

SUPREME COURT OF WASHINGTON

Hallauer v. Spectrum Properties, Inc.

143 Wash. 2d 126 (2001) · Decided February 22, 2001

SUMMARY

The Washington Supreme Court considers whether landowners holding a certificated water right may condemn an easement across neighboring property to convey water for domestic use, a heat pump, and fish propagation. The court holds that RCW 90.03.040, rather than the private-way-of-necessity statute in RCW 8.24.010, governs the condemnation and that beneficial use of water constitutes a public use. It reverses the Court of Appeals and permits the Hallauers to proceed with their condemnation action.

CASE DETAILS

COURT	Supreme Court of Washington
WRITING FOR THE COURT	Madsen, J.; Smith, J.; Johnson, J.; Ireland, J.; Bridge, J.; Guy, J. Pro Tem.; Talmadge, J. Pro Tem.
JURISDICTION	Washington
DECIDED	February 22, 2001
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	After the trial court and Court of Appeals denied the Hallauers' request to condemn an easement for a water pipeline, the Washington Supreme Court granted discretionary review.
STANDARD OF REVIEW	The court independently interpreted the applicable constitutional and statutory condemnation provisions and determined whether the facts established reasonable necessity.
PRECEDENTIAL VALUE	Published Washington Supreme Court opinion; precedential.
PARTIES	Wilbur G. Hallauer, Josephine Hallauer, Champerty Shores Owners Association v. Ernesto C. Del Rosario, Madeliene B. Del Rosario

TOPICS

- eminent domain
- easements
- real estate
- statutory interpretation
- administrative law

PRACTICE AREAS

- Eminent domain
- Water rights
- Real property
- Statutory interpretation
- Administrative law

QUESTIONS PRESENTED

1. Whether condemnation of a right-of-way for transporting water under RCW 90.03.040 is governed by the landlocked-property necessity standard in RCW 8.24.010.
2. Whether the Hallauers established the reasonable necessity required to condemn an easement for transporting water from their certificated water right to their property for beneficial use.
3. Whether RCW 8.24.030 supplied a basis for attorney fees in the condemnation proceedings.

HOLDINGS

1. Condemnation of a right-of-way to transport water for application to a beneficial use is governed by RCW 90.03.040 and the public-use condemnation procedures in chapter 8.20 RCW, not by the landlocked-property standard in RCW 8.24.010.
2. The Hallauers' domestic use of water and fish-propagation use are beneficial uses constituting public uses under RCW 90.03.040, and the need to cross the Del Rosarios' property to convey water from the spring to the Hallauers' property satisfies the reasonable-necessity requirement.
3. RCW 8.24.030 does not apply to this proceeding and therefore does not provide a basis for attorney fees in the Supreme Court or Court of Appeals.

KEY QUOTATIONS

“Thus, in marked contrast to RCW 8.24.010, RCW 90.03.040 does not require necessity based upon the landlocked nature of the condemnor’s property, but expressly states the relevant necessity as “necessary for the storage of water for, or the application of water to, any beneficial use.”” (145-146)

“The only way in which the water can be conveyed to the Hallauers’ property is over or through the Del Rosarios’ land.” (150)

“RCW 90.03.040 is the more specific of the statutes regarding condemnation for transportation of water and is also the later of the enactments.” (147)

FACTUAL BACKGROUND

The Hallauers owned property adjacent to land containing a spring from which they held a certificated water right. They installed a pipeline across the neighboring property to carry spring water to their land for a heat pump, cooling system, and fish-propagation ponds. After the neighboring property changed ownership, the Del Rosarios demanded removal of the pipeline, and the Hallauers sought condemnation of an easement for a replacement pipeline. The trial court and Court of Appeals concluded that condemnation was unnecessary because the Hallauers' property was not landlocked and alternative water and energy sources existed.

PROCEDURAL HISTORY

The Hallauers originally obtained a judgment quieting title to a prescriptive easement, but that judgment was reversed on appeal. On remand, they sought, among other relief, condemnation of an easement across the Del Rosarios' property for a pipeline. The trial court found no reasonable necessity, and the Court of Appeals affirmed. The Supreme Court reversed and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remanded for further proceedings consistent with the Supreme Court's determination that the Hallauers may proceed with condemnation under RCW 90.03.040. The Court of Appeals' attorney-fee award to the Del Rosarios was also reversed.

CASES CITED

- State v. Belmont Improvement Co., 80 Wn.2d 438, 442-43, 495 P.2d 635 (1972)
- State v. Dawes, 66 Wn.2d 578, 583, 404 P.2d 20 (1965)
- City of Seattle v. Mall, Inc., 104 Wn.2d 621, 623, 707 P.2d 1348 (1985)
- Crook v. Hewitt, 4 Wash. 749, 31 P. 28 (1892)
- Clark v. Nash, 198 U.S. 361, 25 S. Ct. 676, 49 L. Ed. 1085 (1905)
- State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 P. 994 (1914)
- Pine Martin Mining Co. v. Empire Zinc Co., 90 Colo. 529, 11 P.2d 221 (1932)
- State ex rel. Galbraith v. Superior Court, 59 Wash. 621, 110 P. 429 (1910)
- Prescott Irrig. Co. v. Flathers, 20 Wash. 454, 55 P. 635 (1899)
- White v. Stout, 72 Wash. 62, 129 P. 917 (1913)
- State ex rel. Andersen v. Superior Court, 119 Wash. 406, 205 P. 1051 (1922)
- Dep't of Ecology v. Abbott, 103 Wn.2d 686, 691, 694 P.2d 1071 (1985)
- State ex rel. Kettle Falls Power & Irrig. Co. v. Superior Court, 46 Wash. 500, 90 P. 650 (1907)
- State ex rel. Liberty Lake Irrig. Co. v. Superior Court, 47 Wash. 310, 313-14, 91 P. 968 (1907)
- State ex rel. South Fork Log Driving Co. v. Superior Court, 102 Wash. 460, 470, 173 P. 192 (1918)
- In re Application for Water Rights of Bubb, 200 Colo. 21, 610 P.2d 1343 (1980)
- Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970)
- Dep't of Ecology v. Acquavella, 131 Wn.2d 746, 755, 935 P.2d 595 (1997)
- Dep't of Ecology v. Grimes, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993)
- Neubert v. Yakima-Tieton Irrig. Dist., 117 Wn.2d 232, 237, 814 P.2d 199 (1991)
- Ellis v. Pomeroy Improvement Co., 1 Wash. 572, 21 P. 27 (1889)
- Crescent Harbor Water Co. v. Lyseng, 51 Wn. App. 337, 340, 753 P.2d 555 (1988)
- City of Tacoma v. Welcker, 65 Wn.2d 677, 683-84, 399 P.2d 330 (1965)
- State ex rel. Lange v. Superior Court, 61 Wn.2d 153, 377 P.2d 425 (1963)
- State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 P. 805 (1920)
- State ex rel. Gibson v. Superior Court, 147 Wash. 520, 266 P. 198 (1928)
- State ex rel. Henry v. Superior Court, 155 Wash. 370, 284 P. 788 (1930)

- In re Pers. Restraint of Yim, 139 Wn.2d 581, 592, 989 P.2d 512 (1999)
- State v. Houck, 32 Wn.2d 681, 684-85, 203 P.2d 693 (1949)
- State v. Wright, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)
- Wark v. Wash. Nat'l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)
- Pearce v. G.R. Kirk Co., 22 Wn. App. 323, 327, 589 P.2d 302 (1979)
- Tunstall v. Bergeson, 141 Wn.2d 201, 211, 5 P.3d 691 (2000)
- State ex rel. Kirkendall v. Superior Court, 130 Wash. 661, 228 P. 695 (1924)
- State ex rel. Ballard v. Superior Court, 114 Wash. 663, 195 P. 1051 (1921)
- Mack v. Eldorado Water Dist., 56 Wn.2d 584, 354 P.2d 917 (1960)
- Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 169, 876 P.2d 435 (1994)
- State v. Hill, 123 Wn.2d 641, 648, 870 P.2d 313 (1994)

OPINION

MADSEN, J.

Madsen, J. Wilbur G. and Josephine Hallauer, who hold a certificated water right to water from a spring on neighboring land, seek to condemn a way across that land for transporting water to their property for domestic use and to ponds for fish propagation.

The Court of Appeals held that because the Hallauers' property is not landlocked and alternative sources of water are available, the Hallauers failed to prove a reasonable necessity for condemnation. We reverse the Court of Appeals and hold that the Hallauers are entitled to proceed with their condemnation action. FACTS The Hallauers and respondents Ernesto C. and Made*130liene B. Del Rosario own adjacent property on the shore of Lake Osoyoos in Okanogan County.

Donald Thorndike was the Del Rosarios' predecessor in interest. In the mid-1970's, part of a bluff on Thorndike's property collapsed, revealing a natural spring. In the early 1980's the Hallauers built a home on their property with a heat pump and cooling system that used water from a well.

The first winter, the heat pump froze because the water from the well was too cold for its proper operation. Mr. Hallauer learned that the water from the spring on Mr. Thorndike's property would be satisfactory for operation of the heat pump as well as for supplying water to ponds intended for fish propagation. Mr. Thorndike and Mr. Hallauer agreed that Mr. Hallauer would apply to the Department of Ecology for a water right entitling him to withdraw water from the spring on the Thorndike property, and when the water right was granted Mr. Hallauer would pay Mr. Thorndike \$500.1 In March 1982, Mr. Thorndike signed the application for the water right as owner of the property, and Mr. Hallauer signed as the applicant.

In March 1984, Mr. Hallauer sent a letter to Mr. Thorndike saying the application had been approved and enclosed a check for \$500. Mr. Hallauer developed the spring and installed a

pipeline to transport water from the spring to his property for the heat pump and fish ponds.

The property on which the ponds are located was developed into the Champerty Shores development, a private community. In 1984, fish were added to the ponds. In October 1984, the Department of Ecology issued a certificate of water right. Mr. Thorndike's property was acquired by Spectrum Properties, Inc., following foreclosure proceedings.

In October 1989, Mr. Del Rosario entered into a real estate contract for the purchase of the property, took possession, and began managing an apple orchard on it. During roadwork on the property, the Hallauers' pipeline was discovered, and the *131Del Rosarios demanded that the pipeline be removed. Litigation ensued.

Although the Hallauers originally obtained a judgment quieting title to a prescriptive easement across the Del Rosarios' property, that decision was reversed on appeal. On remand, the Hallauers sought, among other things, to condemn an easement for a pipeline to carry water from the spring to their property. Petitioner Champerty Shores Owners Association was added as a necessary party plaintiff because it had taken ownership of the fish ponds and an interest in the spring right.

The trial court held that the Hallauers had failed to show a reasonable necessity for a private condemnation. On appeal, the Court of Appeals affirmed. This court granted discretionary review. ANALYSIS Although several other grounds for relief have been argued during litigation between the parties, the only matter before this court is whether the Hallauers are entitled to condemn an easement across the Del Rosarios' property for a pipeline to transport water from the spring to their property for use in the heat pump and cooling system and as a water supply for propagation of fish.

The authority to condemn a right of way to transport water has long existed in this state, both by constitutional and statutory provisions. The chief question posed by this case is whether the showing of necessity to condemn a right of way to transport water is identical to the showing required to condemn a private way of necessity.

The Court of Appeals, relying on RCW 8.24.010, held that "necessity" means the same in both contexts. We disagree because RCW 8.24.010 does not apply in the context here. As we explain below, RCW 90.03.040 provides the statutory authority for condemnation in this case. Among other things, the statute directs that "property or rights shall be acquired [through condemnation] in the manner provided by law for the taking of private property for public use by *132private corporations." RCW 90.03.040.

Therefore, chapter 8.20 RCW (eminent domain by corporations), rather than chapter 8.24 RCW, provides the procedures for condemnation. RCW 8.20.070 states that at the hearing on a petition to condemn where the contemplated use is a public use, the court will enter an order of public use and necessity if it is "satisfied by competent proof that the contemplated use for which the land,

real estate, premises or other property sought to be appropriated is really a public use... that the public interest requires the prosecution of such enterprise... and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise.” In order to determine whether the Hallauers are entitled to an order of public use and necessity, we examine both public use and necessity, as the three conditions set out in RCW 8.20.070 are interrelated.

See *State v. Belmont Improvement Co.*, 80 Wn.2d 438, 442-43, 495 P.2d 635 (1972); *State v. Dawes*, 66 Wn.2d 578, 583, 404 P.2d 20 (1965). Also, the public interest condition and the necessity condition “are generally subsumed under the definition of ‘necessity’.” *City of Seattle v. Mall, Inc.*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985).

The interrelatedness of the conditions is particularly apparent where water rights or rights of way to transport water are concerned. This is because of the adoption of the prior appropriation doctrine in this state for acquisition of new water rights; condemnation of rights of way to transport water is an integral component of application of water to beneficial use.

Accordingly, we begin by discussing the public use condition as a predicate to discussion of the necessity condition. Our analysis begins with article I, section 16 of the Washington State Constitution, which provides: Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.

No private property shall be taken or *133damaged for public or private use without just compensation having been first made....[2] As an initial matter, this constitutional provision does not require that condemnation for rights of way to transport water is subject to the same criteria as condemnation for private ways of necessity.

The first sentence of article I, section 16 carves out two forms that a condemnation for “private” use may take. The constitution states the exceptions to the rule that private property may not be taken for private uses as: “except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.” Const. art. I, § 16 (emphasis added).

This distinction was carried out in enabling legislation. In 1913, Rem. Rev. Stat. § 936-1 (RCW 8.24.010) was enacted to replace certain earlier enabling statutes. It provides for condemnation of “lands of [another] sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be.” RCW 8.24.010 (emphasis added).

The title of the 1913 act containing RCW 8.24.010, like the constitutional provision, also sets forth the two types of condemnation authorized for private uses: “An Act relating to the taking of

private property for private ways of necessity and for drains, flumes and ditches on or across the lands of others for agricultural, domestic or sanitary purposes.” Laws of 1913, ch. 133, at 412 (emphasis added).

Thus, neither article I, section 16 nor some of the early enabling legislation mandates treating condemnation for a right of way to transport water the same as a condemnation for a private way of necessity. Although RCW 8.24.010 was enacted as an enabling provision for article I, section 16, it soon gave way to RCW 90.03.040 where condemnation of water rights or rights of way to transport water are concerned.

Rem. Rev. Stat. *134§ 7354 (RCW 90.03.040) was enacted as part of the 1917 water code under which the prior appropriation doctrine became the sole method for acquisition of new water rights. It provides in part that “[t]he beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use.”³ RCW 90.03.040.

This statute was needed in order to implement the prior appropriation doctrine. Before adoption of the 1917 water code, two water rights doctrines applied in Washington. Under the doctrine of riparian rights, an owner of land on a stream or other body of water has the right to use the water. *Crook v. Hewitt*, 4 Wash. 749, 31 P. 28 (1892).

The second doctrine, the prior appropriation doctrine, developed in the arid western states, “provides that a right to water can be established only by putting water to beneficial use and that the first such use in time is the first such use in right.” Charles B. Roe & Peter R. Anderson, *Water Law*, in 1C Kelly Kunsch, *Washington Practice: Methods of Practice* § 91.4 (4th ed.

1997). Both of these types of water rights could have been acquired in Washington in its early history. *135 Where a riparian water right was involved, the water right holder generally had access to sufficient water because water was adjacent to or within the holder’s property.⁴ However, prior appropriation rights, by definition, do not require that the owner’s land abut a stream or other water body.

Where appropriative rights are concerned, there “need be no relationship between the source of the water and the locus of use.” A. Dan Tarlock, *Law of Water Rights and Resources* § 5.24, at 5-41 (2000). Accordingly, there must be some means of delivering the appropriated water to the owner’s land.

The authority to condemn property for rights of way to transport water is thus an essential part of the prior appropriation scheme: “Access to water open to appropriation can generally be acquired by eminent domain.

To prevent de facto riparianism, western states passed statutes permitting a water rights claimant to condemn the necessary rights of way to bring the water from the stream to the place of his use.” Id. at 5-42. The constitutionality of these statutes was originally at issue because the power of eminent domain was limited to public uses. Id. at 5-43.

However, by the time RCW 90.03.040 was enacted the validity of such statutes was settled. In *Clark v. Nash*, 198 U.S. 361, 25 S. Ct. 676, 49 L. Ed. 1085 (1905), the Court upheld a Utah statute granting the right to condemn land for the purpose of conveying water in ditches across that land for irrigation of the condemnor’s land alone.

The Court observed that [w]here the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to *136hold, with the state courts, when they uphold a state statute providing for such condemnation.

The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use clearly be private. [Water rights] are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed....

Clark, 198 U.S. at 367-68, 370. It is now settled that “[e]minent domain may be used to transport water so long as the use is beneficial; beneficial uses are presumed public uses.” *Tarlock*, supra, § 5.24, at 5-42. RCW 90.03.040, like statutes in other western states, declares that the beneficial use of water is a public use. This declaration of public use applies even if the water is used by an individual solely on that individual’s private land.

Article I, section 16 speaks both of condemning private property for private uses, including “for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes,” and of private property for public purposes.

However, “private use” as used in the constitutional provision is imbued with a public nature where condemnation of water rights and rights of ways to transport water are concerned. Taking private property for private purposes within the meaning of the constitutional provision has been explained as follows: “[I]t is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature, that is, a use in which the public participates, directly or indirectly, as in the case of highways, railroads, public service plants and the like.

It is sufficient that the use of the particular property for the purpose proposed, is necessary to enable individual proprietors to utilize and develop the natural resources of their land, as by reclaiming wet or arid tracts, improving water power or working a mine.

In *137such cases the public welfare is promoted by the increased prosperity which necessarily results from developing the natural resources of the country....” Lewis, *Eminent Domain* (3d ed.), §1. *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 587, 137 P. 994 (1914).

The Colorado Supreme Court has similarly said that although the words “private use” appear in the state’s constitution and statutes, it “is obvious that they do not mean a strictly private use; that is to say, one having no relation to the public interest.

The fact that the Constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi public.” *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P.2d 221, 225 (1932).

In *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 629, 110 P. 429 (1910), the court discussed this principle in the context of beneficial use of water. The court noted that article I, section 16, provides for eminent domain for certain private purposes, including ditches for agricultural purposes.

Although the provision in terms seems to give the power to take for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose to warrant the taking; that is, though it be seemingly called a private use by these words of the constitution, it is also in effect a public use in view of the necessities of a state like ours having vast areas of arid land.

59 Wash. at 629. The court explained that the reclamation through irrigation of one small field by an individual promotes the development and adds to the taxable wealth of the state as well as reclamation by irrigation of large areas. *Id.* at 632.

The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character, is not public service, but is the development of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. Whether such development *138and increased wealth comes from the effort of a single individual, or the united efforts of many, in our opinion does not change the principal upon which this right of eminent domain rests.

Id. at 631; see also, e.g., *Prescott Irrig. Co. v. Flathers*, 20 Wash. 454, 458-59, 55 P. 635 (1899); *White v. Stout*, 72 Wash. 62, 66, 129 P. 917 (1913). The same principle was discussed by the United States Supreme Court in *Clark*, quoted above. While these state cases preceding enactment of RCW 90.03.040 treat transportation of water for irrigation as sufficiently public in nature to

allow condemnation for conveying the water, the statute, like the constitution, encompasses other beneficial uses.

Article I, section 16 specifically refers to agricultural, domestic, or sanitary purposes. Article XXI, section 1 states that “use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.” This latter provision makes the stated purposes public purposes, “but it does not preclude the state, through its legislature, from declaring other purposes to be also public in their nature.” *State ex rel.*

Andersen v. Superior Court, 119 Wash. 406, 409-10, 205 P. 1051 (1922). As noted, RCW 90.03.040 declares that the beneficial use of water is a public use. At present, the vast majority of this state’s citizens do not engage in agriculture. Yet the development and wealth of this state derived from nonagricultural endeavor is unquestionably dependent upon beneficial use of water, including domestic use of water.⁵ Our state’s citizens must have use of water, not merely for economic development of their own land, but also so that they can live and work throughout the *139state in a wide variety of occupations.

We live, more than ever, in a time of limited water resources and expanding growth. Application of water to beneficial use, as contemplated by our water codes, is a crucial factor in sustaining this state and its people.

The legislative declaration in RCW 90.03.040 that beneficial use of water is a public use must also be viewed in light of other language in article I, section 16, which states that “[w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.” This does not mean, however, that the Legislature cannot declare public uses.

State ex rel. Andersen, 119 Wash. at 410. “The legislature can declare in the first instance that the purpose is a public one, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded.” *Id.* A legislative declaration will be accorded great weight. *Port of Seattle v. Isernio*, 72 Wn.2d 932, 936, 435 P.2d 991 (1967); *Miller v. City of Tacoma*, 61 Wn.2d 374, 383-84, 378 P.2d 464 (1963).

The Legislature’s declaration that beneficial use of water is a public use is not unfounded. We turn again to the historical context. As noted, the prior appropriation doctrine developed in recognition of the value and scarcity of water in western states. Indeed, the importance of beneficial use of water led to the decline of the riparian system in this state: Strict application of the riparian rights doctrine led to problems.

The riparian rights doctrine prevented appropriative or riparian development by others, even if the riparian rights had never been exercised. As population density increased, demand for water grew

and the vitality of the riparian doctrine began to wane. See [Frank J.] Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 Tex. L. Rev. 24, 25-26 (1954).

Dep't of Ecology v. Abbott, 103 Wn.2d 686, 691, 694 P.2d *1401071 (1985). Thus, condemnation of riparian rights was upheld in early cases. For example, in 1907 this court upheld an 1890 statute that authorized condemnation of riparian rights for irrigation, subject to the riparian's irrigation needs. *Id.* (citing *State ex rel. Kettle Falls Power & Irrig. Co. v. Superior Court*, 46 Wash. 500, 90 P. 650 (1907)); see also *State ex rel.*

Liberty Lake Irrig. Co. v. Superior Court, 47 Wash. 310, 313-14, 91 P. 968 (1907) (“[i]f [the riparian] is not using the water and does not propose to use it as soon as practicable in the ordinary and reasonable development or cultivation of his lands, then there is no reason why the water should be withheld from others who need and will promptly use it if permitted”).

RCW 90.03.040 allows, among other things, condemnation of a water right for a proposed superior use. Shortly after the statute's enactment in 1917, the court held that a nonriparian owner could condemn a riparian's right, where the nonriparian sought immediate use for power while the riparian intended future use. *State ex rel. South Fork Log Driving Co. v. Superior Court*, 102 Wash. 460, 470, 173 P. 192 (1918).

Appropriative rights thus played an early and vital role in this state's water law and, with erosion of the riparian rights doctrine, have become the dominant form of water rights in this state. This evolution occurred because of the enormous importance, given the limited availability of water, of actual beneficial use of water to develop land, and of rejection of speculative interests.

See, e.g., *State ex rel. Liberty Lake Irrig. Co.*, 47 Wash. at 313-14. The importance of water in this state simply cannot be overstated. We conclude that the Legislature's declaration that beneficial uses are public uses, coinciding with its choice of prior appropriation as the sole basis for acquisition of new water rights in this state in 1917, is entitled to deference.

Our conclusion accords with the laws of other western states that provide that condemnation of any property or rights necessary to apply water to beneficial use is a *141condemnation for a public use. The Idaho State Constitution provides that [t]he necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose... is hereby declared to be a public use....

Private property may be taken for public use [provided just compensation is paid].... Idaho Const. art. I, § 14. Colo. Rev. Stat. § 37-86-102 provides that “[a]ny person owning a water right or conditional water right shall be entitled to a right-of-way through the lands which lie between the point of diversion and point of use or proposed use for the purpose of transporting water for

beneficial use in accordance with said water right or conditional water right.” The Colorado Supreme Court held in *In re Application for Water Rights of Bubbs*, 200 Colo.

21, 610 P.2d 1343 (1980) that the owner of a conditional water right was authorized to condemn a right of way to transport water for beneficial uses. The court noted that the ultimate sources of the state statute were article II, section 14 and article XVI, section 7 of the Colorado Constitution.

The first of these constitutional provisions provides that private property shall not be taken for private use without the consent of the owner, “except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.” Colo. Const. art. II, § 14.

The second provides for rights of way across public, private and corporate lands for transportation of water for domestic purposes, irrigation, mining and manufacturing and drainage, upon payment of just compensation.

In *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970), the court examined state constitutional and statutory law governing condemnation of rights of way to transport water. The court noted that N.M. Stat. Ann. § 75-1-3 provides a right in “ ‘any person, firm, association *142or corporation’ ” to condemn land for a right of way for “ ‘construction, maintenance and operation’ ” of “ ‘canals, ditches... pipelines or other works for the storage or conveyance of water for beneficial uses.’ ” *Kaiser Steel*, 467 P.2d at 988 (quoting statute).

The court observed that the state constitution allows condemnation only for public uses. *Id.* The court then described the state’s history of water rights, noting that the prior appropriation system had been adopted given that “[w]ater conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.” *Id.* at 989.

The court held that it was not the ultimate use of the water that controlled the issue of public use, but rather beneficial use of the water. *Id.* at 991. Significantly, the court said that while it had held that irrigation uses were public uses in earlier cases, “[w]e do not suppose for a moment that it is the use for growing crops or producing food that has moved this Court to hold as it has concerning irrigation as a public use.

Rather, it must have been the fact of beneficial use of water which unquestionably is of the greatest importance to this state, that dictated the result.” *Id.* The court said that “[i]n view of our state’s environmental situation, the distribution of water is of paramount importance, justifying the defining of such distribution as a ‘public use.’ ” *Id.* at 993.

The same is true in Washington. Where water is limited, where water rights do not depend upon riparian access to water, and where application of water to beneficial use is required to hold a

water right, distribution of water is imperative and so is the ability to acquire a way to convey the water to its place of use.

The Del Rosarios complain, though, that if obtaining a certificated water right is all that is necessary to justify exercise of the power of eminent domain under RCW 90.03.040, then the Department of Ecology determines property rights issues which it has no right to determine. One seeking a water right in this state must apply for a *143permit, which may be issued only if the Department finds (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare.

RCW 90.03.290. (Appropriations of groundwater must comply with surface water code provisions, RCW 90.03.250 to .340, which are expressly incorporated into the groundwater code. RCW 90.44.060.) A permit, and ultimately a water right certificate, may be obtained only where water is applied to beneficial use. “The principle that water must be used for a beneficial purpose is a fundamental tenet of the philosophy of water law in the West.” *Dep’t of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997). “ ‘An appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon the land.’ ” *Dep’t of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993) (quoting *Neubert v. Yakima-Tieton Irrig.*

Dist., 117 Wn.2d 232, 237, 814 P.2d 199 (1991)). Perfection of an appropriative right requires that appropriation is complete only when the water is actually applied to a beneficial use. See, e.g., *Ellis v. Pomeroy Improvement Co.*, 1 Wash. 572, 21 P. 27 (1889).⁶ The Department must, in reaching a decision on a water right application, consider beneficial use and the public welfare, as well as whether the proposed use would be consistent with the highest feasible use of the water and with achieving the maximum net benefits to the people of the state, see RCW 90.03.290 and RCW 90.54.020(2).

The Legislature has delegated to the Department the authority to issue water rights in compliance with the relevant statutes. The Department, in issuing a water right, makes no determination of any interests in land, but *144instead carries out its delegated duties, as indeed it must.

As a separate matter, the Legislature has also declared that beneficial uses are public uses for purposes of eminent domain. Whether the power of eminent domain may be exercised is a constitutional and statutory issue legally distinct from the Department’s acts in issuing water rights. *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 340, 753 P.2d 555 (1988), relied upon by the Del Rosarios, actually supports our analysis.

In *Crescent Harbor*, the question was whether a corporation organized to own and maintain an existing water supply system had acquired a prescriptive easement over Lyseng’s property. Lyseng argued that the corporation had failed to allege compliance with provisions of the water code, had

failed to join as a necessary party under the code, and had failed to exhaust administrative remedies under water rights statutes.

The Court of Appeals rejected these arguments on the ground that a determination of a water right is a different legal matter from the determination whether a prescriptive easement was acquired. *Crescent Harbor Water Co.*, 51 Wn. App. at 340.

As the court correctly said, and as is true here, the Department has no authority to adjudicate private property rights. *Id.* Our discussion of the public use question sets the stage for discussion of the necessity question. RCW 90.03.040 provides that the right of eminent domain may be exercised by any person “to acquire any property... when found necessary for... the application of water to[] any beneficial use.” (Emphasis added.) “The word ‘necessary,’ when used in or in connection with eminent domain statutes, means reasonable necessity, under the circumstances of the particular case.” *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683-84, 399 P.2d 330 (1965) (citing *State ex rel.*

Lange v. Superior Court, 61 Wn.2d 153, 377 P.2d 425 (1963)). However, rather than determining whether the Hallauers established that a right of way across the Del Rosarios’ land was necessary in order to put water from the spring to beneficial use, as RCW 90.03.040 directs, the Court of Appeals applied RCW 8.24.010. That court read RCW 8.24.010 as providing that an easement for transporting water may be condemned only where the land on which the water is to be used is landlocked: “An owner... of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment” is authorized to condemn such an easement.

RCW 8.24.010.7 The court reasoned that the Hallauers must show both a public use and reasonable necessity, and they had failed to show the latter because the Hallauers’ property is not landlocked, other forms of energy are available to heat and cool their home, and alternate sources of water are available. This analysis overlooks the fact that RCW 90.03.040 does more than declare that beneficial use of water is a public use.

The statute also provides that any person can condemn a right of way to transport water where necessary to apply the water to beneficial use. RCW 90.03.040; *State ex rel. Lincoln v. Superior Court*, 111 Wash. 615, 191 P. 805 (1920) (Laws of 1917, § 4 at 448 permits condemnation of ditch by one of its owners and cotenants for carrying additional water from another source to its lands); *State ex rel.*

Gibson v. Superior Court, 147 Wash. 520, 266 P. 198 (1928) (RCW 90.03.040 and Const. art. I, § 16 provide for the right of condemnation of rights of way to transport water over the lands of another for domestic and irrigation purposes).

Thus, in marked contrast to RCW *1468.24.010, RCW 90.03.040 does not require necessity based upon the landlocked nature of the condemnor’s property, but expressly states the relevant necessity

as “necessary for the storage of water for, or the application of water to, any beneficial use.” (Emphasis added.)

We recognize that the Court of Appeals’ analysis is supported by *State ex rel. Henry v. Superior Court*, 155 Wash. 370, 284 P. 788 (1930). There, the court reasoned that Laws of 1917, ch. 117 is in pari materia with Laws of 1913, ch. 133, which include what is now RCW 8.24.010. 155 Wash. at 374-75.

The court read the two statutes together, and concluded that the same analysis applies as to condemnation of rights of way for transporting water as applies to condemnation of property for a logging railroad easement. 155 Wash. at 375-76.

The court therefore emphasized that in order to condemn a right of way to transport water, the condemnor’s property must be landlocked with no other available water. 155 Wash. at 376. We conclude that the analysis in *State ex rel. Henry* is flawed.

The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999). Such statutes “ ‘must be construed together.’ ” *Id.* (quoting *State v. Houck*, 32 Wn.2d 681, 684-85, 203 P.2d 693 (1949)). “In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974).

If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls. *Wark v. Wash. Nat’l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976); *Pearce v. G.R. Kirk Co.*, 22 Wn. App. 323, 327, 589 P.2d 302 (1979). Courts also consider the sequence of all statutes relating to the same subject matter.

Tunstall v. Bergeson, 141 Wn.2d 201, 211, 5 P.3d 691 (2000), petition for cert. filed (Wash. Jan. 4, 2001). *147In applying the same standard of necessity to condemnation of rights of way for transporting water as applies to private ways of necessity under RCW 8.24.010, the analysis in *State ex rel. Henry* failed to give any effect to RCW 90.03.040. Both statutes contemplate rights of way for transporting water.

RCW 8.24.010 provides for the right of eminent domain if the condemnor’s land is so situated that a right of way across the land of another to transport water for agricultural, domestic, and sanitary purposes is necessary for the proper use and enjoyment of the condemnor’s land. RCW 90.03.040 provides for the right of eminent domain to any person if necessary for the application of water to beneficial use.

Although the goal is to read statutes related to the same subject together if possible, there is an obvious conflict between the statutes where rights of way to transport water are concerned. RCW 90.03.040 is the more specific of the statutes regarding condemnation for transportation of water and is also the later of the enactments. These two factors indicate that insofar as the statutes conflict, RCW 90.03.040 prevails.

Wark, 87 Wn.2d at 867; Pearce, 22 Wn. App. at 327. This does not mean that RCW 8.24.010 is without import. That statute still applies insofar as condemnation of private ways of necessity are condemned, both prescribing whether eminent domain for such ways is authorized and defining such ways. It also may be relied upon where condemnation of a right of way for drains, flumes, or ditches for agricultural, domestic or sanitary purposes is necessary for the proper use and enjoyment of the condemnor's land, i.e., landlocked land.

It cannot apply, however, to preclude condemnation of rights of way to transport water as authorized by RCW 90.03.040. To the extent that State ex rel. Henry is to the contrary, it is overruled. Our reading of these statutes is bolstered by the last line of the proviso of RCW 90.03.040, which, as we noted above, provides that acquisition of property or rights under the statute shall be "in the manner provided by law for the *148taking of private property for public use by private corporations." The Legislature plainly intended that actions for condemnation of water rights and rights of way to transport water be brought under RCW 90.03.040, with the procedures of chapter 8.20 RCW (eminent domain by corporations) applying, not those of chapter 8.24 RCW.

Further, by directing that the manner for acquiring rights or property be the same as for takings for public use, the legislative intent that the "landlocked land necessity" expressed in RCW 8.24.010 not apply is apparent. This is because RCW 8.20.070 expressly addresses condemnation petitions for proposed public uses and for private ways of necessity.

The Legislature's directive that the procedures and determinations for condemnation for public uses apply plainly indicates it did not intend that the procedures and determinations for private ways of necessity apply.⁸ Our determination that RCW 90.03.040 applies in this case accords with most of this court's decisions in cases where condemnation has been sought for transporting water for beneficial use.

In these cases the court has considered only RCW 90.03.040⁹ and the state constitutional provisions, and has not relied on or referenced RCW *1498.24.010. E.g., State ex rel. Lincoln, 111 Wash. 615; State ex rel. Andersen, 119 Wash. 406; State ex rel. Gibson, 147 Wash. 520; State ex rel. Kirkendall v. Superior Court, 130 Wash. 661, 228 P. 695 (1924); Mack v. Eldorado Water Dist., 56 Wn.2d 584, 354 P.2d 917 (1960).¹⁰ *148At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property

described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing that a jury be summoned, or called, in the manner provided by law, to ascertain the compensation which shall be made for the land, real estate, premises or other property sought to be appropriated, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. *149This court has on several occasions addressed necessity as the need for the right of way to transport the water through the land of another in order to use it for a sufficiently public purpose.

See *State ex rel. Ballard v. Superior Court*, 114 Wash. 663, 195 P. 1051 (1921); *State ex rel. Kirkendall*, 130 Wash. 661. In *Mack*, the appellants held two appropriative water rights. They acquired a right of way for transporting water under the first right over the respondent's property by adverse user.

The system for conveying the water consisted of a small wooden dam and a two-inch pipeline. After acquiring the second water right, the appellants went on respondent's land and constructed a new concrete dam upstream from the diversion point used by respondent for withdrawing water under water rights held by respondent. Appellants then commenced an action under RCW 90.03.040 seeking to obtain the right to maintain the new dam and replace the two-inch pipe with a four-inch pipe.

The trial court entered findings of fact, including the fact that as the stream entered the appellants' land, its height was such that the water could easily be used by the appellants, and therefore there was no necessity for going upon the respondent's land which would give rise to a right for a decree of necessity. *Mack*, 56 Wn.2d at 586. This court upheld the trial court's determination based upon the comparative feasibility of taking the water from a point on the respondent's land or on appellants' land where the same *150stream passed through the property.

Id. at 588. Thus, we recognized the statutory necessity standard, i.e., reasonable necessity for the application of the water to beneficial use. See also *Canyon View Irrig. Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 610, 619 P.2d 122 (1980) (necessity requirement satisfied where alternate route would involve excessive cost and there was no natural waterway to transport water by gravity).

Because RCW 90.03.040 provides for condemnation of rights of way to transport water for application to beneficial use, the *Del Rosarios* and the Court of Appeals have mistakenly relied on

cases involving private ways of necessity where necessity largely turned on the landlocked nature of the land of the party seeking condemnation.

The Hallauers propose to use water under their certificated water right for use in their heat pump and cooling system, and for fish propagation. Their domestic use of water is clearly a beneficial use falling within the Legislature's declaration that beneficial uses are public uses. See RCW 90.54.020; *State ex rel. Gibson*, 147 Wash. at 523 (“[t]he advantageous use of the water on the lands for domestic purposes clearly appears”); *State ex rel.*

Andersen, 119 Wash. 406. It is also a use that the constitution expressly recognizes as supporting condemnation for a “private purpose.” See Const. art. I, § 16. The necessity for the right of way is obvious. The water right that the Hallauers hold allows withdrawal of water from the spring on the Del Rosarios land.

The only way in which the water can be conveyed to the Hallauers' property is over or through the Del Rosarios' land. Accordingly, the Court of Appeals' holding that necessity has not been established must be reversed.

The Del Rosarios contend, however, that the Hallauers do not have the right to appeal the trial court's decision on their eminent domain claim. This is a new issue raised for the first time in supplemental briefing in this court.

The Del Rosarios cite only one case from the 1950's, *151 and fail to address the rules for appellate procedure. In light of those rules, we have doubts about the correctness of their claim, but decline to address the issue in the absence of sufficient briefing. See *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994); *State v. Hill*, 123 Wn.2d 641, 648, 870 P.2d 313 (1994).

The Del Rosarios also seek attorney fees in this court pursuant to RCW 8.24.030. The Hallauers maintain that if they prevail on this review, the award of attorney fees on appeal should be reversed. Chapter 8.24 RCW does not apply in this case.

Accordingly, the statute does not serve as the basis for awarding attorney fees in this court or in the Court of Appeals. For this reason, aside from any other considerations, we decline to award fees in this court and we reverse the Court of Appeals' award of attorney fees to the Del Rosarios.¹¹ The Court of Appeals is reversed, and this case is remanded for further proceedings.

Smith, Johnson, Ireland, and Bridge, JJ., and Guy and Talmadge, JJ. Pro Tern., concur. The parties dispute the details of the agreement; however, its terms are not important to resolution of this case. In addition to article I, section 16, the constitution also provides that “[t]he use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.” Const. art. XXI, § 1.

RCW 90.03.040 provides in full: The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned in this chapter and use the same in common with the former owner, and including the right and power to condemn an inferior use of water for a superior use.

In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one: PROVIDED, That no properly right in water or the use of water shall be acquired hereunder by condemnation for irrigation purposes, which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land then under irrigation to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity where such land is situated.

In any case, the court shall determine what is the most economical method of irrigation. Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private corporations.

However, even a riparian water right holder might not have sufficient frontage to obtain necessary water. Early statutes allowed for condemnation of rights of ways to obtain water for certain uses. For example, in *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 P. 429 (1910), the court addressed statutes permitting condemnation for rights of ways to transport water for irrigation and mining purposes.

The statutes expressly granted the right to nonriparian proprietors and to riparian proprietors lacking sufficient frontage. *Id.* at 624. Beneficial uses are defined in RCW 90.54.020(1), enacted as part of the Water Resources Act of 1971, chapter 90.54 RCW: Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

There is no question in this case that the Hallauers have a certificated water right. To provide for the possibility that there may ultimately be a determination that the party seeking condemnation of a right of way to transport water does not have a water right, or has lost the right through abandonment or statutory forfeiture, the trial court order can provide for reversion of the right of way interest to the landowner under appropriate circumstances.

See *State ex rel. Kirkendall v. Superior Court*, 130 Wash. 661, 665-66, 228 P. 695 (1924). RCW 8.24.010 provides in full: An owner, or one entitled to the beneficial use, of land which is so

situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be.

The term “private way of necessity,” as used in this chapter, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

RCW 8.20.070 provides: The codification of the statute has changed, although its wording has remained unchanged since the date of enactment. There is also no question of the validity of RCW 90.03.040. First, it is a statute of the type approved by the United States Supreme Court in *Clark v. Nash*, 198 U.S. 361, 25 S. Ct. 676, 49 L. Ed. 1085 (1905).

Second, the court has held that the statute is a valid exercise of legislative power. *State ex rel. Gibson*, 147 Wash. at 523. Because chapter 8.24 RCW does not apply in this case, our comments do not have any bearing on when attorney fees might be awarded under RCW 8.24.030. Following remand and further proceedings, the Del Rosarios may be entitled to attorney fees under chapter 8.25 RCW.

The provisions of that chapter obviously cannot be applied at this stage of proceedings.