

Chapter 90.16 RCW
APPROPRIATION OF WATER FOR PUBLIC AND INDUSTRIAL PURPOSES

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Use of waters for irrigation, mining, manufacturing, deemed a public use: State Constitution Art. 21.

RCW 90.16.010 Appropriation by certain water companies. Such water companies incorporated for the purposes specified in the preceding section shall have the right to purchase or take possession of and use and hold such lands and waters for the purposes of the company, lying without the limits of the city or town intended to be supplied with water upon making compensation therefor. The mode of proceeding to obtain possession of such lands for the use of the company, right-of-way for laying pipes and aqueducts for the use of the company, when the parties cannot agree shall so far as the same be applicable be as prescribed in chapter 187: PROVIDED, That nothing therein contained, shall be so construed, as to authorize the appropriation of water belonging to any person, unless the owner thereof shall refuse to supply said town or city with water after being requested so to do by the town board or city council. [1883 p 45 § 1, subd. 8; Code 1881 § 2448; 1873 p 408 § 28; 1869 p 340 § 30; RRS § 11570.]

Reviser's note: The language "for the purposes specified in the preceding section" refers to Code 1881 § 2447 (repealed by 1939 c 143 § 19) which stated in part: ". . . for the purpose of supplying any cities or towns in this territory, or the inhabitants thereof with pure and freshwater."

The language "chapter 187" refers to chapter 187 of the Code of 1881 the existing sections of which chapter are codified in chapter 81.36 RCW and RCW 90.16.100; the remaining sections thereof have been repealed.

Validating—1881 Act: "All persons who have organized themselves as a corporation under the provisions of this chapter for purposes other than those enumerated in section 2421, are hereby declared

incorporate bodies, with all the powers the same as they would enjoy had they been incorporated for the purposes set forth in section 2421." [Code 1881 § 2445.] The language "this chapter" refers to chapter 185, Code of 1881 which embodied the territorial laws relating to the formation of corporations; current provisions relating thereto are codified in Titles 23 and 24 RCW. The language "section 2421" refers to Code 1881 § 2421 which set forth the purposes for which a corporation might then be formed. General purposes for which a corporation may be formed under existing law are codified in Title 23B RCW; see also Table of Prior Laws following Title 23 RCW digest.

RCW 90.16.020 Appropriation for industrial purposes. Any person or persons, or company now incorporated, or that may hereafter become incorporated under the laws of this state, for the purpose of mining or manufacturing, shall have the right to purchase or appropriate and take possession of and divert from its natural channel, and use and hold the waters of any river, creek or stream in this state that may be required for the mining and manufacturing purposes of any such person or persons, corporation or corporations, and to construct all dams, canals, reservoirs, ditches, pipes, flumes and aqueducts, suitable and necessary for the controlling, directing and running such waters to their mines or manufacturing establishments of any such person or persons, corporation or corporations, where the same may be intended to be utilized for such purposes: PROVIDED, That no such appropriation or diversion of the waters of any such river, creek, or stream, from its natural channel; nor shall any such dam, canal, reservoir, ditch, pipe, flume or aqueduct, be constructed to the detriment of any person or persons, corporation or corporations, occupying the lands or being located below the point or place of such appropriation or diversion on any such stream or its tributaries, or above or below such dam, canal, reservoir, ditch, pipe, flume or aqueduct, or of the owners of the lands, through which the waters run in the natural course for the deprivation of the same, or the owners of the land through or upon which such dam, canal, reservoirs, ditch, pipe, flume or aqueduct, may pass through or over, or be situated upon, unless just and adequate compensation be previously ascertained and paid therefor. [Code 1881 Bagley's Supp. p 38-39 § 1; 1879 p 124 § 1; RRS § 11575.]

RCW 90.16.025 Appropriation for industrial purposes—Procedure. The mode of proceeding to appropriate, take possession of and divert such waters and to build such dam, canal, ditch, reservoir, pipe, flume, or aqueduct, as prescribed in RCW 90.16.020, when the parties cannot agree upon the purchase thereof, shall be the same as prescribed in chapter four of an act to provide for the formation of corporations, approved November thirteenth, eighteen hundred and seventy-three, except that the amount of the benefits accruing to the residue of the property of the same individual or corporation, by reason of the use made of that taken, to be estimated by the parties assessing the damages, shall be deducted from the value of the property taken. [Code 1881 Bagley's Supp. p 39 § 2; 1879 p 125 § 2.]

RCW 90.16.030 Right of eminent domain by water power companies.

The right of eminent domain for the purpose of appropriating real estate is hereby extended to all corporations that are now or that may hereafter be incorporated under the laws of this state, or of any state or territory of the United States and doing business in this state, for the purpose of conveying water by ditches, flumes, pipe lines, tunnels or any other means for the utilization of water power: PROVIDED, HOWEVER, That said right of eminent domain shall not be exercised in respect to any residence or business structure or structures. [1901 c 143 § 1; RRS § 11572. FORMER PART OF SECTION: 1901 c 143 § 3; RRS § 11574, now codified as RCW 90.16.045.]

RCW 90.16.040 Right of eminent domain by water power companies—

Right of entry. Every corporation that is now or that may hereafter be incorporated under the laws of this state, or of any other state or territory of the United States and doing business in this state, for the purpose of conveying water by ditches, flumes, pipe lines, tunnels or any other means for the utilization of water power, shall have the right to enter upon any land between the termini of the proposed ditches, flumes, pipe lines, tunnels or any other means for the utilization of water power, for the purpose of examining, locating and surveying such ditches, flumes, pipe lines, tunnels or any other means for the utilization of water power, doing no unnecessary damage thereby. [1901 c 143 § 2; RRS § 11573.]

RCW 90.16.045 Right of eminent domain by water power companies—

Procedure. Every such corporation shall have the right, subject to the proviso contained in RCW 90.16.030 to appropriate real estate or other property for a right-of-way for such ditches, flumes, pipe lines, tunnels or other means of conveying water, and for any other corporate purposes, in the same manner and under the same procedure as now is or may be hereafter provided by law in the case of other corporations authorized by the laws of the state to exercise the right of eminent domain. [1901 c 143 § 3; RRS § 11574. Formerly RCW 90.16.030, part.]

Eminent domain by corporations: Chapter 8.20 RCW.

RCW 90.16.050 Use of water for power development—Annual license fee—Progress report—Exceptions to the fee schedule—Ensuring accountability in the programs.

(1) Every person, firm, private or municipal corporation, or association hereinafter called "claimant", claiming the right to the use of water within or bordering upon the state of Washington for power development, shall on or before the first day of January of each year pay to the state of Washington in advance an annual license fee, based upon the theoretical water power claimed under each and every separate claim to water according to the following schedule:

(a) For projects in operation: For each and every theoretical horsepower claimed up to and including one thousand horsepower, at the rate of eighteen cents per horsepower; for each and every theoretical horsepower in excess of one thousand horsepower, up to and including ten thousand horsepower, at the rate of three and six-tenths cents per

horsepower; for each and every theoretical horsepower in excess of ten thousand horsepower, at the rate of one and eight-tenths cents per horsepower.

(b) For federal energy regulatory commission projects in operation that are subject to review for certification under section 401 of the federal clean water act, the following fee schedule applies in addition to the fees in (a) of this subsection: For each theoretical horsepower of capacity up to and including one thousand horsepower, at the rate of thirty-two cents per horsepower; for each theoretical horsepower in excess of one thousand horsepower, up to and including ten thousand horsepower, at the rate of six and four-tenths cents per horsepower; for each theoretical horsepower in excess of ten thousand horsepower, at the rate of three and two-tenths cents per horsepower.

(c) To justify the appropriate use of fees collected under (b) of this subsection, the department of ecology shall submit a progress report to the appropriate committees of the legislature prior to December 31, 2009, and biennially thereafter. The progress report will: (i) Describe how license fees and other funds used for the work of the licensing program were expended in direct support of the federal energy regulatory commission licensing process and license implementation during the current biennium, and expected workload and full-time equivalent employees for federal energy regulatory commission licensing in the next biennium. In order to increase the financial accountability of the licensing, relicensing, and license implementation program, the report must include the amount of licensing fees and program funds that were expended on licensing work associated with each hydropower project. This project-specific program expenditure list must detail the program costs and staff time associated with each hydropower project during the time period immediately prior to license issuance process, the program costs and staff time deriving from the issuance or reissuance of a license to each hydropower project, and the program costs and staff time associated with license implementation after the issuance or reissuance of a license to a hydropower project. This program cost and staff time information must be collected beginning July 1, 2016, and included in biennial reports addressing program years 2016 or later. The report must also include an estimate of the total workload, program costs, and staff time for work associated with either certification under section 401 of the federal clean water act or license implementation for federally licensed hydropower projects expected to occur in the next reporting period, or both. In addition, the report must provide sufficient information to determine that the fees charged are not for activities already performed by other state or federal agencies or tribes that have jurisdiction over a specific license requirement and that duplicative work and expense is avoided; (ii) include any recommendations based on consultation with the departments of ecology and fish and wildlife, hydropower project operators, and other interested parties; and (iii) recognize hydropower operators that exceed their environmental regulatory requirements.

(d) The fees required in (b) of this subsection expire June 30, 2029. The biennial program reports submitted by the department of ecology will serve as a record for considering the extension of the fee structure in (b) of this subsection.

(2) The following are exceptions to the fee schedule in subsection (1) of this section:

(a) For undeveloped projects, the fee shall be at one-half the rates specified for projects in operation; for projects partly developed and in operation the fees paid on that portion of any project that shall have been developed and in operation shall be the full annual license fee specified in subsection (1) of this section for projects in operation, and for the remainder of the power claimed under such project the fees shall be the same as for undeveloped projects.

(b) The fees required in subsection (1) of this section do not apply to any hydropower project owned by the United States.

(c) The fees required in subsection (1) of this section do not apply to the use of water for the generation of fifty horsepower or less.

(d) The fees required in subsection (1) of this section for projects developed by an irrigation district in conjunction with the irrigation district's water conveyance system shall be reduced by fifty percent to reflect the portion of the year when the project is not operable.

(e) Any irrigation district or other municipal subdivision of the state, developing power chiefly for use in pumping of water for irrigation, upon the filing of a statement showing the amount of power used for irrigation pumping, is exempt from the fees in subsection (1) of this section to the extent of the power used for irrigation pumping.

(3) In order to ensure accountability in the licensing, relicensing, and license implementation programs of the department of ecology and the department of fish and wildlife, the departments must implement the following administrative requirements:

(a) (i) Both the department of ecology and the department of fish and wildlife must be responsible for producing an annual work plan that addresses the work anticipated to be completed by each department associated with federal hydropower licensing and license implementation.

(ii) Both the department of ecology and the department of fish and wildlife must assign one employee to each licensed hydropower project to act as each department's designated licensing and implementation lead for a hydropower project. The responsibility assigned by each department to hydropower project licensing and implementation leads must include resolving conflicts with the license applicant or license holder and the facilitation of department decision making related to license applications and license implementation for the particular hydropower project assigned to a licensing lead.

(b) The department of ecology and the department of fish and wildlife must host an annual meeting with parties interested in or affected by hydropower project licensing and the associated fees charged under this section. The purposes of the annual meeting must include soliciting information from interested parties related to the annual hydropower work plan required by (a) of this subsection and to the biennial progress report produced pursuant to subsection (1)(c) of this section.

(c) Prior to the annual meeting required by (b) of this subsection, the department of fish and wildlife and the department of ecology must circulate a survey to hydropower licensees soliciting feedback on the responsiveness of department staff, clarity of staff roles and responsibilities in the hydropower licensing and implementation process, and other topics related to the

professionalism and expertise of department staff assigned to hydropower project licensing projects. This survey must be designed by the department of fish and wildlife and the department of ecology after consulting with hydropower licensees and the results of the survey must be included in the biennial progress report produced pursuant to subsection (1)(c) of this section. Prior to the annual meeting, the department of ecology and the department of fish and wildlife must analyze the survey results. The departments must present summarized information based on their analysis of survey results at the annual meeting for purposes of discussion with hydropower project licensees. [2022 c 139 § 1; 2016 c 75 § 1; 2007 c 286 § 1; 1929 c 105 § 1; RRS § 11575-1.]

RCW 90.16.060 Schedule of fees for claimants of water power—Statement of claim—Penalties—Excessive claim—Abandonment. The license fee herein required shall be paid in advance to the state department of ecology and shall be accompanied by written statement, showing the extent of the claim. Said statement shall set forth the name and address of the claimant, the name of the stream from which the water is appropriated or claimed for power development, a description of the forty acres or smallest legal subdivision in which the point of diversion and point of return are located, the date of the right as claimed, the maximum amount of water claimed, expressed in cubic feet per second of time, the total average fall utilized under such claim, the manner of developing power and the use to which the power is applied. If the regular flow is supplemented by water stored in a reservoir, the location of such reservoir, its capacity in acre feet, and the stream from which it is filled and fed, should be given, also the date of the right as claimed for storage purposes.

Should any claimant fail or neglect to file such statement within the time specified, or fail or neglect to pay such fees within the time specified, the fees due and payable shall be at the schedule rates set out in RCW 90.16.050, increased twenty-five percent, and the state shall have preference lien therefor, with interest at the rate of ten percent per annum from the date of delinquency, upon the property of claimant used or necessary for use in the development of the right or claim, together with any improvements erected thereon for such development, and upon request from the director of ecology the attorney general shall proceed to foreclose the lien, and collect the amount due, as herein provided, in the same manner as other liens for general state and county taxes on real property are foreclosed.

The filing of a claim to water in excess of the amount to which the claimant is legally entitled shall not operate to vest in such claimant any right to the use of such excess water, nor shall the payment of the annual license fees, provided for herein, operate to vest in any claimant any right to the use of such water beyond the amount to which claimant is legally entitled. The filing of such claim, or claims to water shall be conclusive evidence of abandonment by the claimant of all right to water for power purposes not covered by the claim, or claims, as filed; and the failure to file statement and pay the fees, as herein required, for any power site or claim of power rights on account of riparian ownership within two years after June 12, 1929, shall be conclusive evidence of abandonment. The amount of the theoretical horsepower upon which fees shall be paid shall be computed by multiplying the maximum amount of water claimed, expressed

in cubic feet per second of time, by the average fall utilized, expressed in feet, and dividing the product by 8.8. [1988 c 127 § 78; 1929 c 105 § 2; RRS § 11575-2. Formerly RCW 90.16.060, 90.16.070 and 90.16.080.]

Property taxes

lien foreclosure: Chapter 84.64 RCW.

lien of taxes: Chapter 84.60 RCW.

RCW 90.16.090 Disposition of fees. (1) All fees paid under provisions of this chapter, shall be credited by the state treasurer to the reclamation account created in RCW 89.16.020 and subject to legislative appropriation, be allocated and expended by the director of ecology for:

(a) Investigations and surveys of natural resources in cooperation with the federal government, or independently thereof, including stream gaging, hydrographic, topographic, river, underground water, mineral and geological surveys; and

(b) Expenses associated with staff at the departments of ecology and fish and wildlife working on federal energy regulatory commission relicensing and license implementation.

(2) Unless otherwise required by the omnibus biennial appropriations acts, the expenditures for these purposes must be proportional to the revenues collected under RCW 90.16.050(1). [2007 c 286 § 2; 1988 c 127 § 79; 1973 c 106 § 39; 1939 c 209 § 1; 1929 c 105 § 3; RRS § 11575-3.]

RCW 90.16.100 Appropriation of lands by corporations conveying water. All corporations, authorized to do business in the state, and who have been, or may hereafter be organized, for the purpose of erecting and maintaining flumes and aqueducts to convey water for consumption or for mining, irrigation, milling or other industrial purposes, shall have the same right to appropriate lands for necessary corporate purposes, and under the same regulations and instructions as are provided for other corporations; and such corporations organized for such purposes, in order to carry out the object of their incorporation, are authorized to take and use any water not otherwise legally appropriated. [Code 1881 § 2472; 1879 p 134 § 1; RRS § 11576.]

RCW 90.16.110 Water for use outside state. Whenever the use of water shall be necessary for domestic, manufacturing, irrigation, or in interstate transportation at or for any incorporated or unincorporated city, town, village or hamlet situated partly in Washington and partly in an adjoining state or where any city, town, village or hamlet is incorporated on one side of the state line and there are inhabitants living in adjacent and contiguous territory on the other side, it shall be lawful for any person, association or corporation to locate, appropriate, divert and deliver any of the unappropriated public waters of this state necessary for the use of such city, town, village or hamlet and the inhabitants thereof and those residing in and embracing such contiguous territory both within this state and such adjoining state; and locations may be made and authority is hereby granted for such purpose the same as for any other

appropriation within the state and a diversion and delivery for such purpose shall have the same force and effect as if made for use wholly within this state and any appropriation, diversion or use heretofore made for such purpose shall be deemed as valid and legal as if made for a use wholly within this state and priority thereof shall date from the appropriation and diversion the same as if it had been made for use wholly within this state. [1919 c 41 § 1; RRS § 11577.]

RCW 90.16.120 Water for use outside state—Reciprocity. The provisions of *this act shall not apply to any territory or the inhabitants thereof situated or located in any adjoining state which does not by its laws, usages or legal regulations grant similar or reciprocal rights, privileges and opportunities to this state and its inhabitants and adjacent and contiguous territory whether incorporated or unincorporated as in *this act specified. [1919 c 41 § 2; RRS § 11578.]

***Reviser's note:** "this act" [1919 c 41], is codified in RCW 90.16.110 and 90.16.120.