

MICHAEL Naylor <mgnaylor79@gmail.com>

Mon, Nov 19,
12:23 PM

to Tammy.walker

Tammy,

This is my corrected email. I accidentally hit the send before I was finished with it.

Good morning Tammy, Attached are our Court documents just filed in the Spokane Superior Court. Would you be so kind and share them with Tabatha Blacksmith.

As I explained to Tabatha last week. CANSS's is not a political organization and the Board feels that the complaint filed by Norm Smith is frivolous and an attempt to discredit our efforts. Norm Smith is a huge supporter of the HiTest now PacWest Silicon and Pend Oreille County Commissioner Mike Manus. Norm Smith is now trying to silence the public's First Amendment rights using the State of Washington's campaign finance laws. It is sad when HiTest now PacWest a Canadian Corporation has interfered in our local elections and nothing was done about it. Please check out the FANSS facebook page. The majority of this group is County and PUD Employees who support Mike Manus and PacWest.

All one needs to do is google Newport Smelter to see what is going on. It is sad when the public has to raise their own money to hire attorneys to protect themselves from foreign corporations, state and local governments who are violating our basic civil rights and breaking the law. I also highly recommend that you contact Bradley White or Walter Green at the Washington State Auditors Office in Spokane and ask them how their investigation is going into this matter.

Please let Tabatha know that we have called a special board meeting next Thursday in order to deal with this frivolous and unwarranted complaint filed by Norm Smith.

Sincerely,

Michael Naylor Chairman of CANSS

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

RESPONSIBLE GROWTH *NE WASHINGTON;
CITIZENS AGAINST NEWPORT SILICON
SMELTER; THEODORE & PHYLLIS KARDOS;
DENISE D. TEEPLES; GRETCHEN L. KOENIG;
SHERYL L. MILLER; JAMES W. &
ROSEMARY CHANDLER; and PAMELA
BYERS LUBY,

Plaintiffs,

vs.

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1; PEND OREILLE COUNTY; and HITEST
SAND, INC.,

Defendants.

Case No. 18-2-02551-1

**DECLARATION OF CITIZENS
AGAINST NEWPORT SILICON
SMELTER**

I, Michael Naylor Chairman of the Board of CANSS, swear and affirm as follows:

1. Citizens Against Newport Silicon Smelter ("CANSS") is a not-for-profit citizen group with members who also reside within the boundaries of the Pend Oreille

Richard K. Eichstaedt (WSBA 36487)
UNIVERSITY LEGAL ASSISTANCE
721 North Cincinnati Street – P O Box 3528
Spokane, WA 99220-3528
Telephone: 509.313.5791
Facsimile: 509.313.5805
Dylan A. Eaton (WSBA 34414)
Norman M. Semanko (*pro hac vice pending*)
PARSONS BEHLE & LATIMER
800 West Main Street, Suite 1300
Boise, Idaho 83702
Telephone: 208.562.4900
Facsimile: 208.562.4901

1 County Public Utility District No. 1 and are served by the PUD. The mission of
2 CANSS is to prevent Hi-Test's proposed Silicon Smelter from being located in
3 the Newport area.

4 2. Our properties will be impacted by the smelter by air pollution, decrease in
5 property values, dust, noise, light, and traffic.

6 3. We are a party to the action here.

7 4. We are aware of the sale and purchase of land between the Pend Oreille County,
8 the Public Utility District No. 1, and PacWest for its use as a site for a smelter.

9 5. Pend Oreille Public Utility District No. 1 was created for the purpose of offering
10 utility services for the benefit of the people it serves. RCW § 54.04.020. When Pend Oreille
11 Public Utility District No. 1 sold and purchased land in a private sale without utility purposes, it
12 stripped the people it serves, including me, of the benefit to use the land for public purposes.

13 6. Additionally, the actions of the Pend Oreille Public Utility District No. 1 are
14 significant public matters that merit judicial resolution.

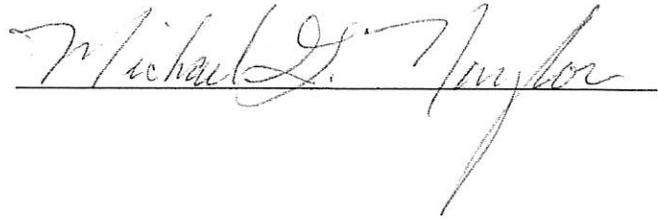
15 7. As county residents, we were stripped of the opportunity to vote on the sale of the
16 parcel as permitted by RCW § 54.16.180 (1) when Pend Oreille Public Utility District No. 1 sold
17 land that was not declared surplus under RCW § 54.16.180 (2)(b).

18 8. The actions of the Pend Oreille Public Utility District No. 1 threaten substantial
19 harm to us, our utility services, the use and enjoyment of our utility services, and our community.

20
21 Richard K. Eichstaedt (WSBA 36487)
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DATED this __1st__ day of November 2018.



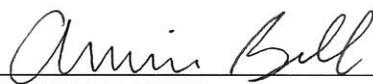
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1 I, ANNIE E. BELL, declare under penalty of perjury under the laws of the State of Washington
2 that the following is true and correct.

3 I have examined the attached document, which is the Declaration of Citizens Against
4 Newport Silicon Smelter, and consists of four pages, including this page, and it is complete and
5 legible.

6 I am the person who received the attached emailed document image on November 12,
7 2018 and believe such to contain the true signature of Michael Naylor.

8 Signed at Spokane, Washington, on the 16th day of November, 2018.

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12 _____
ANNIE E. BELL

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SUPERIOR COURT FOR THE STATE OF WASHINGTON
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RESPONSIBLE GROWTH *NE WASHINGTON;
CITIZENS AGAINST NEWPORT SILICON
SMELTER; THEODORE & PHYLLIS KARDOS;
DENISE D. TEEPLES; GRETCHEN L. KOENIG;
SHERYL L. MILLER; JAMES W. &
ROSEMARY CHANDLER; AND PAMELA
BYERS LUBY,

Plaintiffs,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1; PEND OREILLE COUNTY; and HITEST
SAND, INC.,

Defendants.

Case No. 18-2-02551-1

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

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1 **I. INTRODUCTION**

2 Last year, the Pend Oreille Public Utility District No. 1 (“PUD”) purchased a parcel of
3 land from Pend Oreille County for the express purpose of selling the parcel, and three other
4 parcels, to HiTest Sand (now known as “PacWest”) for the development of a silicon smelter
5 outside of the City of Newport. The purchase of the parcel from the County and the subsequent
6 sale to PacWest, along with the authorizing resolution, failed to comply with Washington law
7 governing the purchase and sale of property by government entities. This case challenges these
8 *ultra vires* actions.

9 Plaintiffs request this Court to enter summary judgment in Plaintiffs’ favor, deny
10 Defendant’s motion for summary judgement, and to enter a declaratory judgment¹ that the land
11 transactions by Pend Oreille County and the PUD are *ultra vires* and void as a matter of law.

12 **II. STATEMENT OF UNDISPUTED FACTS**

13 On April 18, 2017, PacWest sent a letter to the PUD inquiring about the purchase of land
14 and, potentially, requesting electrical service from the PUD for a silicon smelter PacWest
15 proposes to build in the County. Eichstaedt Decl., Ex. A. at 1. PacWest was interested in the
16 purchase of four individual parcels of land, three of which were owned by the PUD, parcels
17 #17036, #19183, and #19193, and a fourth owned by Pend Oreille County. *Id.* The PUD
18 purchased its three parcels several decades ago for other purposes that never occurred. Eichstaedt
19 Decl., Ex. B.

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23 ¹ Plaintiffs’ complaint included a request for a writ of prohibition as alternative grounds for relief. As set forth below, declaratory judgment provides sufficient relief to resolve this matter and, accordingly, Plaintiffs withdraw their request for a writ of prohibition.

1 On or about March 9, 2016, the PUD issued a notice of intent to declare its three parcels
2 surplus and, at the next PUD Commissioner meeting, these three parcels were among a group of
3 land declared surplus. Eichstaedt Decl., Ex. C, Ex. D at 5. Notice of sale for the three parcels was
4 published on or about August 31, 2016 and September 7, 2016 and they were still for sale at the
5 time of the letter from PacWest. Eichstaedt Decl., Ex. E.

6 The fourth parcel of land PacWest requested in its letter was Parcel #19182, which at the
7 time was owned by Pend Oreille County. Eichstaedt Decl., Ex. F. In its Letter of Intent to
8 PacWest, the PUD offered to acquire Parcel #19182 from the County and sell all four parcels
9 (the surplus parcels and Parcel #19182) to PacWest in one transaction. Eichstaedt Decl., Ex. G at
10 1. The PUD's only stated purpose for acquiring Parcel #19182 was to sell it to PacWest. *Id.* No
11 discussion of any other purpose was stated prior to the sale. Later, on or about June 16, 2017, the
12 PUD sent PacWest a revised Letter of Intent, which only included the three surplus properties
13 that the PUD owned at that time. Eichstaedt Decl., Ex. H at 1.

14 In order to effectuate the plan, the Pend Oreille County Commissioners approved
15 Resolution 2017-22, authorizing the sale of Parcel #19182 to the PUD on June 20, 2017.
16 Eichstaedt Decl., Ex. I. Then on August 1, 2017, the PUD passed Resolution 1399 authorizing its
17 General Manager to negotiate with PacWest for the sale of the combined four parcels. Eichstaedt
18 Decl., Ex. J. However, at the time Resolution 1399 passed allowing negotiation of the land sale,
19 the PUD did not own Parcel #19182. Eichstaedt Decl., Ex. F. The PUD issued a check to Pend
20 Oreille County for the purchase of Parcel #19182 on August 2, 2017. Eichstaedt Decl., Ex. K.

21 On or about August 10, 2017, PacWest deposited earnest money for the sale of the four
22 parcels for the PUD. Eichstaedt Decl., Ex. L. The Purchase and Sale Agreement between the
23 PUD and PacWest for the sale of the four parcels was completed on or about August 21, 2017.

1 PUD Ans. ¶ 4.14. On September 18, 2017, a Special Warranty Deed was recorded with the
2 County Auditor combining all four parcels of land into a single deed owned by PacWest.
3 Eichstaedt Decl., Ex. M.

4 On April 23, 2018, the Plaintiffs informed the PUD that the purchase and sale of Parcel
5 #19182 was done in violation of the statutes. Eichstaedt Decl., Ex. N. On May 15, 2018, the
6 PUD Commissioners passed Resolution 1411 stating they were making the determination that
7 Parcel #19182 was surplus, as well as affirming and ratifying the land purchase from Pend
8 Oreille County and the entire sale of land to PacWest. Eichstaedt Decl., Ex. O.

9 III. STANDARD OF REVIEW

10 Summary judgment is warranted when “there is no genuine issue as to any material fact”
11 and “the moving party is entitled to judgment as a matter of law.” CR 56(c). A material fact is
12 one upon which the outcome of the litigation depends in whole or in part. *Zobrist v. Culp*, 18
13 Wn. App. 622, 637 (1977). If there is but one conclusion that can be reached, the court must
14 grant summary judgment. *Malnar v. Carlson*, 128 Wn.2d 521, 535 (1996) (citing *Marincovich v.*
15 *Tarabochia*, 114 Wn.2d 271, 274 (1990)). The material facts of this case are undisputed.
16 Therefore, this Court should grant summary judgment to Plaintiffs and declare the land
17 transactions are void as *ultra vires*.

18 IV. ARGUMENT AND AUTHORITY

19 A. PLAINTIFFS SATISFY THE PROCEDURAL REQUIREMENTS TO OBTAIN DECLARATORY 20 RELIEF.

21 The Uniform Declaratory Judgments Act (“UDJA”), RCW § 7.24.010 *et seq.*, is designed
22 “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and
23 other legal relations; and is to be liberally construed and administered.” RCW § 7.24.120. “A
24 declaratory judgment is used to determine questions of construction or validity of a statute or
25 ordinance.” In addition, the UDJA allows for an interested person to have any question arising

1 under the validity of a contract determined, so long as the UDJA’s underlying requirements are
2 met. *Id.* When a justiciable controversy exists and Plaintiffs have standing, declaratory relief is
3 proper. *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33 (2011).

4 **1. A Justiciable Controversy Exists in this Matter.**

5 Washington courts have held “[a] justiciable controversy is an actual, present, and
6 existing dispute, or the mature seeds of one, which is distinguishable from a possible, dormant,
7 hypothetical, speculative, or moot disagreement.” *Superior Asphalt & Concrete Co. Inc. v.*
8 *Washington Dep’t of Labor & Indus.*, 121 Wn. App. 601, 606 (2004). The fundamental question
9 in this case is whether the land transactions failed to meet the substantive requirements of
10 Washington law and are therefore *ultra vires*. This is a justiciable controversy and not a
11 “potential, theoretical, abstract, or academic” question courts will avoid. *Id.* at 606.

12 **2. Plaintiffs Have Standing to Obtain Declaratory Judgment.**

13 Standing under the UDJA has two requirements. First, a court must determine “whether
14 the interest asserted is arguably within the zone of interests to be protected by the statute or
15 constitutional guaranty in question.” *Branson v. Port of Seattle*, 152 Wn.2d 862, 875–76 (2004).
16 Second, the court determines “whether the party seeking standing has suffered from an injury in
17 fact, economic or otherwise.” *Id.*

18 Here, Plaintiffs satisfy the standing requirements in three ways.² First, Plaintiffs have
19 standing as they fall within the zone of interest and have suffered injury in fact to hold standing
20 personally in this matter. Second, the Supreme Court has expanded the issue of standing

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23 ² The Court needs only find standing for any one party to proceed. *League of Education Voters v. State*, 176 Wn.2d 808, 817 n. 3 (2013); *see also Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497 (2007) (“Only one of the petitioners needs to have standing to permit us to consider the petition for review”).

1 regarding public service companies, allowing RCW Title 80 to apply to entities that fall under
2 the definitions of RCW § 80.04.010. *Fisk v. City of Kirkland*, 164 Wn.2d 891 (2008).
3 Specifically, RCW § 80.04.440 has been used to permit standing by any person or corporation to
4 bring suit challenging the legality of the service company's actions. *Id.* Third, in cases where
5 standing is uncertain, courts will proceed with declaratory relief under the public importance
6 standing doctrine. *See Am. Traffic Solutions*, 163 Wn. App. at 433. This is because when utility
7 districts are acting outside the authority granted to them, it is a "significant and continuing
8 matter[] of public importance that merit[s] judicial resolution." *Id.*

9 ***a. Plaintiffs fall within the Zone of Interest that the statute was intended***
10 ***to protect.***

11 The challenged land transactions failed to comply with substantive legal requirements,
12 including a requirement for consent of the people to surplus property. Plaintiffs fall within the
13 zone of interest because they are customers of the PUD who have been denied an opportunity to
14 voice their objection and are subject to the consequences of the PUD's actions. *See e.g.*, Kardos
15 Decl. ¶ 4, 6-7, Koenig Decl. ¶ 6, 9. Here, Plaintiffs are "within the zone of interests to be
16 protected or regulated by the statute or constitutional guarantee in question." *City of Seattle v.*
17 *State*, 103 Wn.2d 663, 668 (1985). Public utility districts were created to serve the people and the
18 public interest:

19 The purpose of this act is to authorize the establishment of public utility districts to
20 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.

21 Laws of 1931, ch. 1, § 1 (emphasis added).

22 Both RCW § 54.16.020 and RCW § 54.16.180 grant authority to the PUD to purchase and sell
23 land under limited circumstances. Instead of granting general authority to do so at any time, the

1 Legislature selected specific circumstances to protect the people it serves. As customers of the
2 PUD, Plaintiffs fall within the zone of interest because public utility districts were created by the
3 people and to serve people, such as Plaintiffs.

4 ***b. Plaintiffs have an injury in fact because they were deprived of the***
5 ***benefit of the PUD following proper process, the PUD stripped***
6 ***Plaintiffs of the beneficial use of the property, and Plaintiffs bear the***
7 ***environmental harm of the PUD's actions.***

8 The PUD argues Plaintiffs have not alleged “personal, substantial harm”, but this is not
9 the requirement for injury in fact. The “injury in fact test is not meant to be a demanding
10 requirement. Typically, if a litigant can show a potential injury is real, that injury is sufficient for
11 standing.” *City of Burlington v. Washington State Liquor Control Bd.*, 187 Wn. App. 853, 869
12 (2015).

13 Plaintiffs have shown their injury is real and have thus met the injury in fact requirement
14 of standing. First, when the PUD failed to follow the law in selling the property, Plaintiffs were
15 injured because they were deprived of the benefit of the proper process for disposal of public
16 property. *See, e.g.*, Kardos Decl. ¶ 7; Koenig Decl. ¶ 7-9; Luby Decl. ¶ 7,9; Johnson Decl. ¶ 12;
17 James Chandler Decl. ¶ 7; Rosemary Chandler Decl. ¶ 7; Miller Decl. ¶ 7; CANSS Decl. ¶ 5;
18 Teeples Decl. ¶ 7. As stated in the declarations, the PUD is required by law to follow certain
19 procedures when it sells land. RCW § 54.16.180(1)-(2),(9). The procedures require public
20 involvement whenever public land is sold, either by vote or by resolution and public hearing. *Id.*
21 When the PUD ignored its obligations to perform either of these duties, it harmed Plaintiffs by
22 denying their right to be involved in the process.

23 Second, Plaintiffs suffered injury in fact as they are customers of the PUD. Compl. ¶ 2.3-
2.8. The PUD was established for the purpose of providing energy services for the customers it

1 serves. *See, e.g.*, Kardos Decl. ¶ 7; Koenig Decl. ¶ 7; Luby Decl. ¶ 7; Johnson Decl. ¶ 9; James
2 Chandler Decl. ¶ 7; Rosemary Chandler Decl. ¶ 7; Miller Decl ¶ 7; CANSS Decl. ¶ 5; Teeples
3 Decl. ¶ 7. It is afforded the power to buy and sell land for very specific energy purposes, not for
4 private affairs. RCW § 54.16.020; RCW § 54.16.180. “Economic interests are sufficient to give
5 standing to sue [under the Declaratory Judgment Act].” 15 Karl B. Tegland, Wash. Prac., Civil
6 Procedure § 42.2 (2d. ed. 2017) (*citing Heavens v. King County Rural Library Dist.*, 66 Wn.2d
7 558 (1965); *see also City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 96 (1988)
8 (Utility ratepayers were appropriate parties in litigation over solid waste facility, because “it is
9 the ratepayers who would ultimately pay the bills”). When the PUD failed to use the land, it
10 purchased within its rights, or for the benefit of the people it serves, it stripped its customers of
11 the beneficial use of the property.

12 Third, Plaintiffs have suffered injury in fact because of the harmful environmental effects
13 they will be exposed to as a result of this land sale. *See Save a Valuable Env't (SAVE) v. City of*
14 *Bothell*, 89 Wn.2d 862, 866 (1978) (“[T]he standing of a non-profit corporation to challenge
15 government actions threatening environmental damage is firmly established in federal
16 jurisprudence.”). The goal of this land sale was to facilitate the development of a silicon smelter
17 and this smelter will result in significant pollutants harming the health and property of Plaintiffs.
18 Organizational Plaintiffs, Responsible Growth *NE Washington (“RG*NEW”) and Citizens
19 Against Newport Silicon Smelter (“CANSS”), have missions to address environmental harm and
20 promote local sustainable growth. Johnson Decl.¶ 3-5, 8; CANSS Decl. ¶ 1.

21 Fourth, Plaintiffs have suffered injury in fact because RG*NEW and CANNs have goals
22 that are negatively impacted by the PUD’s actions. Johnson Decl.¶ 3-5, 8, 13; CANSS Decl. ¶ 1.
23 In *Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642

1 (2012), the Court held a group had suffered injury in fact because the group’s goal “could
2 reasonably be impacted” by the challenged state initiative. The court held the group had suffered
3 an injury in fact because the interest group’s goal was to prevent substance abuse and violence,
4 and as such, that goal could reasonably be impacted by the initiative’s impact on the State's
5 regulation of alcohol. *Id.* Similarly, here, the goals of RG*NEW and CANSS are to promote and
6 encourage green and healthy growth in the community of Pend Oreille County and to act as a
7 voice for the community and its members. *See, e.g., Johnson Decl.* ¶ 3-5, 8. These goals are
8 reasonably impacted by the PUD’s failure to follow required processes and its resulting land sale
9 to PacWest for the purposes of building a smelter.

10 Lastly, the PUD argues this land sale was “beneficial” to the PUD, and thus its
11 customers, because it sold the land to PacWest at a price higher than its appraised value. Even
12 assuming this is true, it does not refute Plaintiffs’ standing. The Supreme Court held an injury to
13 a plaintiff may exist “[r]egardless of whether these harms might be justified or offset by other
14 societal benefits.” *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185
15 Wn.2d 97, 107 (2016).

16 **3. RCW § 80.04.440 Grants Standing to Any Person.**

17 Plaintiffs have not only demonstrated their zone of interests and injuries in fact, but
18 Plaintiffs also have express standing under RCW § 80.04.440, which provides that
19 anyone has the ability to challenge the actions where “any public service company shall do,
20 cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared
21 to be unlawful . . . [and] [a]n action to recover for such loss, damage or injury may be brought in
22 any court of competent jurisdiction *by any person or corporation.*” RCW § 80.04.440 (emphasis
23 added). This statute applies here because the PUD is a “public service company.”

A “public service company” is defined by the statute as “every gas company, *electrical*

1 company, telecommunications company, wastewater company, and water company.” RCW §
2 80.04.010(23) (emphasis added). Within this definition, “electrical company” is broadly defined
3 to encompass “any corporation, company, association, joint stock association, partnership and
4 person, their lessees, trustees or receivers appointed by any court whatsoever . . . and every city
5 or town owning, operating or managing any electric plant for hire within this state.” RCW §
6 80.04.010(12) (emphasis added).

7 According to the PUD’s website and the Washington State Public Utility District services
8 map, the PUD is a Public Service Company engaged in water, electric, and telecommunications
9 services. Eichstaedt Decl., Ex. P.

10 While public utility districts are considered municipal corporations in regard to their
11 ability to purchase and sell land, this does not preclude them from falling under RCW § 80.04 as
12 well. *Fisk v. City of Kirkland*, 164 Wn.2d 891 (2008); RCW § 54.16.180(9). The Supreme Court
13 has expanded the applicability of RCW § 80.04, making it clear the statute applies to the PUD
14 since it falls under the definition of a public service company. *Fisk*, 164 Wn.2d 891 (2008). In
15 *Fisk*, the Court said the City of Kirkland was not exempt from RCW § 80.04 because it is a
16 municipal corporation. *Id.* The Court held the plain language of the statute clearly applies to
17 corporations that fall under the definition of RCW § 80.04 even if they are considered municipal
18 corporations. *Id.*

19 As a municipal corporation engaged in public service, the PUD falls under the plain
20 language of RCW § 80.04.440. Since this statute allows standing to anyone to sue when the
21 service company is acting unlawfully, Plaintiffs have standing required to bring this suit against
22 the PUD.

23 **4. Public Importance Standing Applies to This Case.**

Even if the Court finds Plaintiffs lack standing, the Court may still address the issues
raised here because the validity of the land transactions involves significant issues of public

1 importance that merit judicial resolution. Courts have held “even if the question of [a plaintiff’s]
2 standing were debatable,” the court “would still address the issues presented . . . because they
3 involve significant and continuing matters of public importance that merit judicial resolution.”
4 *Am. Traffic Sol*, 163 Wn. App. at 433. Serious public importance exists when the controversy
5 “immediately affects significant segments of the population, and has direct bearing on
6 commerce, finance, labor, industry or agriculture generally.” *Grant Cty. Fire Prot. Dist. No. 5 v.*
7 *City of Moses Lake*, 150 Wn.2d 791, 803 (2004). Additionally, if a case is determined to be of
8 serious public importance, requirements of standing should be applied liberally. *Wash. Natural*
9 *Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 96 (1969).

10 Here, public importance standing applies because the PUD’s actions (1) impact a
11 substantial segment of the population and (2) impact commerce, finance, labor, industry, or
12 agriculture. The PUD “distributes electricity to approximately 8,500 customers in Pend Oreille
13 County.”³ Second, decisions involving the PUD and its actions to facilitate the development of a
14 smelter inherently impact commerce, finance, labor, and industry.

15 Moreover, courts have determined public importance standing can apply when there is
16 media interest and there is a possibility the outcome could affect the activities of other public
17 utility districts in the state. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App.
18 501, 505 (2003). Here, there is significant interest in this matter by citizens of the County and
19 this will have substantial impacts on the practices of other public utility districts statewide.
20 Eichstaedt Decl., Ex. Q. There is extensive media coverage on this matter not just county-wide,
21 but statewide and in Idaho. Eichstaedt Decl., Ex. R. Further, the PUD is one of many public
22

23 ³ See <https://cnsfiber.net/CMS/42/pend-oreille-pud>. The total population of Pend Oreille County is only 13,354.
See <https://www.census.gov/quickfacts/pendoreillecountywashington>.

1 utility districts around the state, all of which are regulated by the same state statutes. If the PUD
2 is permitted to buy and sell land contrary to law, precedent will be created allowing other utility
3 districts to do so as well. Lastly, the land sale transaction is creating a significant impact on the
4 community by threatening to put an industrial smelter in a rural residential community.

5 **B. THE PUD’S LACHES ARGUMENT IS WITHOUT MERIT.**

6 The PUD argues laches should preclude consideration of this case because Plaintiffs
7 waited too long to file suit. However, courts have rejected laches to void actions:

8 If the transaction was truly void . . . **it would be subject to challenge and**
9 **invalidation at any time, perhaps years later.** Any improvements made in
reliance on the invalid deed would be in vain.

10 *S. Tacoma Way*, 169 Wn.2d 118, 124 (2010) (emphasis added).

11 Regardless, a defendant relying on laches bears the burden of proving: (1) knowledge or
12 reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action
13 against a defendant; (2) an unreasonable delay by the plaintiff in commencing cause of action;
14 and (3) damage to the defendant resulting from the unreasonable delay. *King Cty. v. Taxpayers of*
15 *King Cty.*, 133 Wn.2d 584, 642 (1997). Here, the PUD has not met its burden in proving all three
16 elements of laches and is thus barred from using the defense of laches. *See Buell v. City of*
17 *Bremerton*, 80 Wn.2d 518, 522 (1972) (“None of these elements alone raises the defense of
18 laches.”).

19 First, the PUD has not proven Plaintiffs unreasonably delayed in commencing this cause
20 of action. *Taxpayers of King Cty.*, 133 Wn.2d at 642. While the PUD alleges Plaintiffs waited
21 eight months to bring this suit, they do not demonstrate how this delay is unreasonable. In
22 finding laches applies, courts find a delay is unreasonable when the delay is a matter of years (or
23 decades), not months. *Davidson v. State*, 116 Wn.2d 13, 27 (1991) (claim barred by laches after

1 it have been delayed for more than 60 years); *In re Marriage of Dicus*, 110 Wn. App. 347, 357
2 (2002) (13-year delay). The PUD cannot simply assert that because Plaintiffs waited eight
3 months, the delay is unreasonable. Consequently, because the PUD has failed to demonstrate
4 how a delay of less than a year is unreasonable, it is barred from using the defense. *See Auto.*
5 *United Trades Org. v. State*, 175 Wn.2d 537, 542 (2012).

6 Second, even if the Court finds eight months is unreasonable, the PUD has not shown it
7 was prejudiced by the delay. *Taxpayers of King Cty.*, 133 Wn.2d at 642. The PUD makes
8 unsupported statements that “each entity has changed their positions in reliance on the purchase
9 and sale, including commencing development of the properties.” Defs. Mot. and Mem. for
10 Summ. J. at 10. Such unsupported statements do not demonstrate the PUD was prejudiced as a
11 result of an unreasonable delay. There is no evidence the PUD will be prejudiced in any way –
12 whether development on the property occurs or not. Moreover, PacWest cannot proceed with
13 development for months or even years -- it has applied for no permits for development and there
14 is a myriad of permits required to be obtained prior to any development. Eichstaedt Decl., Ex. S
15 (As many of 16 permits will be required prior to development.).

16 In sum, “[a]bsent unusual circumstances, the doctrine of laches should not be invoked to
17 bar an action short of the applicable statute of limitations.” *In re Marriage of Capetillo*, 85 Wn.
18 App. 311, 317 (1997). The PUD has not demonstrated “unusual circumstances” justifying the
19 application of laches and must be barred from using this defense.

20 **C. THE PURCHASE OF THE PARCEL FROM THE COUNTY BY THE PUD, THE SALE TO**
21 **PACWEST, AND THE PUD’S RESOLUTION ARE *ULTRA VIRES* AND SHOULD BE**
22 **DECLARED AS VOID.**

23 Courts have consistently held that “[u]ltra vires acts are those performed with no legal
authority and are characterized as void on the basis that no power to act existed.” *S. Tacoma*

1 *Way*, 169 Wn.2d at 123; *see also Noel v. Cole*, 98 Wn.2d 375 (1982) (sale of timber *ultra vires*
2 because state failed to comply with statutory requirements and underlying policy). In the case of
3 government entities, an illegal contract is *ultra vires* and is void. *Barnier v. City of Kent*, 44 Wn.
4 App. 868, 873-74 (1968).

5 To determine if a contract is *ultra vires*, a court first determines if the action is
6 substantively or procedurally illegal. *S. Tacoma Way*, 169 Wn.2d at 122-23. A contract is *ultra*
7 *vires* when “performed with no legal authority and [] characterized as void on the basis that no
8 power to act existed, even where proper procedural requirements are followed.” *Id.* Since the
9 actions by PUD were more than a procedural mistake, and instead a clear act outside its statutory
10 authority, the purchase, the sale, and the resolution are all void.

11 **1. The Purchase of Parcel #19182 by the PUD from the County is *Ultra Vires*.**

12 RCW § 54.16.020 states a public utility district “may . . . purchase, acquire, lease, add to,
13 maintain, operate, develop, and regulate all lands, property, property rights . . . and systems for
14 generating electric energy by water power, steam, or other methods.” The plain language of the
15 statute provides the purchase of land by a municipal corporation be for only energy purposes –
16 not for acquisition and conveyance to a third party. The PUD is not a real estate agency or a real
17 estate holding company.

18 The undisputed facts demonstrate the PUD purchased Parcel #19182 from Pend Oreille
19 County for the purpose of selling it to PacWest as part of a combined sale of a total of four
20 parcels and not to obtain an easement as the PUD asserts. Eichstaedt Decl., Ex. A. Even before
21 the PUD purchased the land, the PUD demonstrated its intent to purchase Parcel #19182 for the
22 sole purpose of selling it to PacWest, not for an easement or any other energy purposes. *Id.*

23 According to the letter of Intent to Sell issued by the PUD to HiTest on April 25, 2017, the PUD

1 stated it was including Parcel #19182 in the transaction “which is currently owned by Pend
2 Oreille County,” but could be conveyed to the PUD via an “intergovernmental transfer.”
3 Eichstaedt Decl., Ex. A, PUD Ans. ¶ 4.7. No discussion of any other purpose, including an
4 easement, was stated any time prior to the sale.

5 Citing *Sundquist Homes v. Snohomish PUD*, 92 Wn. App. 950, 955 (1998), the PUD
6 urges this Court to ignore its statutory authority and apply the holding “the rule of strict
7 construction shall have no application to this act and the same shall be liberally construed.” Def.
8 Mot. For Summary Judgment ¶ 16.1. Of course, a “liberal construction” does not mean clear
9 statutory language can be ignored or set aside so any action the PUD can come up with is
10 authorized. This reading is not a liberal construction but is a rewriting contrary to the plain
11 language of the statutes and legislative intent. When the PUD purchased the land from Pend
12 Oreille County, the PUD acted outside of its statutorily granted authority. The PUD does not
13 have general statutory authority to buy land, but only to buy and sell land for energy purposes
14 causing the purchase of Parcel #19182 by the PUD from Pend Oreille County to clearly be *ultra*
15 *vires*. RCW § 54.16.020.

16 Courts will allow a procedurally invalid, but substantially correct transaction to occur,
17 however this *ultra vires* action is far more than a procedural issue. The PUD’s actions are
18 distinguishable from the actions of the agency in *S. Tacoma Way* where the court found there
19 was a general statutory authority to buy and sell land. *S. Tacoma Way*, 169 Wn.2d at 124
20 (holding the failure of DOT to notify abutting landowner of intent to sell state land did not render
21 sale to purchaser *ultra vires*). The purpose of the PUD is to provide its customers with electrical
22 service, not to engage in land transactions for the benefit of private corporations. This is
23 demonstrated in the language of the RCW § 54, which lists specific circumstances where

1 authority is granted instead of a universal grant of authority to buy land. *See* RCW § 54.16.020;
2 RCW § 54.16.180. It is undisputed the purpose of the PUD in purchasing parcel #19182 was not
3 for energy purposes but instead for sale, which clearly makes the action *ultra vires*. Since it is
4 *ultra vires*, this Court must deem the purchase void.

5 **2. The Sale of the Parcels by the PUD to PacWest is *Ultra Vires*.**

6 The PUD asserts it was not required to put the sale of Parcel #19182 to a vote nor was it
7 required to declare it surplus and pass a resolution. Defs. Mot. and Mem. for Summ. J. at 12-13.
8 To support this assertion, the PUD relies on the argument that it is given “broad powers” to
9 achieve its “lawful purpose.” *Id.* at 14. However, “broad powers” do not entitle the PUD to
10 ignore explicit statutory requirements. Washington law requires the PUD sell land only after
11 three fifths voter approval:

12 A district may sell and convey, lease, or otherwise dispose of all or any part of its
13 works, plants, systems, utilities and properties, after proceedings and approval by
14 the voters of the district, as provided for the lease or disposition of like properties
15 and facilities owned by cities and towns. The affirmative vote of three-fifths of the
16 voters voting at an election on the question of approval of a proposed sale shall be
17 necessary to authorize such a sale.

18 RCW § 54.16.180(1).

19 The statute also offers an alternative, which allows the PUD to bypass the voter
20 requirement and sell land that has become “unserviceable, inadequate, obsolete, worn out or unfit
21 to be used in the operations of the system and which is no longer necessary, material to, and
22 useful in such operations” for the PUD. RCW § 54.16.180(2)(a)-(b). There is no evidence Parcel
23 #19182 was considered “unserviceable, inadequate, obsolete, worn out or unfit to be used in the
operations of the system and which is no longer necessary, material to, and useful in such
operations” for it to be considered surplus. RCW § 54.16.180(2)(a)-(b).

1 The PUD claims that Parcel #19182 was declared surplus in its *post hoc* Resolution 1411,
2 yet the PUD did not even own the land when it was allegedly declared surplus – it had already
3 sold the parcel. PUD Answer ¶ 4.11, 4.17. Claiming that the parcel the PUD had already sold
4 (without following the required statutory process) is “no longer necessary” is a clear attempt to
5 abuse the powers granted to it for private sale purposes and cannot be permitted by this Court.
6 The statute is clear that it only permits sales under “surplus” circumstances or by three-fifths of
7 the voters which the PUD failed to meet.

8 By failing to abide by the statutory regulations, the sale of Parcel #19182 by the PUD to
9 PacWest is *ultra vires* because the PUD lacked authority to sell land that was not properly made
10 surplus and could not be made surplus because it did not meet the requirements as prescribed by
11 RCW § 54.16.180. The PUD also did not follow the other approach to sell the land by allowing
12 for three-fifths of the voters.

13 Lastly, courts have stated:

14 *Ultra vires* acts are those performed with no legal authority and are characterized
15 as void on the basis that no power to act existed, even where proper procedural
16 requirements are followed. *Ultra vires* acts cannot be validated by later ratification
or events.

17 *S. Tacoma Way*, 169 Wn.2d at 123.

18 The PUD’s attempt to legitimize the sale of Parcel #19182, and thus the entire sale to PacWest,
19 by passing Resolution 1411 accordingly fails. PUD claims this “ratification” under Resolution
20 1411 remedies the failure to declare surplus, but this is incorrect. Defs. Mot. and Mem. for
21 Summ. J. at 19-20. The ratification of *ultra vires* actions cannot be fixed by a *post hoc* action
22 because this is not a merely procedural action; it is a blatant step outside authority. *See S.*

23 *Tacoma Way*, 169 Wn.2d at 123.

1 **a. The Transaction Is Not Severable.**

2 The divisibility of a contract is dependent on the intent of the parties when the contract
3 was formed. *Saletic v. Starnes*, 51 Wn.2d 696, 699 (1958). When looking at contracts,
4 “Washington continues to follow the objective manifestation theory of contracts. Under this
5 approach, we attempt to determine the parties' intent by focusing on the objective manifestations
6 of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst*
7 *Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005) (citing *Max L. Wells Trust v.*
8 *Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602 (1991)).

9 The contract for sale of the four land parcels from the PUD to PacWest does not include a
10 severability clause. Eichstaedt Decl., Ex. T. Therefore, the entire contract should be voided
11 because the illegal sale of Parcel #19182 cannot be separated from the sale of the remaining three
12 parcels and because without a severability clause, the parties intended this sale of the land to be
13 whole and indivisible. With no severability clause in the contract, nor objective intent
14 demonstrated by the parties that the contract be divisible, this Court should void the entire
15 purchase and sale agreement and not try to sever a single parcel out of a uniform transaction.

16 **3. Resolution 1399 is Void because it is Ultra Vires.**

17 As a municipal corporation, the PUD “possess[es] only those powers conferred on them
18 by the constitution, statutes, and their charters” *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d
19 679, 685-86 (1987) (citing 2 E. McQuillin, *Municipal Corporations* § 10.09 (3d ed. 1979)).
20 Public utility districts are authorized to “adopt general resolutions to carry out the purposes,
21 objects, and provision of this title.” RCW § 54.16.190. Accordingly, the PUD can only sell land
22 to PacWest if the power is within its purposes, objects, and provisions. The purpose of the PUD

1 is to conserve electric and water resources for the State and “supply public utility service,
2 including water and electricity for all uses.” RCW § 54.04.020.

3 The Board of Commissioners of the PUD passed Resolution 1399 on August 1, 2017
4 purporting to allow the PUD to sell the combined four parcels to PacWest and authorized the
5 PUD’s general manager to negotiate the sale. Eichstaedt Decl., Ex. J. This resolution is void as
6 *ultra vires* because it is outside of the authority granted to PUD. Parcel #19182 was not declared
7 surplus prior to sale to PacWest and was not in the PUD’s ability to sell. Therefore, it was not in
8 the Board of Commissioners power to adopt Resolution 1399 because selling Parcel #19812 was
9 not within the “purposes, objects, or provisions” of RCW § 54.16.190 that gives the PUD its
10 authority. This is also the case for the PUD’s unauthorized purchase of the parcel from the
11 County. The Legislature made it clear public utility districts can only sell land by voter approval
12 or by decision of the board, RCW § 54.16.020, and the PUD has admitted to not holding
13 elections on this sale of land to PacWest. PUD Answer ¶ 4.18. The PUD does not have the
14 authority to pass resolutions purporting to give it more authority than what the Washington State
15 Legislature has granted and as a result, this Court should declare Resolution 1399 void.

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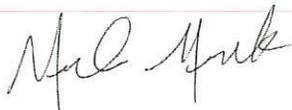
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1 **V. CONCLUSION**

2 For the aforementioned reasons, this Court should GRANT Plaintiff's cross-motion for
3 summary judgment and deny Defendant's motion for summary judgment and declare (1) the
4 purchase of land by PUD is void as it is *ultra vires*; (2) the sale of land to PacWest is void as it is
5 *ultra vires*; and (3) Resolution 1399 is void as it is *ultra vires*.

6 DATED this 16th day of November 2018.

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