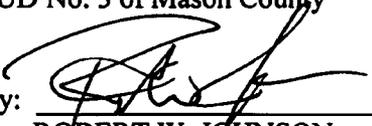
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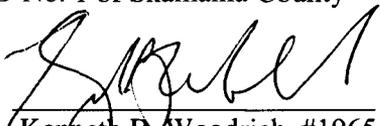
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<p>PUD No. 1 of Jefferson County</p> <p>By: </p> <p>HARRIS MERICLE Malcolm S. Harris, #4710 601 Union Street, Suite 2600 Seattle, WA 98101 (206) 621-1818</p>	<p>PUD No. 1 of Lewis County</p> <p>By: _____</p> <p>VANDER STOEP Rene J. Remund, #2928 Allen C. Unzelman, #44348 345 N.W. Pacific Ave. P.O. Box 867 Chehalis, WA 98532 (360) 748-9281</p>
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<p>PUD No. 1 of Jefferson County</p> <p>By: _____ HARRIS MERICLE Malcolm S. Harris, #4710 601 Union Street, Suite 2600 Seattle, WA 98101 (206) 621-1818</p>	<p>PUD No. 1 of Lewis County</p> <p>By:  VANDER STOEP Rene J. Remund, #2928 Allen C. Unzelman, #44348 345 N.W. Pacific Ave. P.O. Box 867 Chehalis, WA 98532 (360) 748-9281</p>
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<p>PUD No. 1 of Whatcom County</p> <p>By:  CHMELIK SITKIN & DAVIS Jonathan K. Sitkin, #17604 1500 Railroad Ave. Bellingham, WA 98225 (360) 671-1796</p>	<p>PUD No. 1 of Cowlitz County</p> <p>By: _____ VANDER STOEP Rene J. Remund, #2928 Allen C. Unzelman, #44348 345 N.W. Pacific Ave. P.O. Box 867 Chehalis, WA 98532 (360) 748-9281</p>
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PUD No. 1 of Whatcom County

By: _____

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Bellingham, WA 98225
(360) 671-1796

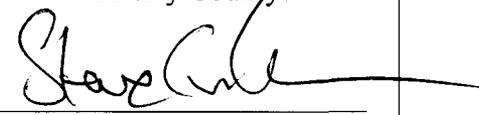
PUD No. 1 of Cowlitz County

By:  #44348

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Chehalis, WA 98532
(360) 748-9281

<p>PUD No. 1 of Snohomish County</p> <p>By: </p> <p>Kristin Hall, #13318 P.O. Box 1107 Everett, WA 98206 (425) 783-8603</p>	
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Certificate of Service to follow.]

<p>PUD No. 1 of Snohomish County</p> <p>By: _____ Kristin Hall, #15318 P.O. Box 1107 Everett, WA 98206 (425) 783-8603</p>	<p>PUD No. 1 of Ferry County</p> <p>By:  Stephen Graham, #25403 1312 North Monroe, Suite 140 Spokane, WA 99201 (509) 252-9167</p>
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Certificate of Service to follow.]

**SUPREME COURT
OF THE STATE OF WASHINGTON**

PUBLIC UTILITY DISTRICT NO.)	
1 OF KLINKITAT COUNTY, a)	
Washington municipal corporation,)	DECLARATION
)	REGARDING E-MAIL
Petitioner,)	TRANSMISSION
)	
v.)	GR 17(a)(2)
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF NATURAL)	
RESOURCES,)	
)	
Respondent.)	
)	
)	
)	

SIMON BARNHART declares and states as follows:

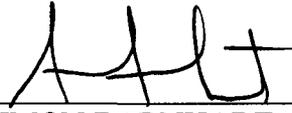
1. I received the signature page of the Amicus Curiae Memorandum of Public Utility Districts in Support of Petition for Review via e-mail transmission, signed by the following on the specified date:

Jonathan K. Sitkin on July 20, 2015;
William R. Penoyar on July 24, 2015;
Wayne W. Nelson on July 24, 2015; and
Robert W. Johnson on July 24, 2015.

2. I have examined each signature page to which this Declaration refers, and each is complete and legible.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of July, 2015, at Port Angeles, Washington.



SIMON BARNHART

CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury under the laws of the State of Washington that on this 24th day of July, 2015, I caused to be served true and correct copies of the foregoing Amicus Curiae Memorandum of Public Utility Districts in Support of Petition for Review, and the Appendix thereto, by U.S. Mail and addressed to the following:

Michael J. Rollinger
Assistant Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100


Laurella White

Received
Washington State Supreme Court

JUL 27 2015

Ronald R. Carpenter
Clerk

CASE NO. 917442

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY, a
Washington municipal corporation,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

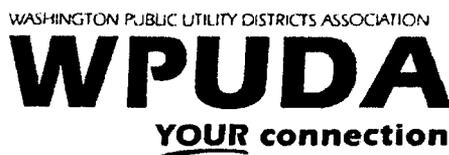
**APPENDIX TO AMICUS CURIAE MEMORANDUM OF PUBLIC
UTILITY DISTRICTS IN SUPPORT OF PETITION FOR REVIEW**

PLATT IRWIN LAW FIRM
Simon Barnhart, WSBA #34207
403 S. Peabody St.
Port Angeles, WA 98362
(360) 457-3327
Of Attorneys for Amici

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[Home](#) [About Us](#) [About PUDs](#) [PUD Services](#) [Member Services](#) [Contact Us](#)



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Frequently Asked Questions

What is a PUD?

A Public Utility District is a community-owned, locally regulated utility created by a vote of the people under [RCW 54](#).

What are PUDs authorized to provide?

PUDs in Washington are authorized to provide electricity, water and sewer services, and wholesale telecommunications. A PUD may provide one or more of these services, depending on the needs of the community.

How many PUDs are there in Washington state?

There are currently 28 PUDs. Of those, 24 provide electricity, 19 provide water or wastewater services, and 13 provide local access to broadband telecommunications services.

How many customers do PUDs serve?

Public utility districts that are members of the Washington PUD Association serve approximately one-million residential, business and industrial customers in 26 counties across Washington State. PUDs serve more than half the state geographically.

How are PUDs regulated?

PUDs are governed by a nonpartisan, locally elected board of commissioners. Commissioners are responsible for setting rates and for overseeing the operation of the PUDs. They meet in open session where members of the public can observe and participate in the decision-making process.

How long do PUD commissioners serve?

PUD commissioners are elected to serve six-year terms. A couple PUDs have five member Commissions. The five member Boards include at large positions that serve four year terms. Commissioner salaries are set by state law, based on the size of the utility.

Where do PUDs get their electricity?

Most PUDs purchase electricity wholesale from the Bonneville Power Administration, a federal agency that markets power generated by 34 hydroelectric dams in the Columbia River Basin. Several PUDs own and operate their own hydroelectric dams, including Chelan, Grant, Pend Oreille and Cowlitz PUDs. Many PUDs are also members of Energy Northwest.

What is Energy Northwest?

Energy Northwest is a consortium of publicly utilities that owns and operates Columbia Generating Station, the state's only commercial nuclear plant, the Nine Canyon Wind Project, the Packwood Lake Hydroelectric Project, and the White Bluffs Solar Station. Energy Northwest is also developing the Radar Ridge Wind Project in Pacific County.

Announcements

The Washington PUD Association congratulates our new Executive Officers for 2015-2016.

President: Dennis Bolz, Chelan PUD

Vice-President: Dennis Reid,

Wahkiakum County PUD

Secretary: Ron Skagen, Douglas

County PUD

Treasurer: Ben Kostick, Lewis County

PUD

Past President: Diana Thompson,

Pacific County PUD

Upcoming Events

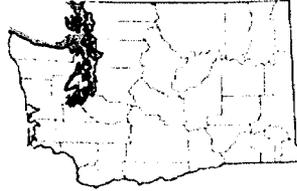
[Water Workshop](#)

Wed Sep 23, 2015 1:00 PM - Fri Sep 25, 2015 12:00 PM

[WPUDA Annual Conference](#)

Wed Dec 2, 2015 1:00 PM - Fri Dec 4, 2015 12:00 PM

Our Tweets



PUD STATISTICS

Based on 2013 operating year. Summary date does not include Snohomish PUD

TOTAL CUSTOMERS

ELECTRICITY641,272
WATER.....105,022
SEWER4,721
TELECOMMUNICATIONS....28,197*
*via retail service providers

LINES INSTALLED (MILES)

ELECTRICITY33,375
WATER2,702
TELECOMMUNICATIONS 5,821

SALES

ELECTRICITY.....24.5 MILLION MWH
WATER15.63 BILLION GALLONS

REVENUE FROM SALES

ELECTRICITY..... \$1.40 BILLION
WATER \$59.48 MILLION
TELECOM\$25.61 MILLION

Links to WPUDA Member PUDs

- [ASOTIN COUNTY PUD](#)
- [BENTON COUNTY PUD](#)
- [CHELAN COUNTY PUD](#)
- [CLALLAM COUNTY PUD](#)
- [CLARK PUBLIC UTILITIES](#)
- [COWLITZ COUNTY PUD](#)
- [DOUGLAS COUNTY PUD](#)
- [FERRY COUNTY PUD](#)
- [FRANKLIN COUNTY PUD](#)
- [GRANT COUNTY PUD](#)
- [GRAYS HARBOR COUNTY PUD](#)
- [JEFFERSON COUNTY PUD](#)
- [KITSAP COUNTY PUD](#)
- [KITTITAS COUNTY PUD](#)
- [KLUCKITAT COUNTY PUD](#)
- [LEWIS COUNTY PUD](#)
- [MASON COUNTY PUD NO. 1](#)
- [MASON COUNTY PUD NO. 3](#)
- [OKANOGAN COUNTY PUD](#)
- [PACIFIC COUNTY PUD](#)
- [PEND OREILLE COUNTY PUD](#)
- [SKAGIT COUNTY PUD](#)
- [SKAMANIA COUNTY PUD](#)

Tweets

Follow

 **WPUDA** @WPUDA 15 Jul 

Congrats to Clark Public Utilities;ranked highest in customer satisfaction by J.D. Power for Western U.S. midsize electricity providers!

 **WPUDA** @WPUDA 19 May

Congrats to @BentonPUD, @DouglasPUD and

Tweet to @WPUDA

Our Sponsors



7/17/2015

FAQs

- [STEVENS COUNTY PUD](#)
- [THURSTON COUNTY PUD](#)
- [WAHKIAKUM COUNTY PUD](#)
- [WHATCOM COUNTY PUD](#)
- [ENERGY NORTHWEST](#)

More About PUDs

[Washington PUDs](#)

[History](#)

[RCW 54](#)

Washington PUD Association

2015 Duane Ave. Suite 200 Olympia, WA 98501



Washington PUDs

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Customer Service (M-F 8a-5:30p): 425-783-1000

Home » About Us » Quick Facts

Quick Facts

Snohomish County PUD is a municipal corporation of the state of Washington, formed by a majority vote of the people for the purpose of providing electric and/or water utility service. There are 27 other PUDs in Washington, but we are the largest.

Snohomish County PUD is the second largest publicly owned utility in the Pacific Northwest and the 12th largest in the nation in terms of customers served.

Headquarters: 2320 California Street, Everett, Washington 98201 (Mailing Address: PO Box 1107, Everett, WA 98206-1107). Main Switchboard: 425-783-1000. All PUD offices are open Monday through Friday, 8 a.m. to 5 p.m., excluding holidays (the Electric Building headquarters is open until 5:30 p.m.).

The following statistics were compiled at year-end **December 2014** and indicate information for that calendar year.

Electric System Statistics

Service area: 2,200 square miles, including all of Snohomish County and Camano Island.

Electric line miles: 6,339

New electric service connections: 4,760

Customers

- Residential: 301,639
- Commercial: 30,524
- Industrial: 76
- Other (street lighting, temporary lighting, etc.): 277
- Total Customers: 332,516

Generating capacity (Jackson Hydroelectric Project, Woods Creek Hydroelectric Project, Youngs Creek Hydroelectric Project): 120 megawatts (MW)

Average number of employees: 980

Energy sales: 8,812,294 megawatt-hours (MWh)

Operating revenues: \$628,582,000

2014 Retail Power Resources:

Bonneville Power Administration (net of Slice sales)	76%
PUD Hydro (Jackson, Woods Creek, Youngs Creek)	9%
Wind*	7%
Market Purchases	7%
Other Renewables*	1%

*Some of the environmental attributes have been sold in order to support the PUD's renewable energy and R&D efforts.

2013 Fuel Mix (Revised**):

Washington state law requires utilities to publish their fuel mix for customers.

Coal Generation ^{1,2}	5%
Hydroelectric Generation	82%
Natural Gas Generation ^{1,2}	2%
Nuclear Generation ¹	9%
Wind Generation	1%
Other Generations ³	1%
Total	100%

Based on data from the state of Washington as of 12/31/13 (year-end figures updated each summer of the following year).

**The 2013 Fuel Mix was revised due to a miscalculation by the State Fuel Mix Program. For questions about this change: 360-725-3120

¹RPA supplied

²The PUD does not have coal or natural gas resources in its power supply portfolio. It does make market purchases to balance or match its loads and resources. The state requires the PUD to assume that a portion of these market purchases are attributed to coal even though the utility intentionally strives to avoid purchases from carbon-emitting resources.

³Includes biomass, landfill gas, petroleum and waste

A portion of the PUD's environmental attributes from its renewable resources have been sold to fund the utility's renewable energy and R&D projects.

Water System Statistics

The bulk of the PUD's water supply (75%) to serve its customers is purchased from the City of Everett, and some customers are supplied by well water.

Service area: 205 square miles

Operations:

- 375 miles of pipe ranging from 1" to 30" diameter
- 16 reservoirs (15.28 mg of storage)
- 7 well sites

Appendix 2

- 18 pump stations / 54 pumps
- 3 treatment plants (Sunday Lake, Lake Stevens & Kayak)
- 2,331 hydrants
- 6,649 valves
- 937 blow-offs
- 418 air/vacs
- 105 PRV's
- 26 master meters
- 179 million cubic feet of water delivered (excluding wholesale)
- 20 million cubic feet of wholesale water delivered
- Average residential usage 60,000 gallons per year
- Elevation variance: 20' - 730'

Customers: 19,279

Employees: 25

Related Information

Summary Report

By state law, each utility is required to provide summary information about its policies and make that information available to its customers.

Updated annually, this summary report includes our policies and rates as of December 31, 2014.

Rates

Electric Rates: As of April 1, 2015, the current residential billing rate for electric service is about 9.5 cents per kilowatt-hour.

[View current water rates.](#)

Leadership

Commissioners:

David Aldrich, Toni Olson, Kathleen Vaughn

Interim CEO/General Manager:

Anne Spangler

Leadership Team:

- Anne Spangler
Interim General Manager
- Kristin Hall
Interim General Counsel
- Jim West
Assistant General Manager, Customer & Energy Services
- Chris Heimgartner
Assistant General Manager, Distribution & Engineering Services
- Glenn McPherson
Assistant General Manager, Finance
- Benjamin Beberness
Chief Information Officer, Information Technology Services
- Craig Collar
Assistant General Manager, Power, Rates & Transmission Management
- Jessica Matlock
Government Relations & Communications Director
- Kristi Treckeme
Employee Resources Director
- Michael Owens
Executive Liaison
- Julee Cunningham
Communications & Marketing Director
- Garth Williams
Enterprise Resource Planning Program Executive