Condemnation of Water and Water Rights in Kansas*

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I. INTRODUCTION

The cycle of water abundance and drought has required Kansas throughout its history to attempt to meet these water related challenges.¹ In recent years, the Kansas legislature has enacted laws enabling the establishment of groundwater management districts² and assurance districts,³ adopted minimum streamflow legislation,⁴ adopted the concept of water resources planning through the Kansas Water Plan,⁵ and passed water transfer legislation.⁶ The 1988 through 1992 drought in Kansas and the other plains states focused the attention of planners, administrators, legislators, and legal scholars on how to meet the shortage of good quality water and how best to reallocate limited supplies to meet the demand within river basins and above aquifers. In 1991, the Kansas division of water resources⁷ (DWR) established the Wet Walnut Intensive Groundwater Use Control Area⁸ (IGUCA) in

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7. A division of the state department of agriculture.

8. In the Matter of the Designation of an Intensive Groundwater Use Control Area in Barton, Rush and Ness Counties, Kansas, before David L. Pope, Chief Engineer, Kansas DWR (Jan. 29, 1992) (the DWR’s designation of IGUCAs are unpublished, but are available through the Kansas DWR in Topeka, Kansas). See also KAN. STAT. ANN. § 82a-1036 (1989) (procedure for
west central Kansas to protect the Cheyenne Bottoms wildlife area and in 1992 administered junior water rights on the Republican River. In 1993, the legislature enacted significant changes to the Water Transfer Act.9

Most areas of the state are now fully appropriated10—or in some cases, over appropriated—and the Chief Engineer11 has declared a moratorium on new permits in most regions of the state.12 In the areas affected by a moratorium, cities and industries requiring water will be unable to acquire new permits by making application with the Chief Engineer. These cities and industries may have to purchase or condemn13 the rights.

Purchasing is permissible, although these transfers are complex and difficult.14 The type of transfer transaction varies depending on the circumstances. Water, a water right, or land with a water right can be purchased or leased;15 land that has no appurtenant water right can be acquired with a view toward developing water rights.

Where rights are unavailable for purchase, entities seeking water may have to resort to the power of eminent domain: "[T]he power of the sovereign to take property for 'public use' without the owner's consent."16 The power of eminent domain is an extraordinary remedy

designation of an intensive groundwater use control area).

11. Chief Engineer of the division of water resources; see KAN. STAT. ANN. § 82a-701(h) (1989).
12. See, e.g., Kansas State Board of Agriculture, Division of Water Resources Admin. Policy 91-9 (Nov. 1, 1991) (closing various sections within the boundaries of the Southwest Kansas Groundwater Management District).
13. Powers of a sovereign state include the police power ("[t]he power of the legislature . . . to make . . . laws . . . for the good and welfare of [the] commonwealth . . . ") Sweet v. Rechel, 159 U.S. 380, 386 (1895) (quoting MASS. CONST., part II, c. 1, art. 4)), the power of taxation (see, e.g., United States v. Hester, 137 F.2d 145 (10th Cir. 1943)), and the power of eminent domain (see, e.g., George L. Schmutz, Condemnation Appraisal Handbook ix (1963)). Black's Law Dictionary defines "eminent domain" as "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." Black's Law Dictionary 523 (6th ed. (1990)). Black's defines "condemnation" as the "[p]rocess of taking private property for public use through the power of eminent domain." Id. at 292. While this Article uses the terms interchangeably, technically eminent domain refers to the power, while condemnation refers to the process of exercising the power.
15. Id. at 25.
16. Julius L. Sackman, Nichols' The Law of Eminent Domain § 1.11 (1993) (citation...
from the condemnee’s point of view because property is taken without the condemnee’s consent. While government may have the power to exercise eminent domain and while the Fifth Amendment requires compensation, the condemnee typically resists the taking.\(^{17}\)

Condemnation of water rights is not new in Kansas. In the early 1950s the United States, acting through both the U.S. Army Corps of Engineers and the Bureau of Land Management of the U.S. Department of Interior, condemned water rights in Kansas. These agencies acquired these rights as part of the complete “bundle of sticks” of a property right for the construction of flood control and irrigation projects authorized under the Pick-Sloan Plan.\(^{18}\) The agencies acquired both vested and appropriation rights.\(^{19}\)

This Article deals with eminent domain and condemnation of water and water rights, not with the issue of whether regulations or statutory changes in water law doctrine amount to takings of property for which compensation must be paid.\(^{20}\) This Article admits the power of the

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omitted). In State ex rel. Fatzer v. Urban Renewal Agency, 179 Kan. 435, 438, 296 P.2d 656, 659 (1956), the Kansas Supreme Court stated the public use requirement as follows:

It is elementary that the legislature possesses no power to authorize the appropriation of one’s property for a private use or purpose, but it is equally well-settled that the right to take private property for a public use is inherent in the state, and that the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefor.

See infra notes 195-201 and accompanying text for examples of Kansas cases dealing with the public use question.

17. Federal tax law lessens the negative aspects of condemnation to some extent. Some gains may be treated as capital gains, and recognition of the gain can be deferred if the condemnee acquires replacement property within two years. See 26 U.S.C. §§ 1033, 1231 (1988 & Supp. IV 1992).


19. See Peck et al., supra note 14, at 21 (defining vested and appropriation rights).

20. Under its police power, a state through regulation or through changes in water rights doctrine may adversely affect the value of property rights, including water rights, without effecting a transfer of the rights to the state. If the regulation goes too far, a taking of property may be claimed. For example, in the 1945 Kansas Water Appropriation Act, which effected a change from the riparian system to the prior appropriation system in Kansas, the legislature protected existing riparian and groundwater rights that were being used (as vested rights), but holders of rights not being used lost their rights. See Kan. Stat. Ann. § 82a-704a (1989). The Kansas Supreme Court held that this regulation was not a compensable taking. Williams v. City of Wichita, 190 Kan. 317, 341, 374 P.2d 578, 596 (1962), cert. denied, 375 U.S. 7, reh’g denied, 375 U.S. 936 (1963). The Kansas legislature has given the Chief Engineer power to alter water rights when intensive groundwater use control areas are established under Kan. Stat. Ann. §§ 82a-1036 to -1038 (1989) and recently gave the Chief Engineer power in Kan. Stat. Ann. § 82a-733 (Supp. 1993) to impose conservation measures on existing water right holders. Whether these
state to take property through condemnation and inquires into the state’s current condemnation provisions in the area of water rights. Specifically, this Article will address the following questions: To what extent may cities, other public entities, and private entities condemn water rights under the current law in Kansas? How far from their borders can they go? What interests can they take? Are current Kansas laws clear and adequate to meet the future demand for water? How would water rights be valued in condemnation proceedings? How do other states deal with the subject of condemnation of water rights? Should the fact that condemnation is an extraordinary remedy in the water rights area lead to special protections for the condemnee? Could new, comprehensive legislation eliminate some ambiguities in the current situation?

II. KANSAS CONDEMNATION LAW

A. The Kansas Constitution

Because the power of eminent domain is inherent in state government, it does not depend on expressly enumerated rights in the state constitution.\(^{21}\) The state can delegate the power of eminent domain to agencies,\(^{22}\) municipalities, and quasi-government entities such as special districts.\(^{23}\)

The Kansas Constitution does not expressly grant the power of eminent domain to any agency of the state government. It does restrict, however, corporate power of eminent domain for rights of way “until full compensation therefor be first made in money.”\(^{24}\) Cities are given the general power of home rule as follows:

Cities are hereby empowered to determine their local affairs and government including the levying of taxes . . . and other exactions except when and as the levying of any tax . . . is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class . . . .\(^{25}\)

One could imply that this grant of home rule power includes eminent domain power. Other state constitutions have more express constitut-

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\(^{21}\) Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1923).

\(^{22}\) Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

\(^{23}\) See infra part II.B.6 for examples of this delegation.

\(^{24}\) KAN. CONST. art. 12, § 4.

\(^{25}\) Id. § 5(b).
tional grants of eminent domain power. Colorado’s constitution, for example, expressly grants cities the power of eminent domain for water works.\textsuperscript{26} The Colorado Supreme Court has held that an eminent domain statute that required a finding of necessity before exercising eminent domain was unconstitutional in light of the state constitution’s express grant of home rule power to cities.\textsuperscript{27}

\section{Kansas Statutes}

1. Introduction

Kansas grants numerous governmental agencies and some private corporations the power of eminent domain.\textsuperscript{28} Kansas also has an act governing condemnation procedures for most of the entities granted this power.\textsuperscript{29} Indeed, Kansas has a long history of granting condemnation powers involving water. In Kansas territorial days, for example, private condemnation was possible for building mills and mill-dams.\textsuperscript{30} A riparian owner on one side of a stream could construct a dam,\textsuperscript{31} then flood and take by private condemnation one acre of the adjacent owner’s land.\textsuperscript{32} The owner first had to file a petition in court\textsuperscript{33} and have a jury summoned by the sheriff to determine need and damages.\textsuperscript{34} Similarly, a statute enacted in 1867, which is still in effect, enables “any person, corporation or city” erecting a mill-dam or dam for generating power to use condemnation power for various purposes.\textsuperscript{35} Statutes dating from 1891 and still effective today allow condemnation by “[a]ny person, association or corporation” for building dams, canals, reservoirs, and other works for domestic or industrial uses,\textsuperscript{36} and “any person or corporation” can take land for a “public mill or manufactory.”\textsuperscript{37}

\begin{footnotes}
\footnotetext{26}{See e.g., COLO. CONST. art. XX, § 1 (providing that a home rule municipality “shall have the power, within or without its territorial limits, to . . . condemn . . . water works . . . and everything required therefore, . . . by right of eminent domain . . .”).}
\footnotetext{27}{City of Thornton v. Farmers Reservoir & Irrigation Co., 575 P.2d 382, 388 (Colo. 1978) (en banc).}
\footnotetext{28}{See infra part II.B.6.}
\footnotetext{29}{See infra part II.B.5.}
\footnotetext{30}{1855 Kan. Terr. Laws ch. 113.}
\footnotetext{31}{Id. § 2.}
\footnotetext{32}{Id. § 5.}
\footnotetext{33}{Id.}
\footnotetext{34}{Id. §§ 8, 18.}
\footnotetext{35}{KAN. STAT. ANN. §§ 82a-101, -102 (1989).}
\footnotetext{36}{KAN. STAT. ANN. § 42-317 (1993).}
\footnotetext{37}{Id. § 42-318.}
\end{footnotes}
2. The Water Appropriation Act

Section 701(g) of the Kansas Water Appropriation Act defines a water right as "a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance."38 Since this section does not mention involuntary conveyances, such as condemnation or tax foreclosure sales, it may mean that if land with an appurtenant water right is condemned, the water right would not pass unless that water right were specifically described in the condemnation documentation.39

This definition also suggests that because a water right is a real property right, a statute granting power to an entity to condemn "land" or "land or interests in land," and which does not expressly mention water rights, includes the power to take water rights separate from the appurtenant land if necessary to achieve the public purpose. Section 77-201 of the Kansas Statutes Annotated, which defines words and phrases to be used in statutory construction, defines "land," "real estate," and "real property" to "include lands, tenements and hereditaments, and all rights to them and interest in them, equitable as well as legal."40 "Personal property" is defined to include "money, goods, chattels, evidences of debt and things in action,"41 and "property" is defined to include "personal and real property."42 In the following discussion of the statutory powers of various entities to take land, a broad reading would include the right to take a water right instead of, in addition to, or as part of, the land. A narrower reading is also possible. One need not consider that a water right in a prior appropriation state like Kansas is one of the sticks in the bundle. In Kansas, mere land ownership does not confer water rights. One must apply separately for a water right and may be criminally liable for using water without a permit.43 For this reason, one could argue that words like "land" or "real property" in condemnation statutes do not include appurtenant water rights (and that to have the power to take water

38. Id. § 82a-701(g) (1989).
39. Arguably another interpretation of this section is that a water right cannot pass with the land in an involuntary transfer, but rather only in voluntary transfers. Because the U.S. Army Corps of Engineers took large numbers of water rights along with the bottom land in their land acquisitions for reservoirs, this construction of the statute would render these water rights condemnations nullities.
41. Id.
42. Id.
43. Id. § 82a-728 (1989).
rights, one must have express statutory power conferred with the term "water right"). If the statute, however, says the condemnor may take "any interest in land" or the like, water rights would be one of the interests that could be taken.

Because a water right is an interest in land and thus generally subject to transfer or condemnation, a water right involves more than just a quantity of water. Attributes equally as important as the rate of diversion and the total amount of water per year under a water right are the priority date, the type of use, the appurtenant land, the rate of consumption, and the historic use. A condemnor of a water right gets only what the condemnee owns, and sometimes will get even less. All other things being equal, a vested right44 is better than an appropriation right because a vested right has a priority date superior to all appropriation rights.45 All water rights are subject to diminution when administered at the call of more senior rights, or when affected by the establishment of an IGUCA.46 Nature can diminish even senior rights during serious drought conditions. Thus, depending upon conditions, a condemnor of a water right could end up with a less valuable interest than that originally condemned.47

Section 705 states that no person48 can "acquire" an appropriation right to use water other than for domestic use, without prior approval from the Chief Engineer.49 This section was probably intended to refer to obtaining original permits from the Chief Engineer. The language, however, is broad enough to be read as requiring the Chief Engineer's approval whenever a water right is "acquired" through purchase or condemnation. Under this broad interpretation, if any entity, including the state, were to condemn water rights, approval of the Chief Engineer would be necessary. Approval would be necessary even if no change under section 708b or transfer under the Water Transfer Act were involved.

Statutory and administrative controls on changes and transfers affecting voluntary purchases of water rights would also affect involuntary transfers such as condemnation. The following factors may all play a role in decisions about whether to condemn and how much

44. A vested right is one based on use prior to the enactment of the 1945 Water Appropriation Act. See id. § 82a-701(d).
45. Id. §§ 82a-701(d), -701(g), -704a.
47. See discussion infra part II.D. for more detailed information about valuation of water rights.
49. Id. § 82a-705.
a water right is worth: the Water Transfer Act;\textsuperscript{50} minimum streamflow legislation;\textsuperscript{51} limitations on changes in consumptive use;\textsuperscript{52} limits on all water rights to the amount of water actually needed by an appropriator;\textsuperscript{53} statutory conservation plan requirements;\textsuperscript{54} loss for non-use;\textsuperscript{55} and permission from the Chief Engineer for changes in type of use, place of use, and point of diversions.\textsuperscript{56}

The Chief Engineer’s power and duty to consider applications for changes presents an interesting problem in the condemnation area. Section 708b states that “[a]ny owner . . . may change” the attributes of the water right by obtaining prior approval of the Chief Engineer.\textsuperscript{57} A condemning city would not want to condemn an irrigation water right if it could not obtain permission to change the right to municipal use. Nor would a condemning power company want to condemn a recreation water right if it could not change the right to industrial use. But the condemnor does not become an “owner” until the condemnor pays the amount of the appraiser’s award to the clerk of the district court.\textsuperscript{58} In voluntary transfers of water rights through contracts, the purchaser can condition the sale on the ultimate approval of the necessary change by the Chief Engineer. The Chief Engineer will allow the contract purchaser to file the application because the purchaser becomes the equitable owner upon the signing of the contract. But a condemnation cannot be conditional on the change approval.\textsuperscript{59} The condemnor can abandon the proceedings by not paying the appraisers’ award into court. Because the payment must be made within thirty days from the date the appraisers’ report is filed,\textsuperscript{60} which is much less time than it takes the

\textsuperscript{50} Id. §§ 82a-1501 to -1506 (1989 & Supp. 1993).
\textsuperscript{51} Id. §§ 82a-703a, -703b & -703c (1989).
\textsuperscript{52} KAN. ADMIN. REGS. 5-5-3 (1992).
\textsuperscript{53} KAN. STAT. ANN. § 82a-707(e) (1989).
\textsuperscript{54} Id. § 82a-733 (Supp. 1993).
\textsuperscript{55} Id. § 82a-718 (1989).
\textsuperscript{56} Id. § 82a-708b (Supp. 1993).
\textsuperscript{57} Id.
\textsuperscript{58} Id. § 26-507 (1993).
\textsuperscript{59} At issue in Lemmon v. Hardy, 519 P.2d 1168 (Idaho 1974), was whether an entity without a possessory interest in land could obtain a water right appurtenant to that land. Id. at 1168. The court cited two earlier Idaho cases which stated that where the entity trying to acquire water rights (in these cases power companies) had condemnation power, they had the power to acquire the necessary land and thus could get the water right without being an owner of the land. Bassett v. Swenson, 5 P.2d 722, 724-25 (Idaho 1931); Marshall v. Niagara Springs Orchard Co., 125 P. 208, 213 (Idaho 1912). By analogy, section 708b could be read to permit a Kansas entity with eminent domain power, such as a city or a power company, to file for the change as the “owner” because it can become the owner by complying with the Eminent Domain Procedure Act. KAN. STAT. ANN. §§ 26-501 to -517 (1993).
\textsuperscript{60} KAN. STAT. ANN. § 26-517 (1993).
Chief Engineer to pass on a change application, section 708b presents a difficult impediment to condemnation.

Condemnation is not necessary in cases where the holder of a water right seeks water from the same water source being used by someone without water rights. Section 716 of the Water Appropriation Act states that persons with water rights acquired under the Act may enjoin common-law claimants without vested rights "without first condemning those common-law rights." Section 728 has made it unlawful to use water without a permit since 1981, and sections 704a through 704c mandated the certification of all vested rights by 1980. Consequently, holders of water rights theoretically should not have to use section 716 anymore because there should no longer be "common-law claimants without vested rights" using water in Kansas.

An important, but problematic, section of the Water Appropriation Act regarding condemnation of water rights is section 707(b), which provides a preference list:

Where uses of water for different purposes conflict, such uses shall conform to the following order of preference: Domestic, municipal, irrigation, industrial, recreational and water power uses. However, the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it. The holder of a water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this state, other than through condemnation.

The section establishes preferences for conflicting uses of water, but then states that the priority date, not the type of use, is crucial in times of shortage. Moreover, it mentions condemnation, but does not expressly grant condemnation power.

This section has never been construed by a Kansas appellate court. Its meaning has been an enigma to water law professors, law students, practitioners, administrators, and others. Part of the problem in

61. Id. § 82a-716 (1989).
62. Id.
63. Id. § 82a-707(b); see also KAN. ADMIN. REGS. 5-1-1(f) (1992), which adds several "beneficial uses": stockwatering, artificial recharge, hydraulic dredging, and contamination remediation.
64. KAN. STAT. ANN. § 82a-707(b) (1989).
65. See, e.g., Frank J. Trelease, Preferences to the Use of Water, 27 ROCKY MTN. L. REV., 133, 134, 136, 148-49 (1955). Trelease says that "[w]hile this clause would be subject to the possible construction that it created true preferences, its setting seems to indicate that it is only a guide to the state water authorities in choosing between applications for different purposes pending at the same time." Id. at 149. See also Peter N. Davis, Australian and American Water Allocation Systems Compared, 9 B.C. INDUS. & COM. L. REV. 647, 695-96 (1968); KANSAS WATER
interpreting section 707(b) is that the preference list predated\textsuperscript{66} the 1945 Water Appropriation Act. When the 1945 Act was codified, the preference list was incorporated into section 707.\textsuperscript{67} Professor Shurtz analyzed the section as it appeared in its original codified form in 1945.\textsuperscript{68} The recommendations in his 1956 study resulted in amendments in 1957,\textsuperscript{69} including the current language regarding condemnation.

Depending upon how section 707(b) is read, it could apply to at least three types of situations.\textsuperscript{70} One involves initial granting of water rights (Type I). A second involves conflicts among water users, where condemnation might provide a solution (Type II). A third situation involves an entity that needs water, but has no current water rights (Type III).

Type I situations arise when two permit applications arrive in the Chief Engineer’s office at the same time, or are being considered at the same time although one arrived earlier. In the former case, the Chief Engineer could prefer one application over the other based on the preferences enumerated in section 707; in the latter, the Chief Engineer could condition approval of one application on its being inferior, even though the application’s priority date is senior.\textsuperscript{71}

Type II situations would involve conflicting water rights in times of shortage. A city with a senior right could have a junior irrigation right shut down, based on general prior appropriation principles. If the city is junior to the irrigator, the city would get no water despite its higher position on the section 707(b) preference list. This situation exists

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\textbf{RESOURCES BOARD, BULLETIN NO. 3, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER 118-23 (1956) [hereinafter REPORT]; Peck, supra note 10, at 176-77.}
\textsuperscript{66} The preference list appeared in the General Statutes of Kansas § 24-903 (1935) and was originally enacted in 1917. Act of Mar. 13, 1917, ch. 17 § 6, 1917 Kan. Laws 218.
\textsuperscript{67} KAN. GEN. STAT. § 82a-707(b) (Supp. 1945).
\textsuperscript{68} REPORT, supra note 65, at 118-23.
\textsuperscript{70} A fourth situation existed when Professor Shurtz wrote his report in 1956. He suggested that the preference list could be used to solve conflicts where no water rights are involved. REPORT, supra note 65, at 119-21. In 1956, one could use water in Kansas without obtaining a water right. One would have to cease one’s use in favor of a person with a water right, but there was no prohibition against using water without a water right. Since 1981, it has been unlawful to use water without a permit in Kansas. KAN. STAT. ANN. § 82a-728 (1989).
\textsuperscript{71} KAN. STAT. ANN. § 82a-712 (1989) allows the Chief Engineer to condition any permit “as he or she shall deem necessary for the protection of the public interest.” Professor Shurtz discussed this interpretation and suggested a possible amendment that would have clearly provided for this procedure, but warned against such “half developed ideas,” because application of the preference list to pending applications “would require a complete re-examination of all applications pending at the time of each processing and the clerical burden would be entirely out of proportion to benefits gained.” REPORT, supra note 65, at 120; see also Trelease, supra note 65, at 149.
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because section 707(b) provides that priority, not preference, governs. The city could, however, condemn the irrigator’s water right because the city has condemnation power.

Another Type II example might involve a conflict between an electric utility (industrial use) and an irrigator. If the utility has the senior right, it is secure because of prior appropriation principles. If it is junior, however, it would lose. Could it condemn the irrigator’s water right? Like cities, electric utilities have statutory condemnation power. But irrigation use is higher on the preference list of section 707(b) than industrial use, leading one to question whether this ordering could preclude condemnation. Section 707(b) does not answer the question directly. Professor Trelease suggested that the ordering of preferences could preclude condemnation. This reading leads to the conclusion that a condemnor must satisfy two conditions in order to condemn a water right: (1) It must have statutory condemnation power, and (2) its proposed water use must be higher on the preference list than the condemnee’s water use.

Whether an electric utility could condemn the water rights of a competitor that produces hydropower presents still another Type II legal question that section 707(b) does not clearly answer. Industrial use is higher than water-power use, but the end product, electricity, is the same. Furthermore, while domestic users are the most protected and would not be subject to condemnation under this broad reading of section 707(b), they themselves do not have condemnation power. Which entities have condemnation power is discussed below.

Type III situations are not expressly addressed in section 707(b). This section does not prohibit a city without a water right from condemning an irrigation right. Nor does it expressly prohibit a utility without a water right from condemning an irrigation right. Read broadly, however, section 707(b) could be construed as establishing preferences that would preclude condemning water from a user whose use is higher on the preference list than the condemnor’s prospective use.

73. See infra part II.B.6.a.
74. See note 171 infra.
76. "[I]t is possible that the effect of these is to embody the Washington system of flexible condemnation ... [t]he most striking feature ... [of which] ... is a flexible system of eminent domain by which any person seeking to put water to a beneficial use may condemn ‘inferior’ uses for ‘superior’ ones ... ." Trelease, supra note 65, at 149, 157.
77. See infra part II.B.6.
These hypothetical situations illustrate that section 707 could create problems when condemnation is necessary. At the commencement of a condemnation proceeding, a condemnor may have senior rights, junior rights, or no water rights at all. The condemnee’s right may be senior or junior to the condemnor’s right, and its use may be higher, lower, or at the same level of the preference list as the condemnor’s use. New water rights condemnation legislation could address these ambiguities.

3. The Water Transfer Act

The legislature passed this Act in 1982 to give broader oversight and review to major water diversions. Prior to 1982, water theoretically could be diverted and transported anywhere in the state, albeit with numerous hurdles, with the permission of the Chief Engineer. Diversions were possible if the water right were an appropriation or vested right, or with the permission of the Kansas Water Office if the water were obtained pursuant to a contract under the state water marketing program.

The Water Transfer Act defines a water transfer to include any movement of water in the amount of 2,000 acre feet or more over a distance of more than 35 miles. Persons seeking a water transfer have to apply to the Chief Engineer. A three-person panel consisting of the Chief Engineer, the Director of the Kansas Water Office, and the Secretary of the Department of Health and Environment appoints a hearing officer to conduct a hearing. After a hearing during which the hearing officer considers a number of factors—including the environment, water supply, and conservation plans—the hearing officer may approve the transfer application. The panel then passes on the application.

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79. See Peck, supra note 10, at 164-70.
81. Id. § 82a-1503(a).
82. Id. §§ 82a-1501a, -1502.
83. Id. § 82a-1504(a) (requiring the hearing officer to consider factors listed in § 82a-1502(c)).
84. Id. At the time of the writing of this Article, only one such transfer application has been submitted—that of Johnson County Water District No. 1, for a diversion from the Missouri River. Under procedures existing prior to the 1993 amendments to the Transfer Act, the Panel approved the transfer, and the Water Authority approved the Panel’s recommendations, except that the Authority imposed stringent water conservation measures on the Water District. The Water District appealed that decision to the district court, which reversed the order in regard to the Authority’s imposition of conservation measures. The Kansas Court of Appeals affirmed the district court. Water Dist. No. 1 v. Kansas Water Auth., 19 Kan. App. 2d 236, 246, 866 P.2d 1076, 1083 (1994).
The Transfer Act is relevant to the condemnation question because any condemnation of rights that would involve a diversion of water within the definition of the Act must comply with the procedures of the Act. Therefore, any proposed water rights condemnation legislation should consider its interplay with the Water Transfer Act.

4. The Irrigation Statutes

Chapter 42 of the Kansas Statutes Annotated, titled “Irrigation,” contains an assortment of laws generally dealing with irrigation and irrigation districts.\(^85\) Much of the law was enacted prior to 1900, and the legislature has repealed many sections to enable more recently enacted statutes to govern.\(^86\) Many sections, however, are still effective and must be construed with other statutes.

Three sections of Chapter 42 relate to condemnation. The first, section 120, empowers canal corporations to take land by eminent domain for their ditches and canals.\(^87\) The second section, section 309, states that “[e]very vested right of prior appropriation or diversion of water for industrial uses shall be subject as to the right of eminent domain” in the same manner as other private property is condemned.\(^88\) The problem with this language in section 309 is that the term “vested right” did not have its current meaning when section 309 was enacted in 1891. The 1945 Water Appropriation Act defined “vested right” as a right being used in 1945, when the Act went into effect.\(^89\) The legislature was attempting to protect existing vested rights from all new appropriation rights. Moreover, section 309 was part of a larger act passed in 1891 that applied only to the part of the state lying west of the ninety-ninth meridian.\(^90\)

The same problem exists with section 315, the third relevant irrigation statute, which states that “[e]very right of use of water under this act shall be subject as to the right of eminent domain, and, as public interest and economy may require, may be condemned and

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86. KAN. GEN. STAT. § 42-301, for example, which was repealed when the Water Appropriation Act was enacted in 1945, (ch. 390 § 25, 1945 Kan. Sess. Laws 665, 671) provided a clear preference list—domestic, irrigation, industrial—for rights west of the ninety-ninth meridian. Act of Mar. 10, 1891, ch. 133, art. 1, § 1, 1891 Kan. Sess. Laws 223, 223. Section 42-301 further provided that diversions for one purpose could not interfere with those of a higher purpose “without due legal condemnation of, and compensation for, the same . . . .” Id. at 224.
88. Id. § 42-309.
compensated for as any other private right or property." 91 Thus, the "right[s] . . . under this act" do not include all water rights in Kansas. 92

5. The Eminent Domain Procedure Act

In an attempt to bring uniformity to condemnation procedures, in 1963 the legislature enacted the Eminent Domain Procedure Act, found at Chapter 26, sections 501 to 517 of the Kansas Statutes Annotated. 93 The Act requires that the procedure set forth in the Act be followed in "all proceedings." 94 A brief summary of these procedures follows. 95

The condemnor initiates a proceeding by filing a verified petition in the county in which the real estate is situated. 96 The district court considers the verified petition of the plaintiff. 97 If at the consideration hearing the judge finds from the petition that the plaintiff has the power of eminent domain and that the taking is "necessary to the lawful corporate purposes of the plaintiff," the judge enters an order appointing three appraisers to determine damages. 98 The court instructs the appraisers for the purpose of determining just compensation. 99 The appraiser's report must be filed in the court within twenty days. 100 The proceeding is administrative in nature with the court sitting only for purposes of the consideration hearing, the appointment and instruction of the appraisers, and the acceptance of the report of appraisers. 101

The proceeding, once begun, will proceed to completion regardless of whether the defendant landowner or the condemnor appear at the appraisers' hearing. 102 Neither pleading, discovery, nor formal evidence are permitted under the Act. Following the appointment and

94. Id. § 26-501(a) (1993).
95. See infra note 215 and accompanying text for further discussion of this Act.
97. Id. § 26-504.
98. Id.
99. Id.
100. Id. § 26-505.
instruction of the appraisers, the administration of the inquisition is shared by the court and the appraisers. The court retains control for the purpose of setting a deadline for the filing of the appraisers’ report, which determines the date of valuation and the amount of just compensation. The court also remains involved for the purpose of answering questions that the appraisers may have. The appraisers are responsible for conducting a view of the property and a hearing. At the hearing, the appraisers may consider whatever comments either the landowner or the condemnor may offer.

Following the appraisers’ hearing, the appraisers prepare the appraisers’ report and file it with the clerk of the court. After the report is filed, the plaintiff pays into the court the amount of the appraisers’ award. Failure to pay means that the plaintiff abandons the condemnation. Either party, the landowner or the condemnor, may appeal the amount awarded as just compensation by filing a notice of appeal within thirty days of the date that the report is filed. The appeal is docketed as a civil action, and the issue of compensation to all parties with an interest in the land is tried de novo to a jury or to a master. If the amount awarded on appeal exceeds the amount of the money already paid in, the court enters judgment against the plaintiff in the amount of the deficiency plus interest; if the amount is less, the court enters judgment for the plaintiff for the return of the difference plus interest.

To stop the administrative proceeding, a defendant landowner must attack the proceeding collaterally in the nature of a suit for injunction. Condemning authorities, both governmental agencies and public utilities, may, in the absence of bad faith, fraud, or abuse of discretion, determine the amount of land needed to be taken for their lawful purposes.

105. Id. § 26-506(a).
106. Id.
107. Id. § 26-505.
108. Id. § 26-507(a).
109. Id. § 26-507(b).
110. Id. § 26-508.
112. Dotson, 198 Kan. at 675, 426 P.2d at 142.
6. Entities with Statutory Condemnation Power

Numerous entities have statutory condemnation power in Kansas. Because there are so many such entities, not all of them are discussed in detail in this Article. Some of those mentioned are relevant to the subject of water rights condemnation; others relate to water projects of one kind or another; still others are mentioned for illustrative purposes only. Some statutes expressly state that certain entities do not have condemnation power. Others prescribe or limit what property can be taken. For example, when county water supply and distribution districts are acquiring existing water supply and distribution systems by condemnation, they must take all of the real and personal property of the existing system.

a. Cities

Condemnation power for cities is found in various sections of the Kansas Statutes Annotated. One broad section gives cities "the right to acquire by condemnation any interest in real property, including a fee simple title thereto . . . [except] . . . solely for street purposes." Under the corporation statutes, municipalities are empowered to condemn "any real property." The board of public utilities (electric or gas) of any city has condemnation power outside the corporate limit of the city. Other sections more narrowly provide power to take various types of property for various purposes.

116. A computer search for all statutes containing the words "eminent domain" or "condemn" (in any form) revealed 411 such separate statutory sections. While a few relate to "condemning" and confiscating property that is illegal or faulty, most relate to eminent domain.

117. E.g., KAN. STAT. ANN. § 74-6608 (1992) (stating that the state biological survey "shall not have the power to acquire by condemnation a fee or any lesser right or interest in real property."); KAN. STAT. ANN. §§ 74-8904, -8905 (1992 & Supp. 1993) (stating that the development finance authority does not have the power of eminent domain).


119. KAN. STAT. ANN. § 26-201 (1993). Cities have power of condemnation, however, to accomplish certain street matters. See e.g., KAN. STAT. ANN. §§ 12-686, -687 (1991) (cities may condemn property when necessary to provide or improve connections between main trafficways); KAN. STAT. ANN. § 13-443 (1991) (cities may condemn property to improve streets).

120. KAN. STAT. ANN. §§ 17-2345(d), -2361 (1988).

121. Id. § 12-808a (1991).

122. KAN. STAT. ANN. § 13-1023 (1991) provides the following:

Private property may be . . . condemned for streets, alleys, levees, market houses, market places, depot grounds, bridges or approaches thereto, public buildings, sewers, to acquire stone quarries . . . and for public parks within or without the city, as may be hereafter needed or required for the use of the city.

Cities may also condemn sites for docks, wharves, and river terminals, id. § 12-672, and for sewer systems, id. §§ 12-622, 13-1030. See also id. § 12-867 (for combined waterworks and sewer systems in certain sized cities); id. §§ 12-3104, 13-1018h (which grant broad condemnation
In regard to water and water rights, the governing body of any city may

[D]am any river not navigable, . . . condemn and appropriate . . . any such land or lands located in or out of the corporate limits thereof, as may be necessary for the construction and operation of waterworks, and . . . condemn, appropriate and divert the water from such river, or so much thereof as may be deemed necessary for such purpose. 123

When using this section, a city would file the suit in the county in which the city is situated, which means that a condemnee from another

powers to cities for sewer system planning, construction, improvement, operation, and maintenance; id. §§ 13-1014, -1015, -1016, -1018 (dealing with rights-of-way for sewerage); id. § 14-714 (for cities of the second class); id. § 12-631v (for sewage-disposal plants); id. § 12-1306 (for parks within or without the city limits); id. § 13-1353 (quoting similar condemnation power to city boards of park commissioners); id. §§ 13-2501, -2514, -2519, -2534, -2536 (for boards of city commissioners, § 13-2542 restricts such takings to areas within five miles of the city limits). Cities have additional condemnation authority for many other types of sites: id. § 12-1401 (for cemeteries); id. §§ 13-1024b, -14d02 (for bridges and viaducts); id. §§ 12-2115, -2123 (for refuse disposal facilities); id. § 12-2202 (for off-street parking stations); id. §§ 13-1374, -1388, -1390 (giving first class cities condemnation power for lands for public parking stations and off-street parking facilities); id. §§ 13-13c05, -13c06 (giving similar powers of condemnation to municipal parking authorities); id. § 13-14b05 (for hospitals in first class cities); id. §§ 14-607, -645, -682, -690 (for hospitals in second class cities); id. § 13-3107 (for transit systems); id. § 3-115 (for airports, all cities are given the same rights in regard to municipal airports, including the right of eminent domain); id. §§ 3-123, -711 (for power to obtain air rights and navigation easements by any political subdivision owning an airport); id. § 73-409 (1992) (for memorials commemorating soldiers).

Cities of the first class (cities with populations of 15,000 or more) with master street plans can condemn "rights-of-way and lands" for roads within three miles of the city limits. Id. § 13-1114b (1991). Cities of the second class (cities with populations between 2,000 and 15,000) may condemn land for streets and alleys, id. § 14-423, for improvement of state or federal highways, id. § 14-556, and for cemeteries, id. § 14-1007a. A city may condemn land when changing grades of streets and alleys, id. § 12-632, -633. See also id. § 13-1326 (giving similar eminent domain authority to city boards of park commissioners). Cities may also condemn land when performing flood protection construction, id. §§ 12-635, -638, and may condemn sites for dams across streams or rivers, id. § 12-1616a.

Cities may condemn sites for public buildings, id. § 12-1736, and for homes for the aged, id. § 12-4908. Cities with redevelopment or urban renewal plans are empowered to condemn "any interest in real property" in connection with their respective plans, id. §§ 12-1773, 17-4747 to -4749 (1988), and, in conjunction with housing authorities, cities have eminent domain authority for "any real property," id. §§ 17-2345(d), -2361. Municipal improvement districts have eminent domain power to acquire "real and personal property." Id. § 12-17.104 (1991). Municipal sewer districts have condemnation power. Id. § 13-1029. City boards or commissions otherwise having power to condemn property have the same power that the city would have for that purpose. Id. § 26-210 (1993). Municipal energy agencies have eminent domain power. Id. § 12-895 (1991).

Certain Kansas cities along the state lines may condemn rights-of-way for street purposes. Id. § 68-506b (1992).

123. Id. § 12-809 (1991).
county must defend in the county where the city is located. Another section provides the following power:

[A] city may establish . . . public wells, cisterns, aqueducts and reservoirs and provide for filling the same and may establish, alter . . . and otherwise improve the channels of watercourses . . . and . . . construct and maintain within or outside of the city limits such channels, tunnels, aqueducts and ditches as may be required and necessary to form an outlet and drain said water carried by such watercourses into a creek, ravine or river . . . for all or any of said purposes such cities may acquire . . . by the exercise of the power of eminent domain . . . within or without the city limits, within five (5) miles therefrom, or within twenty (20) miles therefrom where it is necessary in order to obtain an adequate water supply for such cities, all lands required . . . but no such construction shall be made within the corporate limits of any other city until such city shall first consent thereto.125

Still other sections empower cities of the first class to acquire private property for “water plant[s]”126 or “waterworks for the purpose of supplying such city . . . with water” by condemnation of “all grounds deemed necessary either within or without the city upon which to erect such works . . . and . . . lay pipes.”127

Article 27 of Chapter 12 of the statutes is titled Water Supply, Waterworks and Distribution of Water and deals with cities situated in counties with populations between 30,000 and 40,000.128 This article empowers these cities to contract for common supplies of water and to use condemnation power to acquire “existing sources of water supply, waterworks systems, or portions thereof, necessary for the purposes of the joint project anywhere in the state of Kansas,” but prohibits taking state property or the property of any political subdivision of the state without that party’s consent.129

Legislation enacted in 1955 empowers municipalities in counties of a certain population and assessed valuation to join together to acquire a common supply of water130 and permits them to condemn “existing sources of water supply [and] waterworks systems . . . anywhere in the

124. Id.
125. Id. § 12-694. See also id. §§ 12-845, -846 (cities’ power of eminent domain for public utilities).
126. Id. § 13-1223.
127. Id. § 13-1209; see also id. § 13-2418 (eminent domain procedure for waterworks).
128. Id. §§ 12-2701 to -2715.
129. Id. § 12-2705 (1991); see also id. § 12-2710 (eminent domain procedure for said cities).
130. Act of Apr. 6, 1955, ch. 87, 1955 Kan. Sess. Laws 213 (currently codified at Kan. Stat. Ann. §§ 12-2701 to -2715 (1991)). Affected cities were those in counties with populations between 30,000 and 40,000 and assessed taxable tangible valuations between $78,000,000 and $90,000,000. Ch. 87 § 1, 1955 Kan. Sess. Laws 213, 213. It is not clear from the statutes or the commentary what counties the legislature had in mind when enacting this special legislation.
state of Kansas.” Acquisition under that act was expressly declared to be for a “public use.” Metropolitan authorities of various kinds also have condemnation power.

A foreign municipal corporation with some part of its water plant in the state may condemn property. Under a 1921 resolution adopted by the legislature with the governor’s concurrence, the cities of Kansas City, Kansas, and Kansas City, Missouri, are granted eminent domain authority in Kansas and Missouri regarding acquiring “property, rights and easements” for a waterworks plant. The resolution now appears to be a kind of interstate compact between Kansas and Missouri.

b. Boards of County Commissioners, County Districts, County Authorities, and County Historical Associations

Boards of county commissioners have the power of eminent domain to establish ditches, drains, or watercourses. They may take “lands,

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132. Id. § 12-2710.
133. In metropolitan areas having populations exceeding 120,000, transit authorities can condemn “property [and] rights in property . . . .” Id. § 12-2805; see also id. § 12-2806 (methods of obtaining property). Port authorities may condemn “any land, rights . . . or other property . . . .” Id. § 12-3406(g) (1991). Parking authorities may condemn “real property.” Id. § 13-13c06(b).
134. Id. § 12-810. This statute allows such corporations to:
   [C]ondemn land for the same . . . as well as a route for such proposed water mains . . . and also such land as may be deemed necessary for engine houses, pumping stations, workshops, water stations, intakes, reservoirs, filtering basins, tunnels, shafts and conduits for conveying water, together with all necessary means . . . for building . . . and operating the same . . . . Provided, Such foreign municipal corporation shall not be permitted to condemn any lands actually used by a water company in serving a municipal corporation in the state of Kansas, when the taking of the lands . . . would interfere with the actual operation of such water company’s plant.
135. Joint Resolution of Mar. 18, 1921, ch. 304, 1921 Kan. Laws 471 (included by reference at KAN. STAT. ANN. § 79-205 (1989)). The Mo-Kan Metropolitan Development District, created to help plan and develop the Kansas City metropolitan area under an interstate compact, has condemnation authority for “all rights or property . . . necessary for the purposes of the Mo-Kan agency . . . .” KAN. STAT. ANN. § 12-2514, art. III(13) (1991). The Kansas City area transportation district and authority have similar powers. Id. § 12-2524, art. III(9).
136. KAN. STAT. ANN. §§ 24-201 to -216 (1993) (of particular relevance is § 24-204). See also id. §§ 24-108, -125 (enumerating the powers of condemnation of a county for drainage outside drainage districts). Boards of county commissioners have similar powers to drain swamps, bottoms, or lowlands within the county. Id. §§ 24-301 to -317 (of particular relevance is § 24-305). They are also empowered to take “any necessary land or rights-of-way over the same for the operation of public airports,” id. § 3-305 (1991), “sites” for 4-H buildings, id. § 19-1561 (1988), and memorials commemorating soldiers, id. § 73-409 (1992).
including any and all rights thereon" for public parks,\textsuperscript{137} museums,\textsuperscript{138} recreation grounds,\textsuperscript{139} and county lakes.\textsuperscript{140} Boards may also take "lands, and rights of way or easements" as a condition to the construction of federal flood control works.\textsuperscript{141} Counties have eminent domain power to construct levees\textsuperscript{142} and to maintain and operate water mains.\textsuperscript{143} Geary County Commissioners have condemnation authority to take lands for the purpose of straightening the channel of the Smoky Hill River.\textsuperscript{144} Several statutory sections provide for condemning "lands, water and water rights" for establishing parks and recreational grounds by counties of certain size.\textsuperscript{145} Improvement districts established by counties may take "private property."\textsuperscript{146} Sewer districts may take "real or personal property necessary to provide an adequate sewage system."\textsuperscript{147} 

Boards of county commissioners also may take the following: "any real property" for hospital purposes, \textit{id.} \textsection 19-4613 (1988); "land" for public roads, \textit{id.} \textsection\textsections 68-114, -151c, -703, -730 (1992); road building materials, \textit{id.} \textsection 68-137; "right[s]-of-way" for arterial highways, \textit{id.} \textsection 68-151k; and "lands" for cemetery purposes. \textit{id.} \textsection 19-3104 (1988). In 1941, counties with populations of over 125,000 and assessed valuations of over $150,000,000 were given condemnation power for purposes of acquiring land for an aircraft supply and repair depot both inside and outside the city limits. \textit{id.} \textsection\textsections 3-401, -402, -405 (1991).

\textsuperscript{137} \textit{id.} \textsection 19-2801 (1988).

\textsuperscript{138} \textit{id.}

\textsuperscript{139} \textit{id.}

\textsuperscript{140} \textit{id.} \textsection 19-2803c.

\textsuperscript{141} \textit{id.} \textsection 19-3302. \textit{See also} \textit{id.} \textsection 19-3307 (conferring similar rights upon cities).

\textsuperscript{142} \textit{id.} \textsection\textsections 24-801 to -819 (1993).

\textsuperscript{143} \textit{id.} \textsection 19-2623 (1988).

\textsuperscript{144} \textit{id.} \textsection 68-1231 (1992).

\textsuperscript{145} \textit{id.} \textsection\textsections 19-2814, -2816 (1988) (applying to counties with populations between 80,000 and 175,000); \textit{id.} \textsection\textsections 19-2819, -2821, -2823a (applying to counties with populations over 135,000); \textit{id.} \textsection 19-2834 (applying to counties with populations between 11,000 and 14,000 and valuations between $18,000,000 and $35,000,000). Statutory authority also enables counties of specified populations and assessed valuations to condemn "necessary lands, water and water rights" in establishing joint park and recreational grounds. \textit{id.} \textsection 19-2843; \textit{see also} \textsection 19-2841.

County boards of park commissioners may condemn "sites for park and recreational purposes." \textit{id.} \textsection 19-2855 (Supp. 1993). Park boards may condemn "real estate lying within the county." \textit{id.} \textsection 19-2889 (1988). The Johnson County park and recreation district board is empowered to condemn "real estate lying within or without the park district but not outside Johnson county." \textit{id.} \textsection 19-2867; \textit{see also} \textsection\textsections 19-2868, -2875. County boards in Seward, Shawnee, and Wyandotte Counties may condemn "civic and other multi-use public facilities . . . . \textit{Id.} \textsection 19-15,139.

\textsuperscript{146} \textit{id.} \textsection 19-2765(6) (1988).

\textsuperscript{147} \textit{id.} \textsection 19-27a02(c). Fire protection districts have eminent domain power to take "real property." \textit{id.} \textsection\textsections 19-3601a, -3616. An industrial district established by a county has the power of eminent domain within the district. \textit{id.} \textsection\textsections 19-3801, -3808(5). In a statute enacted in 1941, the legislature gave the Washington County Oregon Trail Association eminent domain powers to acquire lands and improvements. \textit{id.} \textsection 76-2017 (1989). County sports authorities have power to condemn "any and all rights and property, of any kind or character, necessary for the purposes of the authority . . . . \textit{Id.} \textsection 19-28,108(h) (1988).
c. Townships and Township Districts

Townships can establish ditches, drains, or watercourses within the township by using eminent domain.\textsuperscript{148} The joint water district shared by the City of Lansing and Delaware Township can exercise eminent domain within the boundaries of the district.\textsuperscript{149} Townships may construct water mains and acquire water from other entities, but it is unclear whether townships may use eminent domain power to do so.\textsuperscript{150}

d. Various Water Districts

Kansas statutes enable a number of types of water districts to form, with purposes ranging from water supply to groundwater protection and flood control.\textsuperscript{151} Rural water districts, created to provide water to rural areas, are empowered to exercise eminent domain within their boundaries.\textsuperscript{152} Similarly, rural water-supply districts can obtain "real . . . property . . . by will, gift, purchase or otherwise as authorized by law . . . ."\textsuperscript{153}

Public wholesale water supply districts have power to acquire "land and interests in land . . . [by] eminent domain . . . within or without the boundaries of the district."\textsuperscript{154}

\textsuperscript{148} KAN. STAT. ANN. § 24-204 (1993). Townships in counties of certain populations can use condemnation to acquire "land . . . within or without such township" for refuse disposal. Id. § 80-2201 (1989); see also id. § 80-2204. A township owning a cemetery can condemn a site for the construction and operation of a chapel, id. § 80-919, and townships can condemn "any real property . . . for hospital purposes." Id. § 80-2533. Township fire districts have the power of eminent domain for the acquisition of "real property." Id. §§ 80-1514a, -1541 (1989 & Supp. 1993). Township sewage districts have eminent domain powers for their purposes. Id. §§ 80-2009, -2010. Township highway commissioners can condemn land for dams to protect bridges. Id. §§ 68-901 to -908 (1992).

\textsuperscript{149} KAN. STAT. ANN. §§ 80-1616, -1618 (1989).

\textsuperscript{150} Id. §§ 80-1601 to -1611 (granting authority to establish water supplies). These statutes were enacted first in a special session of the 1933 legislature. Act of Dec. 4, 1933, ch. 126, 1933 Kan. Laws Special Session 161. Sections 80-1616 through 1618 create the joint water district between the City of Lansing and Delaware Township, which is given eminent domain power in section 1618 by the phrase "[e]very district incorporated under this act . . . shall have the power to . . . exercise eminent domain within the boundaries of such district . . . ." Id. § 1618(1). It is unclear whether this language applies to sections 1601 to 1611 or just to the special joint district.

\textsuperscript{151} See WATER RESOURCES BOARD, SPECIAL WATER DISTRICTS IN KANSAS (1967). Although this book is outdated because several new types of water districts have been invented since 1967, it is a valuable book that describes the then-existing districts' source of authority, powers, functions, and locations.

\textsuperscript{152} KAN. STAT. ANN. § 82a-619(a)(1) (1989).

\textsuperscript{153} Id. § 82a-606.

\textsuperscript{154} Id. § 19-3552(5) (1988).
Kansas statutes permit Miami, Franklin, Johnson, and Wyandotte Counties to establish water supply and distribution districts, which are quasi-municipal bodies corporate with the power of eminent domain. The districts may exercise eminent domain to acquire "property, both real and personal, as may be necessary to provide an adequate system of water production and distribution facilities," and "suitable grounds . . . for the construction, extension, expansion, operation or maintenance of any mains, waterworks or plants." Johnson County Water District No. 1 is such a district. Similar districts are also permitted in counties having populations of less than 100,000; these districts have condemnation power for "property . . . as may be necessary to provide an adequate system of water production and distribution facilities."

Kansas watershed districts are multi-purpose districts, providing more functions than any other form of district. The functions include flood control, public water supply, irrigation, and sediment control. These districts can condemn "land and interests in land" inside or outside the boundaries of their districts. Irrigation districts, associated with lands downstream from federal reservoirs, are empowered to condemn "rights of way for ditches and canals and sites for dams, reservoirs and pumping plants and all lands, water rights, easements and other property" necessary for their purposes. Groundwater management districts, established in south-central and western Kansas, are created to manage and preserve groundwater resources. Although they do not supply water, these districts can condemn "land and interests in land," but are limited to taking land from within the district boundaries and may acquire no more than one thousand acres of land.

156. Id. §§ 19-3502, -3508, -3509 (1988).
157. Id. § 19-3542.
158. Id. § 19-3511.
159. See WATER RESOURCES BOARD, supra note 151, at 37.
160. Id. § 19-3542. Statutes enacted in 1961 permit the formation of a Johnson County Wholesale Water Supply District, id. § 19-3522 to -3535, which would have the power of condemnation to "take any property within or without the district." Id. § 19-3531(9). The district has not been formed.
161. Id. § 24-1201a (1993).
162. Id. § 24-1209.
163. See id. § 42-701.
164. Id. § 42-711(b).
165. Id. §§ 42-705, -711, -712. Older statutes allow the establishment of other types of irrigation districts that have condemnation power. Id. §§ 42-359 (enacted 1891), -388g (enacted 1933).
166. Id. § 82a-1020 (1989).
by all means of acquisition.\textsuperscript{167} Drainage districts, established by county commissioners, also have condemnation power.\textsuperscript{168}

e. Corporations

Under corporation statutes,\textsuperscript{169} many of which are old but still in effect, condemnation of "right[s] . . . [and] . . . rights of way"\textsuperscript{170} may be employed by numerous types of private corporations.\textsuperscript{171} Canal corporations established for irrigation purposes may "appropriate property"\textsuperscript{172} under the Eminent Domain Procedure Act.\textsuperscript{173} Irrigation corporations organized under the corporation chapter have condemnation power to take "any lands or other property."\textsuperscript{174} Persons or corporations needing the fall of water to operate machinery may condemn "for the erection of a public mill or manufactory . . . such amount of land as may be necessary for the location and construction of such mill or manufactory."\textsuperscript{175} Electric cooperative corporations

\footnotesize
\textsuperscript{167} \textit{Id.} § 82a-1028(f). For an overview of the groundwater management law, see John C. Peck, \textit{Kansas Groundwater Management Districts}, 29 KAN. L. REV. 51 (1980).

\textsuperscript{168} They are empowered to "take private property for public use by exercise of the right of eminent domain and may condemn and remove obstructions in such watercourses." \textit{Kan. Stat. Ann.} § 24-407(4) (1993). See also \textit{id.} § 24-132 (regarding the powers of drainage districts traversed or touched by the Kansas River); \textit{id.} §§ 24-601, -612 (regarding the powers of multi-county drainage districts). Drainage districts within counties or cities may condemn "sufficient rights-of-way or other lands of any railroad company or street-railroad company necessary for constructing and maintaining a continuous levee of uniform height across the same." \textit{Id.} § 24-407(6); see also \textit{id.} § 24-438. Within or without the district boundaries they may take land for constructing any "ditch, levee, dike, jetty, riprap or other protective structure." \textit{Id.} § 24-467; see also \textit{id.} §§ 24-489, -490 (regarding drainage district power to improve certain structures in certain districts). Drainage districts established in valleys of natural watercourses for the purpose of increasing the drainage capacity of the water course, \textit{id.} § 24-501, may use the power of eminent domain "as to all lands necessary to the construction of cutoffs, spillways and auxiliary channels." \textit{Id.} § 24-512(5).


\textsuperscript{170} \textit{Id.} § 17-618 (1988).

\textsuperscript{171} These types include macadam-road, plank-road, hospital, telegraph, telephone, electric, hydraulic, irrigating, milling, manufacturing, oil, and pipeline corporations. \textit{Id.} Cemetery corporations may condemn lands necessary to enlarge their cemeteries. \textit{Id.} § 17-1315.

\textsuperscript{172} \textit{Id.} § 42-120 (1993).

\textsuperscript{173} \textit{Id.} §§ 26-501 to -516.

\textsuperscript{174} \textit{Id.} § 17-627 (1988).

\textsuperscript{175} \textit{Id.} § 42-318 (1993). Corporations engaging in the production of petroleum or natural gas in Kansas may acquire by condemnation "rights-of-way and sites for the disposal of . . . brines and mineralized waters." \textit{Id.} § 55-1003 (Supp. 1993). Natural gas public utilities that have certificates from the Kansas Corporation Commission may condemn "property for the underground storage of natural gas." \textit{Id.} § 55-1205 (1983). Telephone and telegraph companies have
have the same eminent domain powers that other corporations constructing or operating electric transmission and distribution lines or systems have.\footnote{176} Railroad corporations have eminent domain power to take property for various purposes including roads, side tracks, depots, rights to conduct water by aqueducts, and drains.\footnote{177}

f. School Districts and Community Colleges

Unified school districts may acquire “any interest in real property, including fee simple title” for school purposes.\footnote{178} Community colleges are empowered to use condemnation within the boundaries of the community college district to acquire “property . . . or any interest therein” that is necessary or desirable for community college purposes.\footnote{179}

g. State Administrative Agencies

Numerous state administrative agencies have condemnation power: the state fair board and community and county fair associations,\footnote{180} the Secretary of Health and Environment,\footnote{181} the Secretary of Transportation,\footnote{182} the Secretary of State,\footnote{183} the Secretary of Administra-
tion, the Kansas Turnpike Authority, the Board of Regents, the State Historical Society, and the State itself. The Secretary of the Department of Wildlife and Parks may condemn "lands, water and water rights." The State Corporation Commission must give approval in some cases to utilities that want to exercise eminent domain power.

h. Other States and Political Subdivisions

Under a 1921 resolution adopted by the Kansas legislature and concurred in by the governor, and apparently now a kind of interstate compact between Kansas and Missouri, the states of Kansas and Missouri are granted eminent domain authority in Kansas and Missouri regarding the acquiring of "property, rights and easements for a waterworks plant."
i. Miscellaneous Entities

Some statutes are not specific regarding what types of entities are granted eminent domain power. For example, in the Republican River Compact between Kansas, Nebraska, and Colorado, “[a]ny person, entity, or lower State” can use condemnation in an upper state to acquire “necessary property rights” for storage reservoirs or diversion works.192 Because Kansas is a lower state to both Nebraska and Colorado and Nebraska is a lower state to Colorado, only Kansas and Nebraska and persons and entities there can hold this power. But Kansas, because it is a lower state to both Colorado and Nebraska, is not subject to the power.

C. Kansas Cases Involving Condemnation and Water

The numerous statutory sections shown above indicate the breadth of coverage of condemnation power in Kansas.193 Appellate case annotations interpreting these sections are also numerous, but only a few cases have involved water and water rights matters.194

In the 1901 case of Lake Koen Navigation, Reservoir and Irrigation Co. v. Klein,195 a company planned to construct canals into the Cheyenne Bottoms to convert it into a lake.196 An 1899 act had given irrigation companies the power of eminent domain to acquire land for water storage and canals.197 The court upheld the legislature’s power to grant condemnation rights to private companies for public uses.198 The court stated that “[c]ourts determine what is a public use” and because agriculture was by far the state’s most important industry, irrigation was a public use.199

193. See supra part II.B.
194. Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578, cert. denied and appeal dismissed, 375 U.S. 7 (1962), perhaps the most important water law case in Kansas, is not a true condemnation case but is more like an inverse condemnation case. In enacting the 1945 Water Appropriation Act, the legislature protected persons who were using their common law water rights by giving them “vested rights.” Id. at 334-35, 374 P.2d at 591. Persons not using their common law rights simply lost them. Id. Plaintiff, a landowner who had not used groundwater prior to the effective date of the Act, claimed that the state had taken his property and that compensation was due. Id. at 340-41, 374 P.2d at 595. The court disagreed, upholding the constitutionality of the Act. Id. at 340, 374 P.2d at 595. See also supra note 20.
196. Id. at 485-86, 65 P. at 684.
197. Id. at 490-91, 65 P. at 686.
198. Id. at 497-98, 65 P. at 688.
199. Id. at 488-89, 65 P. at 685-86.
In Missouri, Kansas & Texas Ry. v. Cambern, a 1903 case, the question was whether the building of a levee was considered a public use. The court analogized the construction of a levee to the construction of irrigation canals from the Lake Koen case and found levee construction for the purpose of preventing the overflow of water to be a public use.

In Wallace v. City of Winfield, a 1916 case, the plaintiff sued the city to obtain compensation for the water the city was taking from his mill pond. The plaintiff claimed that he owned the water and water privileges, and sought damages based on the cost the city charged its customers for the water. The court held that the plaintiff did not own the water because he had not reduced it to possession. The court further held that the plaintiff was not entitled to damages in the amount of the value of the water based on its sale, but rather based on the "injury to the use occasioned by defendant."

The plaintiff's other claim was that the city had exhausted its right to obtain water privileges because it had previously condemned a right to take water from elsewhere on the river. In other words, the plaintiff argued that once a city condemns a right to take water from a river, it cannot use that procedure again. The court rejected this argument; the right of eminent domain, according to the court, is a continuing right that may be exercised whenever it is deemed necessary by an entity authorized to exercise such power.

Two years later the Kansas Supreme Court handed down Evel v. City of Utica. A city of the third class condemned land outside the city limits for waterworks under a statute that permitted condemnation for certain enumerated purposes and "for any other necessary purpose." The statute did not restrict the place where the water might be obtained. The court noted that generally water for cities is located outside their boundaries, and that the legislature must have contemplat-
ed this fact when writing this legislation.\textsuperscript{214} Courts may not then limit cities where the legislature has not limited them.

\section*{D. Valuation of the Property Taken}

1. Introduction: General Principles and Definitions

When property is taken by eminent domain procedures, an important question for both the condemnor and the condemnee is the value placed on the property.\textsuperscript{215} As a general proposition, the condemnor must

\begin{itemize}
\item \textsuperscript{214} \textit{Id.} at 569, 175 P. at 636.
\item \textsuperscript{215} See Kenneth J. Burke, \textit{Water Rights Valuation and Appraisal}, 37 ROCKY MTN. MIN. L.
INST. § 24.01 (1991) (describing water rights in various legal systems; legal considerations affecting rights to the use of water; methods of measuring and valuing water rights; water markets; and valuation techniques).
\end{itemize}

Several sections of the Eminent Domain Procedure Acl, KAN. STAT. ANN. §§ 26-501 to -517 (1993), allude to valuation. Section 26-504 requires the judge to order appraisers to “view and appraise the value of the lots and parcels of land” and to “determine the damages to the interested parties resulting from the taking.” Section 26-506 requires the appraisers to “make their appraisal and assessment of damages, by actual view of the lands to be taken ... and by hearing of oral or written testimony from the plaintiff and each interested party.” If the plaintiff or defendant is dissatisfied with the appraisers’ award, an appeal can be taken under section 26-508. The only issue to be determined on appeal is “that of just compensation to be paid for the land or right therein taken at the time of the taking and for any other damages allowable by law.” \textit{Id.}

Section 26-513 contains the most specific provisions regarding damages. Because a taking could involve anything from water to a water right to a full fee in land that has appurtenant water rights, the whole section might be relevant in some situations. Section 26-513 reads as follows:

\begin{itemize}
\item (a) \textit{Necessity.} Private property shall not be taken or damaged for public use without just compensation.
\item (b) \textit{Taking entire tract.} If the entire tract of land or interest therein is taken, the measure of compensation is the value of the property or interest at the time of the taking.
\item (c) \textit{Partial taking.} If only a part of a tract of land or interest is taken, the compensation and measure of damages are the difference between the value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.
\item (d) \textit{Factors to be considered.} In ascertaining the amount of compensation and damages as above defined, the following factors, without restriction because of enumeration, shall be given consideration if shown to exist but they are not to be considered as separate items of damages, but are to be considered only as they affect the total compensation and damage under the provisions of subsections (b) and (c) of this section:
\begin{enumerate}
\item The most advantageous use to which the property is reasonably adaptable.
\item Access to the property remaining.
\item Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.
\end{enumerate}
\end{itemize}
make just compensation by paying the market value for the highest and best use.\textsuperscript{216} If only a partial taking is involved, severance damages for the remaining property must be considered along with any benefits derived to the remaining property due to the condemnation.\textsuperscript{217} This section of the Article discusses some of the concepts and terms in this proposition, as they relate to the condemnation of water rights.

These principles are equally applicable to the condemnation of fee interests in irrigated or dry land, water rights, leasehold interests in buildings, or easements. When the United States through the U.S. Army Corps of Engineers and the Bureau of Land Management condemned land in Kansas in the early 1950s for flood control and irrigation projects, it acquired water rights as part of the complete bundle of sticks.\textsuperscript{218} It acquired both vested rights and appropriation rights. Few people, however, paid attention to this process at the time. Condemnees sometimes offered evidence of water rights to support a

\begin{enumerate}
\item Productivity, convenience, use to be made of the property taken, or use of the property remaining.
\item View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.
\item Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land and needed to make the change in the improvement.
\item Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.
\item Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.
\item Destruction of a legal nonconforming use.
\item Damage to property abutting on a right-of-way due to change of grade where accompanied by a taking of land.
\item Proximity of new improvement to improvements remaining on condemnee’s land.
\item Loss of or damage to growing crops.
\item That the property could be or had been adapted to a use which was profitably carried on.
\item Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.
\item Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.
\end{enumerate}

\textsuperscript{217} Id.
claim of increased highest and best use under existing condemnation valuation law. Water rights acquired along with the underlying fee simple title for the development of a flood control project were for a public purpose. All of the property rights were acquired and used for the project purposes. The water rights, however, were merely retired. No reported cases focus on the taking of water rights in Kansas as the primary issue in these valuation proceedings. Only recently have we begun to focus on water rights per se as being property subject to condemnation separate from the land.

How does one value water rights? Water rights are granted by the state for a specified quantity per year, to be used at a stated rate of diversion, from a designated point of diversion, at a designated place of use, for an express purpose. A water right in Kansas is appurtenant to a described tract of land. Condemnation of water rights can involve a range of unique acquisition and valuation problems due to the various circumstances under which the condemnation could arise. These situations include, inter alia, the following: (1) condemnation of irrigated land along with the appurtenant water right; (2) condemnation of a water right and sufficient land necessary for a point of diversion and easements for moving the water off the remaining property; (3) condemnation of a water right with intended changes in the type of use, the point of diversion, and the place of use; (4) condemnation of a water right for the purpose of retiring that right; (5) condemnation of the right to call for administration of a water right; and (6) condemnation of only part of a water right.

a. Just Compensation

Just compensation is the amount of compensation to which a person deprived of property is entitled, in order to place that person in the same economic position had the property not been taken. In the case of a taking of the entire property, just compensation is expressed as the market value of the property. A two-step process is in-
olved. The first step is to assign the highest and best use, and the second is to determine the market value for that use. In the case of a partial taking of property, just compensation is expressed as the difference between the market values before and after the taking. In the case of a partial taking, the process for determining the value before the taking is the same as that in determining value in a total taking case. The process is then repeated for the property remaining after the taking. If the process is completed properly, each step is carried out independently without regard to the other step. By doing this, a court can avoid the common pitfall known as the "summation approach": adding up supposed elements of damage and subtracting the total from the before taking value in order to arrive at a value after the taking. The summation approach violates the unity rule and has been rejected by Kansas courts.

The problem with the summation approach to valuation is illustrated by a condemnee’s attempt to value separately a house, garage, barn, crib, and maple trees, rather than to focus on the property as a totality. In the water rights context, the following example illustrates the problem. A road right of way is acquired by condemnation at a location which destroys the usefulness of an irrigation well and a portion of the irrigated cropland. This leaves the condemnee with only 120 useful acres from the quarter section. Well-spacing regulations preclude drilling a new well. The condemnee may attempt to value separately the irrigation machinery, the cost of drilling and developing a well, and the reduced productivity resulting from the loss of the ability to irrigate. This method violates the unity rule. The appropriate method of valuation is to start a new process by observing the property as it stands after the taking. No consideration is given to what was taken. The court attempts to assign the market value for the highest and best use for that piece of property. Before the taking, a quarter section was used for irrigation purposes with associated machinery to irrigate crops. After the taking, the court is appraising a 120 acre tract that is devoted to the dry-land production of crops. The loss is the difference between the two values.

177.
226. See Burke, supra note 215, § 24.10 at 24-35 to -36.
228. See id. § 26-513(b), (c), (d).
229. "[E]ach of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof." Rostine v. City of Hutchinson, 219 Kan. 320, 323, 548 P.2d 756, 760 (1976).
b. Market Value

“Market value is that amount which would be paid under normal circumstance on the free and open market, in the usual course of dealings, by a willing buyer not forced to buy and which amount would be acceptable to a willing seller not forced to sell.” 231 In making this appraisal of value, the court must determine the value to the condemnee and not the value to the condemnor; 232 that is, the condemnor pays the market value of the property value to the condemnee. For example, a city taking an irrigation right pays for the difference between irrigated and dry land crop production, not the economic impact to the city if the city failed to acquire the water right.


c. Highest and Best Use 233

One of the factors listed in section 513 of the Eminent Domain Procedures Act 234 for arriving at damages is “[t]he most advantageous use to which the property is reasonably adaptable,” 235 commonly called highest and best use. 236 The highest and best use concept, therefore, requires that the guiding factor be the most profitable lawful

231. PIK 2d, supra note 103, at 11.05.
232. Hoy v. Kansas Turnpike Auth., 184 Kan. 70, 83, 334 P.2d 315, 326 (1959). In the 1904 case of Lake Koen Navigation, Reservoir & Irrigation Co. v. McLain Land & Invest. Co., 69 Kan. 334, 76 P. 853 (1904), involving condemnation of land for a Cheyenne Bottoms irrigation project, the court noted that there are two ways to figure market value:

(1) By considering the land condemned and appropriated in a body by itself, and unconnected with the other portion of the ranch in question; (2) by considering it as a part of the whole ranch in question. The plaintiff . . . is entitled to compensation for the damage . . . sustained, and if the market value of the land . . . is greater when considered in one of these two ways than in the other, then he is entitled to such fair and reasonable market value . . . as will compensate him for the loss he has sustained.

Id. at 338, 76 P. at 855. The Supreme Court of Kansas was quoting trial court instructions.

The court also noted that the award should be based on the most advantageous use to which the condemned tract can be put. Id. at 339, 76 P. at 855.

233. This term is variously called “best and most advantageous use” by PIK 2d, supra note 103, at 11.11 or “most advantageous use” by KAN. STAT. ANN. § 26-513(d)1 (1993).


235. Id. § 26-513(d)1.

236. PIK 2d, supra note 103, at 11.11 gives the following instruction for arriving at market value:

In arriving at the market value of the land and interest taken, you should consider all of the possible uses to which the land could have been put, including the best and most advantageous use to which the property was reasonably adaptable, but your considerations must not be speculative, conjectural, or remote. The uses which may be considered must have been so reasonably probable as to have had an effect on the market value of the land at the time of the taking.

See SCHMUTZ, supra note 13, at 8-9, for a definition of “highest and best use.”
use to which a property may be reasonably put,\footnote{237} not necessarily the current use of the property.

Not every piece of property is currently being used for its most profitable use. One should not assume, however, that every piece of property is suitable for the development of a hotel-casino complex or other intensive use. In the water rights context, such an assumption could translate to the erroneous presumption that every water right could be used for bottling the water for sale or for providing the water for beer manufacture. The use to which a property may be put will, in large part, depend upon several factors: The owner's ability to interpret the marketplace; the owner's vision of the future; the location of the property in relation to the economic forces that help create value; and the owner's skill in marshalling capital. For that reason, although property naturally gravitates toward its highest and best use,\footnote{238} the existing use of a particular piece of property may be an underutilization of the property. Likewise, there may be little demand for a hotel-casino complex or bottled groundwater in the remote areas of the country. The greater the highest and best use to which the water right is put the greater the water right's value. For example, the condemnation of a limited water right owned by an electric generating facility could easily result in a condemnation award of millions of dollars.

d. Severance Damage

Severance damage is damage to the property remaining in private ownership after the exercise of the power of eminent domain that is attributable to the taking.\footnote{239} For instance, land used for the production of irrigated crops in some sand hills areas of southwestern Kansas may be rendered virtually worthless if the water right associated with that parcel is taken through condemnation. The result of the taking may


The concept of highest and best use can be illustrated by considering a simple silver dollar. A silver dollar represents only one hundred cents of purchasing power. If the owner sees nothing more than that in it, he can exchange the dollar coin for one hundred cents in goods and services. The highest and best use of the silver dollar, however, may be for its silver content, in which case it may be exchanged for several federal reserve notes each representing one hundred cents in purchasing power. Finally, depending upon the condition of the coin, date, place of mint, and condition of circulation, the highest and best use of the coin may be for inclusion in a numismatist's collection, in which case it may represent hundreds of federal reserve notes each representing one hundred cents in purchasing power. The highest and best use of the coin is the same regardless of what the current or prospective owner does, or intends to do, with it.

\footnote{238} Schmutz, supra note 13, at 8.

not be just the reduction in production from an irrigated corn crop to a
dryland corn crop, but may be a reduction from irrigated corn to
dryland cockleburs. If that land is used in conjunction with other land
in the production of cattle, so that the grain produced is used in a
feedlot operation, the land used in unity of use and ownership, but
not directly affected by the taking, may also be damaged. This latter
damage is a severance damage.

e. Benefits

A just compensation award may be reduced by special benefits to the
property remaining in private ownership if the condemnor is a munici-

pality. Benefits are either general or special. General benefits are benefits from the development of a project that accrue to the general public. These general benefits may not be used by the condemnor to decrease an award of just compensation. For example, the general benefit from having road frontage from a highway project is not a benefit that may be considered in the assignment of highest and best use or in the valuation process of the after-taking position. Special benefits are those benefits that result from the development of a project

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240. "Unity of use" means all of that property in private ownership that is used together in common that results in a highest and best use that is greater than the sum of the parts whether the property is contiguous or not. See City of Shawnee v. Webb, 236 Kan. 504, 508-09, 694 P.2d 896, 900-01 (1985); Hogue, 212 Kan. at 341-42, 510 P.2d at 1310-11.

"Unity of ownership" means all of that property that is held in identical ownership for the purpose of determining unity of use, and the extent of property that constitutes the unit for purpose of the condemnation proceeding. Hogue, 212 Kan. at 341, 510 P.2d at 13.

The "unit" is the property held in unity of ownership and unity of use that results in the recognition of highest and best use and that is considered for purposes of valuation. See City of Shawnee, 236 Kan. at 508-09, 694 P.2d at 900-01. In the trial of a condemnation case, evidence will frequently be offered indicating that parcels of land widely separated are being used together to form a highest and best use that is greater than any of the parcels taken alone. In one unpublished federal lake condemnation case tried in the 1970s a farmer used ten parcels of land together in a unit for the production of beef. The parcels were separated by over ninety miles following the most direct route to each parcel from the headquarters that was being acquired. The unit was profitably operated solely because the owner was a single man who was willing to work fourteen-hour days. (Mr. Weatherby, one of the authors of this Article, tried the case for the government.) In such a case, it is proper to question whether such use constitutes the highest and best use of the property notwithstanding the compliance with unity of use and ownership.


244. Id. at 678.

245. Id.

246. See id.
that are special to the property subject to a partial taking.\textsuperscript{247} These benefits may be taken into account in the determination of market value after the taking of property; they may be used by the condemnor to lower the just compensation award.\textsuperscript{248} In a proper case, special benefits may offset the value of what was taken and may indeed result in a greater value after the taking than before. In such a case only a nominal payment is required for the satisfaction of the constitutional mandate of payment of just compensation.\textsuperscript{249} For instance, placement of a cloverleaf on a controlled access highway totally on the land of one owner may constitute a special benefit if it can be demonstrated that such property will develop commercially.\textsuperscript{250}

The taking of a water right can result in both general and special benefits. Assume, for example, that City A condemns 160 acre feet of water rights from a landowner to provide an increased water supply to meet the anticipated demand from municipal growth. Assume further that the farm from which the water right is taken is one of a number of parcels that may develop. The natural inclination of the condemnor is to look at the value of the land for production of irrigated crops and determine that its value is, say, $1,500 per acre. The value of the same land for development now that a reliable water supply has been secured, albeit only by virtue of a changed use of the water right on the land itself, is $3,000 per acre. The condemnor may attempt to pay only nominal damages for the taking of the water right though the benefit realized by the landowner in this example is the same benefit realized by all landowners surrounding City A. The benefit is general in nature, not special; therefore the landowner is entitled to be paid for his loss without offset for the supposed benefit. As the number of potential developable parcels is reduced, the benefit looks more special than general. If this parcel is the only developable parcel, the benefit becomes special and can be used to reduce compensation.

2. Valuation Methods

The valuation of property rights in condemnation is the imprecise means by which courts first determine the highest and best use for property and then assign a dollar value as just compensation.\textsuperscript{251} The elusive concept of market value is sought through the valuation of a

\textsuperscript{247} Id.
\textsuperscript{248} Id. at 677-78.
\textsuperscript{249} Id. at 676.
\textsuperscript{250} See generally id. at 677 (prospective benefits may be considered if it is sufficiently certain they will be realized).
\textsuperscript{251} See supra notes 224-27 and accompanying text.
non-existent market.\textsuperscript{252} Three generally accepted approaches to valuation are used in condemnation cases:\textsuperscript{253} (1) The market data approach, which analyzes sale of so-called comparable properties; (2) the cost approach, which contemplates the cost of supplying a replacement for the thing lost, taking into account both physical and functional depreciation of the property; and (3) the capitalization of income approach, which seeks to segregate the income stream attributable to the thing being acquired and capitalize that income.\textsuperscript{254}

a. Market Approach

The most reliable of these approaches has been uniformly held to be the market data method of valuation.\textsuperscript{255} Courts have held that this method should be used if there have been sales of comparable properties in the same locale near the time of the taking.\textsuperscript{256} The parties research the market place for either the outright sale of the property being acquired or the sale of similar nearby properties occurring at or near the date of taking.\textsuperscript{257} While on its face application of this method may appear to be simple, it is greatly complicated by the number of adjustments necessary to bring the sale property and the condemned property into commonality: date of sale; size of property; highest and best use; zoning; shape of property; differences in improvements and depreciated condition of improvements; type of access and condition of that access; location to amenities and markets; differences in soil types; fences; availability of utilities; productivity of soils; and existence of water rights including all the elements associated with those rights as enumerated in the Water Appropriation Act. As more adjustments are required, the valuation approach becomes less reliable.\textsuperscript{258} If it can be shown that there are no true comparable sales, the other methods of valuation may be used to establish just compensation.\textsuperscript{259}

\begin{footnotes}
\item 252. Schmutz, supra note 13, at 3-12.
\item 254. Id.
\item 255. See, e.g., Board of County Comm'n's v. Willard J. Kiser Living Trust, 250 Kan. 84, 92, 825 P.2d 130, 137 (1992).
\item 256. See, e.g., id.
\item 257. See generally Schmutz, supra note 13, at 3-12 (discussing market value).
\item 258. See Ellis v. City of Kansas City, 225 Kan. 168, 172, 589 P.2d 552, 556 (1979) (suggesting that so-called comparable sales requiring "65 to 70 per cent worth of adjustments... would be unrealistic and not helpful to the court or the jurors in determining value").
\item 259. Ellis, 225 Kan. at 172, 589 P.2d at 555-56. The determination of the value of a waterworks system under a franchise allowing a city to purchase water at "actual value" was appealed in 1922 in City of Baxter Springs v. Estate of Bilger, 110 Kan. 409, 204 P. 678 (1922). The Kansas Supreme Court stated:
\end{footnotes}
b. Cost Approach

In the cost approach, the "fair market value of the land bare and subject to improvement is added to the depreciated replacement cost new of the improvements." The probative value of the cost approach is limited to those cases in which the property taken can be replaced in the marketplace as we understand it. This method of valuation is most useful in cases in which no unique problems associated with either the nature of the rights or the extent of the improvements exist. Before resorting to this approach or the income approach, the court must first exclude the market data approach as a means of determining fair market value and just compensation.

c. Income Approach

The income approach is a technique in which "the anticipated net income is processed to indicate the capital amount of the investment which produces the net income." Kansas courts have approved this approach as a means of valuing unique properties for which no market exists. Among the uses for which the income approach has been found to be applicable are sand and gravel production, oil and gas

Most commodities have a known or easily ascertained value—the price at which the commodity sells in the market where men go to buy and sell. Public utility properties are not within this class of commodities; there is no market for them. They have a value, but that value cannot be accurately named as so many dollars in answer to a single, simple question. Other means must be resorted to for the purpose of ascertaining the values of these properties.

Id. at 411, 204 P. at 679.


261. Ellis, 225 Kan. at 172, 589 P.2d at 555.

262. U.S. ARMY CORPS OF ENGINEERS, supra note 260, at 16; see also SCHMUTZ, supra note 13, at 42-45: "This capital value theory is based upon the belief that buyers and sellers of income-producing properties, with exceptions, consider income the yardstick by which value is measured. Thus, an income of $600 per year in perpetuity is considered to be worth $10,000 on a 6 percent basis."


In the absence of market value, because the special type of property is not commonly bought and sold, resort may be had to the testimony of more specialized experts. The value of property for a special use to which it is adapted or put may be shown by persons familiar with such use, even though they are not familiar with land values generally. If a witness, by reason of his skill, learning or technical training, understands the adaptability of the lands in question for a particular purpose and the demand for land for such purpose, he may state the market value of the land.

Id. at 779-80, 332 P.2d at 543-44.

264. E.g., Eisenring, 183 Kan. 774, 332 P.2d 539.
production, rock quarrying, residential development, and fish farming.

d. The Income Approach as a Possible Approach for Condemnation of Water Rights

The market approach requires finding comparable sales, which is difficult for water rights in Kansas. Most sales have involved the transfer of the land with the water right, not a transfer of the right alone. Nevertheless, sales of water rights alone are increasing in number, and the price paid per acre foot gives an indication of the value of water rights in Kansas. These sales, however, may not meet the test of willing buyer-willing seller because one party may have the power of eminent domain; therefore, evidence of such sales may not be admissible. In both cases—sale of land with water rights and sale of the water right alone—it is unlikely that any two sales of water rights will be for the same amount of water at the same rate of diversion, will have the same priority date relative to other appropriation rights competing from the same water source, or in the case of appropriation from an underground aquifer, will have the same rate of recharge or safe yield policies. These differences may greatly alter the value of one right vis-a-vis another. Adjustments for these differences must be made and the opinion of experts as to those adjustments will have to be

266. E.g., United States v. 1,955.00 Acres of Land, 447 F.2d 673 (10th Cir. 1971); Hoy v. Kansas Turnpike Auth., 184 Kan. 70, 334 P.2d 315 (1959).
268. E.g., United States v. Corbin, 423 F.2d 821 (10th Cir. 1970).
269. The city of Wichita, for example, has offered in newspapers to pay $400 per acre foot of water for water rights in the Equus Beds area. Telephone conversation between John C. Peck and Jerry Blain, Superintendent for Production and Pumping, Wichita Department of Water and Sewer (May 31, 1994). A water right in the amount of 240 acre feet per year appurtenant to a quarter section of land would cost $96,000. A Kansas administrative regulation prohibits increases in consumption, KAN. ADMIN. REGS. S-5-3 (1992), which means that DWR might approve a change, but in a lesser amount than the whole water right. It is possible for a city like Wichita, therefore, not to obtain approval from DWR to move the entire 240 acre feet per year to Wichita in its change application process. If DWR approved only 85% of the water, or 204 acre feet per year, the effective cost of the water right would be $470.59 per acre feet rather than the $400 ostensibly paid for the right.

Another Kansas town recently purchased 80 acre feet of vested water rights for $90,000, or $1,125 per acre foot. DWR approved the change of all 80 acre feet for municipal use. The city also purchased 75 acre feet of an appropriation right appurtenant to the same land, for $60,000 or $800 per acre foot. The tract of land to which these water rights were appurtenant prior to the sale was adjacent to the city boundary.

weighed by the trier of fact. If any sales can be found, they would provide some evidence of the value of a water right being condemned. They may not, however, provide the best evidence of that value because of the vast differences in water rights.

The cost approach may also be discarded in the water rights condemnation situation. Although the cost of drilling and casing a replacement well may be easily determined, and the cost of developing an energy source to operate the well is also readily ascertainable, all would be for naught if no additional water rights can be obtained from DWR. Indeed, a condemnor would be unlikely to risk the cost of a high condemnation award if all that is required is drilling a well.

The income approach may be the preferred approach in water rights condemnation cases in which the two more traditional methods of valuation are not valid indicators of value. Under the income approach, the difference in production potential between dryland farming and irrigating a tract of land establishes the amount of gross income derived from an irrigation water right.271 The valuation procedure would also deduct the cost of utilizing the water right from the gross income and account for any extra management costs and skill.272 Finally to be addressed is the assignment of a capitalization rate.273 At many times, farming arguably has not been an economically justifiable pursuit, with rates of return on investment often falling below the interest rates paid on bank deposits.274 For purposes of this Article, it is assumed that the investment in long term water rights bears some relationship to other long term investments; interest rates paid on long term investments provide an appropriate capitalization rate.

The Department of Agricultural Economics at Kansas State University has published a series of papers titled Kansas Farm Management & Marketing275 that can be used to provide the economic detail left out of this Article. These papers provide information concerning the fixed and variable costs that an irrigator will experience in the production of his crop. Utilization of this series of papers relating to dryland production is instructive in isolating the income derived solely from irrigation. Labor, management, maintenance, depreciation, and other

271. See Schmutz, supra note 13, at 245.
272. See id.
273. See id.
274. “Rates of return on investment” means without adding in the benefits of government programs.
costs can be identified and deducted leaving only the income attributable to the water right. This dollar amount can then be capitalized to determine the market value of the water right.

A city may decide that it cannot condemn the irrigation right because it believes the Chief Engineer would not approve an application to change the right to municipal use. Instead the city may decide to protect its water supply by merely condemning one of the attributes of the property right owned by the irrigator: the right of the irrigator to call for an administration of rights. This gains for the city the position of a senior appropriator notwithstanding the irrigator’s first-in-time status.\footnote{276} Under this scenario, the historic incidence of drought might result in the loss of irrigation rights in only five out of thirty years.\footnote{277} Thus, the likelihood of loss is only one in six for any given year. The value of this limited right can be determined by capitalizing one sixth of the income attributable to the water right as discussed above. In the remaining twenty-five years the farmer will be able to irrigate his crops as he has historically done and therefore will suffer no economic loss.

\footnote{276. A city might condemn this right under existing state law, which recognizes that municipal water supply in section 82a-707 is a higher use of the resource than irrigation. See supra notes 65-71 and accompanying text. Large amounts of the municipal water used in urban areas, however, is used for the irrigation of lawns. See William Ashworth, Nor Any Drop to Drink 15 (1982), reprinted in Charles J. Meyers et al., Water Resource Management 7 (3d ed. 1988).

The purchase of a priority date rather than the right itself is suggested in the literature: “Subordination agreements are arrangements whereby senior appropriators (e.g., irrigators) agree to subordinate their seniority to . . . junior appropriator[s] (e.g., municipalities) in dry years in return for a money payment or some other benefit.” See, e.g., Owen L. Anderson & Pauline M. Simmons, Reallocation, in 2 Waters and Water Rights § 16.04(c)(3) (Robert E. Beck ed., 1991). See also Steven J. Shupe et al., Western Water Rights: The Era of Reallocation, 29 Nat. Resources J. 413, 420 (1989):

Subordination agreements achieve a purpose similar to that of dry-year option agreements. They are based on the fact that a major attribute of an appropriative water right is its relative priority, which can be marketed separately from the right itself. For example, a subordination agreement could be useful for a city with a junior water right (for example, the fourth priority on a stream system) that needs to build a new water treatment plant but cannot obtain financing because its water right is not judged reliable enough. If the city could purchase “consent-not-to-sue” agreements from the holders of the three senior priorities, under which those holders would allow their rights to become subordinate in dry years, a more reliable water right could be created without any formal transfer.

E. Some Other Questions

1. What Types of Water Rights, and for What Uses, May an Entity Condemn?

While some Kansas statutes grant condemnation power to take water rights, they do not describe what type of water right may be taken. These statutes must be read in conjunction with section 707 of the Kansas Water Appropriation Act, which suggests an order of preference for water rights in condemnation. One reading of section 707 would be that, in general, an entity could take a right below that entity's use on the preference list. For example, a city could take a right for irrigation, industrial, recreational, or water power use, but not a right for domestic use or another municipal right. An irrigation district could theoretically take an industrial, recreational, or water power right, but not a domestic, municipal, or another irrigation right.

The above analysis suggests a problem. Cities provide municipal water to those persons and entities on its distribution lines. Under Kansas law, homeowners receiving municipal water are not making a "domestic use." The term "domestic use" is defined generally to cover persons in rural areas with wells who need water for their basic personal and farm needs. Domestic wells, however, are also found in cities and towns. Many people use water from both a domestic well and from the city distribution system. City homeowners on the city water distribution line do not have water rights; nor do commercial and industrial entities like stores and factories or golf courses. A golf course with its own separate water right uses the water for an "irrigation use;" the DWR regulations define irrigation use to include the watering of golf courses. Watering of parks also is defined as an irrigation use. Under the umbrella of the municipal water right held by a city, however, all of these types of uses can be made by the separate entities who purchase water from the city.

What if a city condemns an irrigation right to increase the city's water supply capacity, and the city has present or future industrial or golf course customers to supply and city parks to water? Would this

278. KAN. STAT. ANN. § 82a-707 (1989); see supra notes 63-77 and accompanying text.
279. KAN. STAT. ANN. § 82a-707(b) (1989).
280. Id.
281. Id. § 82a-701(c).
282. Id.
284. Id.
taking violate section 707’s use preference list? An irrigator might argue that while a city could condemn its right to provide water to homeowners, it is unfair and a violation of section 707 to take his irrigation water and provide it in part to an industry (whose use is below the irrigator’s use on the preference list) or to a golf course (whose use is on the same level as the irrigator’s use). The statutes are unclear on this issue and could be amended to preclude such legal questions and challenges.

2. Can Contract Rights Held by Industry Be Taken by Cities?

Municipal and industrial users can enter into contracts with the Kansas Water Office to purchase water under the state’s program for marketing water stored in federal reservoirs.\(^{285}\) These users do not have water rights; they have contract rights.\(^{286}\) The state has the water right in the form of a water reservation right, which enables the state to divert and store large quantities of water in these reservoirs.\(^{287}\) For example, the City of Lawrence has a contract for water from Clinton Reservoir on the Wakarusa River, and Western Resources, Inc. has a contract to purchase water from Milford Reservoir on the Republican River.\(^{288}\) If a city needed additional water, could it condemn the contract rights of an industry, using section 707’s preference list as authority?\(^{289}\)


\(^{287}\) See id. § 82a-1303.

\(^{288}\) Kansas Water Resources Board, State Water Plan: Water Supply and Storage Program 1979-1980, at 32-33, 45-46 (1980). These reports are not published but are available through the Kansas Water Resources Board in Topeka, Kansas.

\(^{289}\) Although only the federal government presumably could condemn water reservation rights held by the State of Kansas, any state governmental unit with condemnation power presumably could condemn the contract rights of water purchasers. Cities likewise could condemn rights held by individuals and industries since cities have condemnation power. While some industries possess this power, their exercise of this right would not extend to other contract rights because state law authorizes the condemnation of “land” only and not other property. Federal Reservoirs, supra note 13, at 829-30 (footnotes omitted). That text is footnoted with the following statement:

Even if industries could condemn contract rights, they might be limited by the Kansas Water Appropriation Act, Kan. Stat. Ann. § 82a-707 (1977), which has a use-preference listing as follows: domestic, municipal, irrigation, industrial, recreational and water power uses. This list is followed by the statement that regardless of use, first in time is first in right for appropriators, which has led to speculation about the meaning of the preference listing. The section adds that a holder of a water right for an inferior
The question of whether these contracts should be able to be condemned, by whom, and under what circumstances should be decided by the legislature and written into law. California, for example, mentions condemnation of water rights and contract rights in its constitution. In the act proposed in this Article, contract rights are not subject to condemnation for the reasons discussed.

III. CONDEMNATION OF WATER RIGHTS IN OTHER STATES

American states are generally divided into two categories of water rights doctrine for streams: the riparian law of the eastern states

use cannot be deprived of use except through condemnation, which probably means, if it is applicable here, that a city could condemn the contract right of an industrial user, but not vice versa. This conclusion might go unquestioned if considered in the context of a large city condemning the contract rights of a small industry. But when a small downstream city (or group of them) seeks to condemn contract rights of a large industry, the conclusion would likely be tested in both the courts and the legislature. Consider, for example, John Redmond Reservoir, whose storage water supply has been purchased by the Kansas Gas and Electric Company and Kansas City Power and Light Company under Contract 76-2 for eventual use in the Wolf Creek Nuclear Power Plant. Condensation by cities of this storage water could mean the power plant could not function unless it could procure water from other supplies.

Id. at 830 n.235 (citation omitted).

290. CAL. CONST. art. 10A, § 5.

291. See infra part IV.B.

292. The riparian law of eastern states is based on land ownership along streams with a sharing concept among riparians during times of shortage. This doctrine presents different concerns than the prior appropriation doctrine in regard to condemnation of water rights. Basic tenets of the riparian doctrine create unique problems for obtaining municipal water supply by eminent domain. A city is generally not thought to be a riparian owner, even if the city is located on a stream. Riparian rights generally may be used only on riparian land and may not be used on either non-riparian land or on land that is in another basin, even if the tract is held by one person and part of the tract is riparian to the stream. Because a non-riparian use is generally an unreasonable use, and thus subject to being enjoined by another riparian user, cities on or off the stream may not simply purchase or condemn a riparian user's water right. In general, for a city to obtain a riparian right that will not be enjoined, the city must keep upstream and downstream riparian owners from complaining. The city does this by purchasing or condemning water rights upstream and downstream, thus preventing complaints from any one riparian owner. Thus, unlike a city in a western state, a city in a riparian state may not simply seek a water right from someone who has the necessary amount of water and then purchase or condemn the right—it may have to obtain large numbers of rights to have a secure situation. See DAVID H. GETCHES, WATER LAW IN A NUTSHELL 36 (1990); JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 37-136 (2d ed. 1991); A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 51-148 (4th ed. 1993); FRANK J. TRELASE & GEORGE A. GOULD, WATER LAW 244-384 (4th ed. 1986).

Professor Getches states the following on the topic of municipal rights in the riparian states:

The power of eminent domain allows municipalities to condemn private riparian water rights for a public purpose if just compensation is paid. Eminent domain can be very expensive, particularly under the natural flow rule, which requires compensation
and the prior appropriation law of the western states. Groundwater doctrines are much more varied and scattered. Kansas is a western, prior appropriation state for both groundwater and surface water.

Because this Article focuses on Kansas condemnation law, an extensive examination of law from other jurisdictions is outside its purview. Interesting ideas are found in the laws of other states,

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even in the absence of present harm. The usual measure of compensation for condemnation of riparian rights is the diminution in the value of affected riparian land.

If a city takes water without condemning the riparian right, injured riparians may bring an action for inverse condemnation, in effect forcing the city to condemn the riparian rights and compensate for the loss.

GETCHES, supra, at 36 (citations omitted); see also SAX ET AL., supra, at 109-09; TRELEASE & GOULD, supra, at 342.

293. Among these doctrines are the absolute ownership doctrine (surface owner can use whatever water the owner can pump regardless of its effect on neighbors, except that the use cannot be wasteful or malicious); the reasonable use doctrine (surface owner can use whatever water the owner can pump as long as it is for a reasonable use on the owner’s land); the correlative rights doctrine (surface users have a share of the underlying aquifer); the Restatement of Torts § 858 (a combination of the above doctrines); and the prior appropriation doctrine (first in time is first in right). See TRELEASE & GOULD, supra note 292, at 385, 390-95, 403-06 (citations omitted).

294. The following is a brief summary of some water condemnation law from other western states.

Alaska. Alaska’s constitution provides that all water in the state, except for two limited uses, is subject to appropriation. ALASKA CONST. art. VIII, § 13. The constitution also states that “[n]o person shall be involuntarily divested of his right to the use of waters . . . except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.” Id. § 16. Patterned after Montana’s eminent domain statutes, Alaska’s statutes give procedures and justifications for exercising eminent domain. ALASKA STAT. §§ 09.55.240 to 260 (1983). Mining, power, and municipal uses are specifically mentioned as being subject to eminent domain power. Id. § 09.55.240(b). Even land belonging to the state or cities is subject to eminent domain if it is not appropriated to a public use. Id. § 09.55.260. Property appropriated to a public use may be taken, but not for a purpose less necessary than that for which it is being used. Id. Cities have condemnation power only within their boundaries. Id. § 29.35.030(a) (1992).

Arizona. While Arizona statutes restrict transfers of water rights, ARIZ. REV. STAT. ANN. § 45-172 (1987), the Arizona Constitution allows private property to be taken by eminent domain for “drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes.” ARIZ. CONST. art. 2, § 17. The constitution makes the question of whether the contemplated use is a public one a judicial question “without regard to any legislative assertion that the use is public.” Id. The state, counties, cities, towns, villages, political subdivisions, and persons can exercise eminent domain for numerous purposes including “[r]eservoirs, canals, ditches, flumes, aqueducts and pipes, for the use of a county, city, town or village, or its inhabitants.” ARIZ. REV. STAT. ANN. § 12-1111(12) (1982). If property is already devoted to a public use, the new use must be “a more necessary public use.” Id. § 12-1112 (Supp. 1993). Interests subject to condemnation include a fee simple, an easement, a right of entry, a “use in the water of a stream, river or spring.” Id. § 12-1113 (1982). “[A]ll real property belonging to any person, including any and all water and water rights for the irrigation of any land condemned . . . [and property] for use in water or water rights.” Id. § 12-1114. Municipal corporations have eminent domain powers inside and outside their corporate limits for public utility purposes.”
including locating waterworks and water pipelines, id. § 9-511(c) (1990), and acquiring public service corporations. id. § 9-516(c). The State Fish and Game Commission can condemn waters for fish hatcheries. id. § 17-241(A) (1984).

California. In general, the right to take property by eminent domain in California includes "rights of any nature in water." CAL. CIV. PROC. CODE § 1240.110(a) (West 1982). The California Constitution contains restrictions on condemning water rights and contract rights held for uses in the Sacramento-San Joaquin Delta. CAL. CONST. art. 10A, § 5. The state can condemn for state water and dam purposes "any real property necessary." CAL. WATER CODE § 250 (West 1971 & Supp. 1994). Counties can condemn water rights, CAL. GOV'T CODE § 25691 (West 1988), and cities "may acquire by eminent domain any property necessary to carry out any of its powers or functions," id. § 37350.5, including "water, water rights, reservoir sites, rights of way for pipes, aqueducts, flumes, or other conduits." id. § 38730. Numerous types of water districts have eminent domain authority. For example, California water districts are empowered to condemn "all property or rights in property necessary or proper for the district works and to supply the land with sufficient water for all district purposes," CAL. WATER CODE § 35600 (West 1984), but are limited geographically to the principal county in which the district is located unless it has consent from another county. id. § 35628. Water storage districts have similar powers and restrictions. id. §§ 43530 (West 1966), 43532.5 (West Supp. 1994). County water authorities have the same eminent domain rights that municipal corporations have, CAL. WATER CODE app. § 45-5(5) (West Supp. 1994), and they can acquire water and water rights within or outside the state but not within the county in which the authority is organized or located. id. app. § 45-5(11).

Idaho. In general the right of eminent domain may be used for public uses including "canals, aqueducts, flumes, ditches or pipes for conducting water for use on state property or for the use of the inhabitants of any county or incorporated city." IDAHO CODE § 7-701.2 (1990). Cities, in establishing city irrigation systems, are empowered to condemn "any of the public or private waters of the state of Idaho whether such waters are surface or subterranean waters." id. § 50-1801 (1988).

Montana. Montana cities may condemn water rights within or outside the city limits, MONT. CODE ANN. §§ 7-7-4404, 7-13-4405 (1993), and counties may condemn "private property within the limits of the project." id. § 76-5-1108. County water districts and county sewer districts may obtain water rights and waterworks, but condemnation power is not expressly listed as one of the methods of obtaining water rights unless the incorporators of the district are members of a private, nonprofit water association. id. § 7-13-2218. By statute, the Montana Department of Natural Resources and Conservation is given the "full control of all the water of the state not under the exclusive control of the United States and not vested in private ownership," and it may condemn "rights to the natural flow of the waters" of the state. id. § 85-1-204(1).

Nebraska. Primary cities (cities having populations over 100,000) can condemn "lands, real or personal property or any property therein . . . for any present or future . . . public purpose." NEB. REV. STAT. § 15-229 (1991); see also id. § 17-539 (applicable to second class cities and villages). Cities can condemn "private property . . . for . . . wells, or waterworks," id. § 19-709, within seventy-five miles of the city. id. § 14-366. Counties have eminent domain power to take "real estate." id. § 23-325. Metropolitan water districts and metropolitan utilities districts have power to condemn property outside their boundaries for erecting waterworks. id. § 14-1103.02. Natural resources districts can take property within or outside their boundaries. id. § 2-3234. For irrigation purposes "[a]ll persons . . . shall be entitled to condemn the right-of-way over or through the lands of others, for any and all . . . purposes." id. § 46-246 (1988). Those purposes include "building . . . dams for the purposes of storing water for irrigation . . . or conveying water . . . [for] domestic, agricultural or any other beneficial use." id. Irrigation districts have condemnation power for "all lands and waters." id. § 46-125.
Nevada. Among the public uses expressly enumerated in Nevada are the following: for county and city use, "reservoirs, water rights, canals, aqueducts, [etc.]," Nev. Rev. Stat. § 37.010.3 (1993); for irrigation use, "[r]eservoirs, dams, [etc.]" Id. § 37.010.5. Cities may condemn within or outside the city limits "rights in lands and water rights in connection therewith." Id. § 350.370.1. According to Nevada case law, water rights are regarded as real property which a city may condemn. Carson City v. Estate of Lompa, 501 P.2d 662, 662 (Nev. 1972). The beneficial use of water is declared a public use and "any person" may exercise eminent domain to construct, use and maintain any works for the "diversion, conveyance and storage of waters." Nev. Rev. Stat. § 533.050 (1993). Water conservancy districts may exercise eminent domain powers and may "appropriate and otherwise acquire water and water rights within or without the state." Id. § 541.140.10.


Oklahoma. A municipality may condemn "water from such river or stream . . . and . . . any land located in or outside . . . the municipality . . . for . . . waterworks." Okla. Stat. Ann. tit. 11, § 37-103 (West 1978). While Oklahoma water districts may acquire water rights, "no district shall have the right to exercise the power of eminent domain for the purpose of acquiring water rights." Id. tit. 82, § 1272(5) (West 1990).

Oregon. Cities and various types of special service districts may condemn a community water supply system. Or. Rev. Stat. § 199.464 (1991). The power of eminent domain for certain types of service districts is subject to the approval of specially formed boundary districts. Id. § 199.420. Cities have condemnation power to take "private property for public use," id. § 225.020(2) (1993), and "land, . . . water or water rights," id. §§ 225.050(2)(a), .060(2). A 1973 attorney general's opinion, however, stated that the power may not be invoked beyond the municipal boundaries without specific statutory authority. 36 Op. Atty. Gen. 626, 632 (1973). Domestic water supply districts, which are "municipal corporation[s]," may condemn "real property, water, water rights and riparian rights . . . within and without" their boundaries. Or. Rev. Stat. § 264.240 (1993). The Division of State Lands may condemn "any riparian rights." Id. § 274.450 (1994). The Department of General Services has power to condemn "real property, water, water rights and watercourses . . . including [those] . . . devoted to a public use before February 27, 1901." Id. § 276.236; see also id. § 276.244 (1993). Certain special service districts have condemnation powers, but may not condemn real property for hydroelectric facilities. Id. § 543.675 (1988). The districts are listed in § 543.655.

however, some of which Kansas might wish to consider. This section summarizes ideas from California, Oregon, and Colorado.

Two California statutes make all water permits conditional on the following:

[N]o value whatsoever in excess of the actual amount paid to the State thereafter shall at any time be ... claimed for any permit ... in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal

__Texas. All political subdivision and constitutional governmental agencies have eminent domain powers to take waters for domestic, municipal, and manufacturing uses as well as for “irrigation of land for all requirements of agricultural employment.” TEX. WATER CODE ANN. § 11.033 (West 1988). A general statement of policy is given in the statute: “The right to take water necessary for domestic and municipal supply purposes is primary and fundamental, and the right to recover from other uses water which is essential to domestic and municipal supply purposes is paramount and unquestioned in the policy of the state.” Id. Various water districts have condemnation power. For example, fresh water supply districts may condemn “water, or land under water, inside or outside the district.” Id. § 53.109 (West 1972). Water improvement districts can condemn “any property” to further purposes such as constructing and operating dams and reservoirs. Id. §§ 55.291, 292. Navigation districts can obtain property by condemnation. Id. §§ 61.115, 63.153, 63.155 (West 1988). Municipalities have broad condemnation powers both inside and outside their boundaries. TEX. LOCAL GOV’T CODE ANN. §§ 251.001, 273.001, 402.011, 402.012 (West 1988 & Supp. 1994). Corporations charted for the purpose of constructing waterworks or furnishing water supply to cities have eminent domain power to take necessary “private property.” TEX. REV. CIV. STAT. ANN. art. 1433 (West 1980).

_Utah. The right of eminent domain is granted for specifically listed public uses, including reservoirs, canals, and aqueducts for counties and towns; and reservoirs and dams for irrigation purposes and for floating of logs; and canals for generating electricity. UTAH CODE ANN. § 78-34-1 (1992). Water conservancy districts may condemn “water, waterworks, water rights, and sources of water” but are precluded from taking water for transmountain diversions. Id. § 17A-2-1413 (Supp. 1993). Junior groundwater appropriators may use the right of eminent domain for the “right of replacement.” Id. § 73-3-23 (1989).

_Washington. Washington cities may condemn “water from any public or navigable lake or watercourse, surface or ground” and “any water [or] water rights.” WASH. REV. CODE ANN. § 35.92.010 (West Supp. 1994). Even cities in adjoining states are given eminent domain power to acquire water rights in Washington. Id. § 8.28.050 (West 1992). Holders of riparian and appropriation rights are subject to condemnation. Id. § 90.03.010. Several entities are given eminent domain powers: the Director of Fisheries for “water rights,” id. § 75.08.040 (West Supp. 1994); any person for a “public use,” id. § 90.03.040 (West 1992); and the United States for water or water rights. Id. § 90.40.010.

_Wyoming. Cities and towns may condemn “any portion of a water right ... for municipal water purposes,” WYO. STAT. § 41-3-1013 (Supp. 1993), “within and without the city limits.” Id. § 15-1-103(a)(xxxv) (1992). The Wyoming Game and Fish Department is expressly precluded from condemning existing water rights for the purpose of providing instream flows. Id. § 41-3-1009 (Supp. 1992). The Wyoming Water Development Commission appears to have condemnation power. Id. § 41-2-122. Water conservancy districts have eminent domain power for “any property necessary to the exercise of the[ir] powers,” id. § 41-3-742(a)(iii) (1977), and irrigation districts have condemnation power to acquire “irrigation works, water rights, ... and other property.” Id. § 41-7-210(a)(iv)(E), (G) (Supp. 1993).
water district, irrigation district . . . or any political subdivision of the State . . . .

Yet municipal corporations taking water for municipal use are made liable "for all damage suffered or sustained . . . directly or indirectly because of injury, damage, destruction or decrease in value . . . resulting from or caused by the taking of any such . . . waters." Similarly, an Oregon statute limits the valuation of water rights when being acquired under the laws of Oregon as follows: "[N]o value shall be recognized or allowed . . . in excess of the actual cost to the owner of perfecting them in accordance with the provisions of the Water Rights Act." Rights obtained for water power purposes by private persons are subject to being taken over after fifty years by the state or a municipality, but "fair value . . . plus any reasonable damages" must be paid.

Colorado has an article in its property statutes governing condemnation by cities, part 2 of which covers condemnation of water rights by municipalities. This water rights condemnation act sets out a detailed procedure for, as well as some limitations on, acquiring water rights by cities in Colorado. In summary, a city can petition to condemn a specific water right. A commission is appointed to "determine the issue of the necessity of exercising eminent domain" and to appraise and award damages. Prior to the hearing, the city must prepare information on the following: its growth plan; the effects on the county, including economic and environmental effects; adverse and irreversible effects from the taking of property and rights; and alternative sources of water supply.

After the commissioners' report to the court, the court holds a hearing to consider it. At this hearing the parties can introduce other evidence, after which the court makes a finding concerning the property award. A party can then seek a jury trial of either six or

296. Id. § 1245.
298. Id. § 537.395(1).
300. Id. § 38-6-202 (1982).
301. Id. § 38-6-202(1).
302. Id.
303. Id. § 38-6-203(1)(a), (b).
304. Id. § 38-6-207.
305. Id. §§ 38-6-209 to -210.
306. Id. § 38-6-210.
twelve members.\textsuperscript{307} The trial is conducted like a regular civil trial.\textsuperscript{308} The court then enters its final judgment.

The statutes provide no limit on how far outside its boundaries a city may condemn water rights. The only limitation is that the city may not condemn water rights "for any anticipated or future needs in excess of fifteen years, nor shall any municipality be allowed to condemn water rights that are appropriated to a prior public use."\textsuperscript{309}

Colorado's constitution grants cities home rule powers. A city "shall have the power, within or without its territorial limits, to . . . condemn . . . water works . . . and everything required therefore."\textsuperscript{310} Based on this constitutional home rule section, the Colorado Supreme Court declared the above water rights condemnation act unconstitutional in \textit{City of Thornton v. Farmers Reservoir & Irrigation Co.},\textsuperscript{311} insofar as the act required a commission to determine the issue of necessity of exercising eminent domain.\textsuperscript{312}

IV. POSSIBLE CHANGES IN KANSAS LAW

A. Introduction

The above discussion indicates that Kansas statutes contain numerous references to eminent domain power and limitations on that power.\textsuperscript{313} These references are scattered throughout the statutes with little coherency, with the possible exception of the Eminent Domain Procedure Act.\textsuperscript{314} Finally, the above discussion indicates that questions will abound when entities, especially cities, begin to have to use condemnation as a method of obtaining needed water supplies.

A Water and Water Rights Condemnation Act (Proposed Act) might provide answers to some of the questions. Such an act could bring to focus the issue of condemning water and water rights by all possible entities and could place limitations on this type of acquisition. Alternatively, such an act could focus on condemnation by the most likely condemners in the near future—cities, other entities providing public water supplies, and industries—and try to rectify problems related to these entities.

\textsuperscript{307} Id. § 38-6-211(1).
\textsuperscript{308} Id. § 38-6-211(2).
\textsuperscript{309} Id. § 38-6-202(2).
\textsuperscript{310} \textit{Colo. Const.}, art. XX, § 1.
\textsuperscript{311} 575 P.2d 382 (Colo. 1978).
\textsuperscript{312} Id. at 387-90.
\textsuperscript{313} \textit{See supra} part II.B.
The following submission focuses on condemnation by likely condemners and the problems related to those condemners. It provides broad condemnation power for certain public water suppliers and industries to condemn water or water rights. It answers some of the questions posed above. In summary, it provides that certain entities may condemn water or water rights anywhere in the state, even from state agencies. The proposed limitations are few: (1) cities and other public water suppliers could not condemn domestic rights or municipal rights; (2) contract rights could not be the subject of condemnation; and (3) if the condemnation would amount to a water transfer under the Water Transfer Act,15 permission under that Act would have to be obtained. Such legislation would raise serious public policy issues, however, that would have to be debated by water users, water resources planners, and legislators. This statute is submitted, not necessarily as a model act, but rather as a vehicle to begin public debate.

B. Proposed Act

Section 1. Title. This act shall be known as the water and water rights condemnation act.

Section 2. Policy, scope, and subject matter. (a) It is the policy of the state of Kansas to provide for the efficient use and reallocation of the water supplies of the state through both voluntary transfers and through condemnation of water and water rights. It is declared to be in the public interest that municipalities and industries condemn water and water rights, under the guidelines and restrictions of this act.

(b) This act shall govern the condemnation of water and water rights in the state. All other acts pertaining directly or indirectly to condemnation of water or water rights shall remain in force unless in conflict with this act.

Section 3. Definitions. When used in this act, unless the context indicates otherwise, the words and phrases defined in the water appropriation act, K.S.A. 82a-701, shall have the same meanings. The following words shall have the following meanings:

(a) “Municipality” includes any city of any class in the state of Kansas, water assurance districts, public wholesale water supply districts, and any “supplier of water” as defined in K.S.A. 65-162a.

(b) “Industry” means a business entity having the power of eminent domain pursuant to the laws of Kansas.

(c) “Water district” means any water-related special district, including but not limited to groundwater management districts.

irrigation districts, and drainage districts, but excluding any district that
is a supplier of water.
(d) "Water contract" means a contract between a municipal or
industrial user and the Kansas water office under the state water plan
storage act, K.S.A. 82a-1301, et seq., and amendments thereto.
(e) "Water" is personal property after it has been diverted by a user
under a water right.
(f) "Municipal use" means the various uses made of water for
household, commercial, irrigation, recreational, or industrial purposes,
where the water right is held by a municipality and where the water is
delivered through a common distribution system operated by a
municipality.
Section 4. Condemnation by municipalities and industries. (a)
Municipalities are hereby empowered to condemn from any person for
municipal use any water or water rights in fee simple in the state of
Kansas used for any purpose other than domestic or municipal use.
Industries are hereby empowered to condemn from any person for
industrial use any water or water rights in fee simple in the state of
Kansas used for any purpose other than domestic, municipal, or
irrigation use. The power to condemn a water right shall also include
the power to condemn only the right of the condemnee to call for an
administration of the condemnee's water right as against the condemn-
or's water right. Water districts shall not condemn water or water
rights. Water contracts shall not be the subject of condemnation.
(b) In using eminent domain powers under this act, municipalities
and industries shall use the eminent domain procedure act, K.S.A. 26-
501, et seq., and amendments thereto.
(c) Municipalities and industries may condemn water or water rights
anywhere in the state within or outside of their boundaries.
(d) If a condemnation of water or water rights would result in
changes in the place of use, the point of diversion, or the use made of
the water as required under K.S.A. 82a-708b, the condemnor may file
a change application as an owner prior to filing the petition for
condemnation. The chief engineer shall make the change application
a priority and shall rule as soon as practicable; the change order may be
made conditional on the condemnor's carrying out the condemnation.
(e) In any case of condemning water or water rights, the procedures
governing water transfers in the water transfer act, K.S.A. 82a-1501, et
seq., and amendments thereto, shall apply where a condemnation would
result in a water transfer as defined in that act, and the condemnor may
file a transfer application prior to filing the petition for condemnation.
Any order permitting the transfer shall be made conditional on the
condemnor's carrying out the condemnation.
(f) In conjunction with the condemnation of water and water rights, municipalities and industries are empowered to condemn any real property or any interest therein associated with the water or water right, and any real property or interest therein, including easements for property located between the location of the point of diversion and the municipal treatment or distribution center required to pump and transport the water.

(g) Venue for proceedings under this act shall be as follows:

(1) For an action taking water, venue shall be in the county where the condemnee impounds the water. If the water is impounded in two or more counties, venue shall be in one of the counties.

(2) For an action taking a water right, venue shall be in the county where the condemnee's point of diversion is located.

(h) No municipality or industry shall institute condemnation procedures under this act without first adopting conservation plans and practices consistent with the guidelines for conservation plans and practices developed and maintained by the Kansas water office pursuant to subsection (c) of K.S.A. 74-2608, and amendments thereto.

(i) A municipality condemning water or water rights for municipal use may condemn water only for the purpose of supplying homes and other buildings, and businesses, with water; water or water rights shall not be condemned for irrigating public lawns, or public or private golf courses, unless the municipality can demonstrate by clear and convincing evidence that such use is in the public interest. An industry condemning water or water rights for industrial purposes may condemn water only for use for the primary purpose for which the industry is established.

C. Discussion

1. Policy Statement

This statement is provided to show that the legislature encourages eminent domain if necessary to provide water for certain entities that have condemnation powers under Kansas law. A policy stating that it is in the public interest and for a public purpose that these entities condemn water will help preclude challenges on those bases.

This Proposed Act would govern condemnation of water and water rights for certain entities in the state. When read with other statutory sections it would change some of the rules, as will be discussed.

316. Proposed Act § 2.
Unless the Proposed Act displaced or would otherwise be relevant to other sections, however, it would have no effect on existing law. Some entities possibly having condemnation power for water rights under current law, such as school districts and fair boards, would continue to have that power unaffected by this Proposed Act. Use of condemnation power in these instances, however, would likely be rare. These entities would not have the presumption of public interest given to municipalities and industries.

2. Definitions

The Proposed Act incorporates the definitions of the Water Appropriation Act because there is no reason to create new definitions of person, chief engineer, domestic uses, vested right, appropriator, appropriation right, and water right. The Proposed Act adds definitions of municipality, industry, water district, water contract, water, and municipal use.

“Municipality” is defined to include cities of all classes and sizes as well as “suppliers of water.” Kansas statutes contain separate chapters for cities in general, and for cities of the first class, second class, and third class. While there is an article called Condemnation in Cities, parts of which have been cited above, it does not expressly cover condemnation of water and water rights. Significantly, however, several types of entities besides cities provide municipal water. These include rural water districts, public wholesale water supply districts, county water supply and distribution districts, and community colleges. In short, the focus of the Proposed Act on municipalities, so defined, recognizes that the primary condemnor of water rights in the future will be public water suppliers.

“Water district” is defined to include water-related districts, except those that are “suppliers of water.” The purpose of this definition is to enable section 4(a) to preclude these non-water-suppliers from condemning water and water rights under this act. Other statutory sections empower groundwater management districts to take “land or

317. Id. § 3.
318. Id. § 3(a).
320. Id.
322. Id. §§ 15-101 to -1705.
323. Id. §§ 26-201 to -211 (1993).
324. See supra note 122 and accompanying text.
325. Id.
326. PROPOSED ACT § 3(c).
interests in land," and irrigation districts to take water rights. These types of districts would have to proceed under those other statutes, rather than under this Proposed Act, without the presumption of a public purpose.

The term "water contract" is defined to include only those contracts between the Kansas water office and municipal and industrial users for water in reservoirs for which the state has water reservation rights. As a result, this definition would not cover a contract under which an industry purchases water from the owner of water impounded in a smaller reservoir.

There are several reasons for this distinction. One is the legislative veto power over contracts entered into pursuant to the water marketing program. Such contracts are subjected to public purpose and political scrutiny and are therefore worthy of exemption. Another reason is that the contract between the state and the municipal and industrial user contains a section limiting the use of the water to a specific geographical area that can be changed only with the approval of the Kansas Water Authority. A third reason is that contracts under the state water marketing program are generally for relatively large amounts of water over long periods of time.

While a broader definition covering all types of contracts could conceivably be used, the Proposed Act would not necessarily preclude the condemnation of other types of water contracts. The legislature could decide, for example, to allow condemnation of the Storage Act water contracts. Nevertheless, we are proposing no condemnation of these contracts for several reasons. Unlike water rights, these contracts are not real property. In addition, the state is the other party to the contract. The taking of a portion of a contract right could have grievous consequences for the condemnee that might not be reflected in the valuation of the property taken. For example, assume that a city downstream from a reservoir takes thirty percent of the rights of a power company's contract for water supply from the reservoir. The power company may have spent millions or billions on the power plant site and needs the water. This taking could render the plant useless.

329. Proposed Act § 3(d).
332. Id.
Highest and best use analysis, however, might require that a much smaller amount be paid for the taking.

"Water" is defined to enable condemnation of water as personal property\(^{334}\) rather than as a water right, which is a perpetual right to use water.\(^ {335}\) For example, a watershed structure could have water impounded for recreation use; this water would be subject to condemnation. If a condemnor sought the stored water for only one year, the condemnation could be seen as a taking of personal property. If the condemnation were for water stored over several years, however, it would begin to look like the water right, and not merely water, were being taken.

"Municipal use" is defined\(^ {336}\) because the Proposed Act's treatment of municipal use is special. The Water Appropriation Act\(^ {337}\) does not define municipal use. The Division of Water Resources' regulations define municipal use as follows:

"Municipal use" means the various uses made of water delivered through a common distribution system operated by: (1) a municipality; (2) a rural water district; (3) a water district; (4) a public wholesale water supply district; (5) any person or entity serving 10 or more hookups for residences or mobile homes; and (6) or any other similar entity distributing water to other water users for various purposes. Municipal use shall include use of water by restaurants, hotels, motels, churches, camps, correctional facilities, educational institutions and similar entities using water which does not qualify as a domestic use.\(^ {338}\)

This DWR definition is broad because it includes "the various uses made of water," and because it includes uses made by various types of entities. The definition in the Proposed Act is, by comparison, more specific regarding the types of uses made of the water.\(^ {339}\) Moreover, the Proposed Act includes only uses by a municipality as defined in the Proposed Act,\(^ {340}\) not other entities mentioned in the DWR regulation. This proposed definition is thus consistent with the Proposed Act's focus on condemnation powers for public water supplies. The definition is specific because of the implicit reference in section 4(a) to the water use preference listing of section 707 of the Water Appropriation Act.\(^ {341}\)

\(^{334}\) Proposed Act § 3(e).
\(^{336}\) Proposed Act § 3(f).
\(^{339}\) Proposed Act § 3(f).
\(^{340}\) Id. § 3(a), (f).
\(^{341}\) See supra notes 63-77 and accompanying text.
3. Condemnation by Municipalities and Industries

The heart of the Proposed Act is section 4, which would make a number of changes in Kansas condemnation law as well as answer some questions raised by current statutes.

While several existing statutes empower cities to condemn land, any interest in real property, water, and private property, and while the irrigation statutes state broadly that all types of water rights are subject to condemnation, no act or section specifically states that cities may condemn water rights. Proposed section 4 provides that water and water rights may be so condemned. Thus, a municipality, as defined in the Proposed Act, could seek less than a real property right by condemning water already impounded in a reservoir or water that will be there in the future. The municipality could seek a full water right, whether the right is a vested right or an appropriation right. The municipality could seek only part of a water right, such as half of the water right’s full annual quantity. Or, the municipality could condemn only the attribute of the water right enabling the condemnee to make a call—that is, the condemnee’s priority status relative to the condemnor. It could not, however, seek contract rights, at least those under the Water Plan Storage Act.

Section 4(a) limits a municipality to condemning water or water rights that are being used for other than domestic and municipal use. This subsection thus recognizes the preference listing in section 707 of the Water Appropriation Act and incorporates its broad interpretation discussed above. Section 4(a) also precludes a municipality from taking water from other providers of municipal water, such as the various districts that provide water for municipal use. Municipalities could condemn from any “person,” defined in section 701(a) of the Water Appropriation Act to include agencies of the state or federal government. Of course, a city would be unable to take a federally held right notwithstanding this section. An express grant of a power to take a state held right is permissible, however, and already exists in Kansas. The Proposed Act’s language would permit, for example, a city to take part or all of a recreational water right held by a state agency.

342. See supra part II.B.6.a.
343. See supra part II.B.4.
344. PROPOSED ACT § 4(a).
346. See supra notes 63-77 and accompanying text.
347. KAN. STAT. ANN. § 82a-701(a) (1989).
348. See KAN. STAT. ANN. §§ 66-908, -909, -910 (1985), which permit railway corporations to condemn state lands not used for a public purpose.
Section 4(a) of the Proposed Act also limits industries to taking water or water rights used for purposes other than domestic, municipal, or irrigation use, thus further recognizing the section 707 preference list. If the legislature determined that irrigation uses should not be preferred, it could change this section of the Proposed Act or amend section 707 to rearrange the preference list. The three classes of water use which would then be available for condemnation would be industrial, recreation, and water power uses. For example, a natural gas utility that needs water for a compressor station could condemn water rights of a tire manufacturing company or a modular home fabrication company.

Section 4(a) states that the enumerated entities have power to take water rights in fee simple. The purpose of this language is to ensure that the limitation sometimes imposed on utilities of taking only easements, and not fee interests, would not apply to water rights. This limitation has relevance when the entity takes the land along with the water rights. While it is conceptually possible to create only an easement to a water right, allowing the fee to be taken probably makes better sense.

“Water districts,” defined as those districts that are not water suppliers, would be precluded from condemning water rights under section 4(a) of this Proposed Act and would remain in their current situation. The legislature could decide that water districts should have the preferred condemnation power under this Proposed Act. If so, the legislature might consider preserving the preference list by stating that irrigation districts could not condemn domestic, municipal, or irrigation rights, but could condemn industrial, recreation, or water power rights.

Use of the current Eminent Domain Procedure Act is maintained to ensure that a new procedure is not invented for these types of cases. Modification of that Act might become necessary to aid in the valuation of water rights. Nothing in the Proposed Act would limit the values of rights to amounts spent in obtaining the right, as statutes in California and Oregon provide. While limiting value is an interesting idea, it is fraught with potential constitutional takings problems if enacted now.

349. See supra note 63 and accompanying text.
351. PROPOSED ACT § 3(c).
353. See supra notes 295-98 and accompanying text.
Kansans have relied on the market system and the Water Appropriation Act's definition of a water right for over fifty years. Section 4(c) of the Proposed Act gives municipalities and industries virtually unlimited geographical condemnation power over water and water rights. Current law regarding condemnation by various entities is somewhat ambiguous. Most statutes say nothing about geographical limits. Some limit condemnation to areas within the boundaries of the condemnor, while others allow condemnation both inside and outside the boundaries. Other statutes suggest no limitation. Yet another statute gives both a five mile and a twenty mile limitation. The 1918 Utica case, discussed previously, held that cities can seek water outside their boundaries if statutes do not prescribe geographical limitations. Currently, the Water Transfer Act, which attempts to provide oversight for movements of large quantities of water over long distances, should provide sufficient safeguards to protect the local basin and the state in terms of various environmental, hydrologic, and economic factors. A small city would rarely be able to afford the costs of acquiring geographically distant water rights and pipeline easements and of operating and maintaining them.

Problems exist under current law when a condemnor needs to obtain DWR approval for a change in type of use, place of use, or point of diversion under section 708b of the Water Appropriation Act, or for a transfer under the Water Transfer Act. Section 708b provides that an owner can apply for the change, but a condemnor does not become the owner until it pays the money into the court. Similarly, anyone wishing to move 2,000 acre feet or more of water a distance of 35 miles or more must obtain approval for the transfer. The condemnor would not want to acquire the water rights, however, unless the transfer were approved. Subsections 4(d) and (e) of the Proposed

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354. See supra note 38 and accompanying text.
357. E.g., id. §§ 12-672, 13-1018h.
358. E.g., id. § 12-694.
360. See supra text accompanying notes 211-14.
361. 103 Kan. at 569-70, 175 P. at 636.
362. KAN. STAT. ANN. §§ 82a-1501 to -1505 (Supp. 1993).
363. Id. § 82a-708b (Supp. 1993); see also supra notes 56-60 and accompanying text.
364. KAN. STAT. ANN. §§ 82a-1501 to -1508 (Supp. 1993); see also supra notes 78-84 and accompanying text.
365. KAN. STAT. ANN. § 82a-708b (Supp. 1993).
366. Id. §§ 82a-1501 to -1508 (Supp. 1993).
Act enable these applications to be filed, considered, and conditionally granted prior to the commencement of the condemnation proceedings.

The venue provisions of the Proposed Act\textsuperscript{367} are meant to place the burden on cities to file the action where the water or points of diversion for the water rights are located. Currently, one of several municipal condemnation statutes previously discussed\textsuperscript{368} requires that the action be filed in the county in which the city seeking condemnation is located.\textsuperscript{369} While cities should have broad condemnation power, they should have to face a local jury in the county in which the water or water right is located.

The Proposed Act’s requirement that municipalities have conservation plans before they institute condemnation proceedings\textsuperscript{370} is consistent with recently enacted legislation. The Water Plan Storage Act,\textsuperscript{371} the Water Transfer Act,\textsuperscript{372} and the Water Appropriation Act\textsuperscript{373} all currently contain requirements regarding conservation plans.

Section 4(i) of the Proposed Act places a limit on the otherwise fairly broad condemnation power recognized and granted by the Proposed Act. It states that cities cannot condemn water for purposes other than supplying homes, buildings, and businesses with water. It expressly precludes taking water for irrigating public lawns or public or private golf courses. While this proposal slightly upsets the preference list of section 707,\textsuperscript{374} it essentially establishes a use preference list for a municipality’s own users. A municipality could purchase or otherwise acquire additional water rights for public or golf course lawn watering, but it could not easily condemn the water rights for that purpose. It seems fair that a municipality could not take an irrigator’s water right and use the water for irrigation within the municipality’s water distribution system. The restriction on industrial use “only for use for the primary purpose for which the industry is established”\textsuperscript{375} is a similar limit. For example, this section would prohibit an electric power company from condemning an irrigation right, and then using the right to irrigate either lawns or crops at its plant site.

\textsuperscript{367} Proposed Act § 4(g).
\textsuperscript{370} Proposed Act § 4(h).
\textsuperscript{372} Id. § 82a-1502 (Supp. 1993).
\textsuperscript{373} Id. § 82a-733.
\textsuperscript{374} Id. § 82a-707 (1989).
\textsuperscript{375} Proposed Act § 4(i).
IV. CONCLUSION

Current Kansas law on condemnation of water rights contains numerous ambiguities. Questions exist: Who has the power, and what is the scope of this power? We have set forth proposed legislation that addresses some of the problems. The Proposed Act would obviously be supported by some and criticized by others. Our purpose is not to propose a model statute, but rather to begin the discussion of the issues that need to be addressed. To find ambiguities and problems in current law is not to suggest that the problems are so great, or that it is so likely that these problems will manifest themselves, that these problems demand the immediate attention of the legislature and revision of current law. We have suggested legislation that might solve some problems, but we recognize that new legislation itself always creates new problems of scope and interpretation. Perhaps it is better to await the day that cities and industries really need to exercise condemnation authority, a day that could be several years or decades off. The very existence of the ambiguities and uncertainties in the current statutory scheme may actually encourage voluntary transfers of water rights when conditions require such transfers.