

# Water is Power: An Analysis of Cities’ Power to Procure Municipal Water Supplies

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*How powerful are U.S. cities? This question forms the basis of a massive debate in the urban law and policy field. Some believe that cities are, or at least have the potential to be, extremely powerful. Others believe that cities are completely powerless. This paper seeks to contribute towards the assertion that cities are in fact powerful. Accordingly, one such city power that may become increasingly important in the future is identified and analyzed: the power to obtain municipal water supplies.*

*Cities’ power to obtain municipal water supplies developed, and will become increasingly important, due to the twin problems of water scarcity and cities obtaining adequate municipal water supplies for their residents. The main way in which cities obtain municipal water supplies is through eminent domain. In addition, cities have two advantages over other water appropriators: they enjoy two exemptions from the anti-speculation principle, allowing them to acquire water rights in advance of demand; and they have increasingly broad rights to pump groundwater. As the twin problems worsen and conflicts over water allocation intensify due to population growth and climate change, two potential outcomes are likely to occur. First, courts might be forced to prioritize the water needs of some municipalities over others. Second, cities’ condemnative water rights might cause a complete shift in our nation’s system of water rights law: states that currently allocate water under the prior appropriation doctrine might switch to a system of condemnative water rights. In conclusion, this paper finds that cities have potentially tremendous power when it comes to obtaining municipal water supplies and that the broad scope of this power, especially considering climate change, population growth, and increasing water rights conflicts, might forever change urban law and policy.*

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#### INTRODUCTION: THE CITY POWER DEBATE

Oil pipelines are not the only pipelines causing a stir these days. In 2018, the City of Thornton, Colorado announced that it was planning to build a seventy-mile, forty-eight-inch pipeline to transport water from reservoirs north of Fort Collins, where water from the Poudre River is stored, all the way to Thornton.<sup>1</sup> According to Mark Koleber, the director of the Thornton Water Project, obtaining this river water is important for the city's future.<sup>2</sup> "In fact, it should satisfy Thornton's thirst until 2065."<sup>3</sup> The problem, however, is that the city's

<sup>1</sup> See Jacy Marmaduke, *High and Dry: Thornton Water Pipeline Spills Doubt for 2 Colorado Towns*, COLORADOAN (last updated Aug. 9, 2018, 2:15 PM), <https://www.coloradoan.com/story/news/2018/08/09/thornton-water-pipeline-rural-colorado-towns-pierce-ault/798558002/>.

<sup>2</sup> Tyler Silvy, *Thornton Pipeline Project Threatens to Stir Up Long-Held Resentment in Weld County*, THE TRIBUNE (Apr. 22, 2018), <https://www.greeleytribune.com/news/local/thornton-pipeline-project-threatens-to-stir-up-long-held-resentment-in-weld-county/>.

<sup>3</sup> *Id.*

proposal means that the pipeline would have to snake through the lands of private landowners throughout Weld County. While some of these landowners have sold their land to the pipeline project for an agreed upon price, at least fifteen others have not.<sup>4</sup> In an effort to ensure the success of the pipeline project, in April 2018, Thornton announced that it did not need the landowners' consent to push the project through. If the landowners did not cooperate, the city could simply condemn their land using its eminent domain power.<sup>5</sup>

Stories like this one beg the question: just how powerful are U.S. cities? This question is the focus of an expansive debate among urban law and policy scholars, politicians, economists, and many others. Some, such as Benjamin Barber<sup>6</sup> and Ed Glaeser,<sup>7</sup> believe that cities are special and have the potential to be extremely powerful in this transnational world filled with old world political institutions.<sup>8</sup> These scholars emphasize that the majority of the world's population currently lives in cities<sup>9</sup> and that economic production is concentrated in cities,<sup>10</sup> thus giving cities sufficient social and economic capital to change things from the ground up.<sup>11</sup> Others, however, argue that cities are actually powerless.<sup>12</sup> These scholars indicate that cities are not mentioned anywhere in the U.S. Constitution and that they are merely administrative units of the states.<sup>13</sup> This debate is also reflected in state politics as some states follow the Home Rule,<sup>14</sup> while others follow Dillion's Rule.<sup>15</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Cf. id.* (“...the Thornton City Council would give city staff the power to declare eminent domain on the more than 15 landowners ... who haven't yet agreed to a price for allowing [the] pipeline to run through their property. Thornton may not use eminent domain, but now that Thornton staff have the power to declare it, it serves as a hefty bargaining chip.”).

<sup>6</sup> Benjamin Barber, *Why Mayors Should Rule the World*, TED TALK (June 2013), [https://www.ted.com/talks/benjamin\\_barber\\_why\\_mayors\\_should\\_rule\\_the\\_world](https://www.ted.com/talks/benjamin_barber_why_mayors_should_rule_the_world).

<sup>7</sup> EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* (2011).

<sup>8</sup> *See, e.g., id.* at 6 (“[C]ities [are] our species' greatest invention.”).

<sup>9</sup> *See, e.g., id.* at 1.

<sup>10</sup> *See id.* at 3–7 (illustrating how urban density contributes to economic production).

<sup>11</sup> *Cf. id.* at 9 (“With very few exceptions, no public policy can stem the tidal forces of urban change.”).

<sup>12</sup> *See, e.g.,* Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (describing cities as mere “creatures of the state” because their powers are strictly construed and limited to those explicitly granted by states); Richard Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91 (2017) (describing how the global marketplace and the practice of state-based federalism account for the weakness of cities).

<sup>13</sup> *See, e.g.,* Frug, *supra* note 12, at 1062–67 (explaining how cities are “subject to absolute state control,” that they have no “natural” or “inherent” powers, and that the U.S. Constitution “has been construed to limit city power”).

<sup>14</sup> A Home Rule state has a specific provision in the state's constitution or statutes giving municipal autonomy over local affairs. In other words, in Home Rule states, there is a presumption of local autonomy. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2011 (2018) (stating that home rule is “the commitment to local lawmaking capacity codified in constitutions and statutes of the vast majority of states”) (internal citation omitted).

Contributing to the debate, this paper identifies and analyzes a major power that cities have: the power to obtain municipal water supplies. Part I of this paper introduces the twin problems that have forced cities to obtain municipal water supplies in the past and that will make this power increasingly important in the future: (1) water scarcity; and (2) cities' efforts to obtain municipal water supplies for their residents. Part II introduces cities' eminent domain power, first describing the concept of eminent domain in general and then exploring the scope of cities' ability to exercise such power. Part II also highlights two additional advantages cities have over other water appropriators. Finally, Part III posits that as water scarcity worsens and conflicts over water allocation intensify, two potential outcomes might occur. First, courts may be forced to prioritize the water needs of some municipalities over the water needs of other municipalities. Second, cities' power to procure municipal water supplies by condemnation may cause a shift in our nation's system of water rights law. Specifically, states that currently allocate water according to the "prior appropriation doctrine" might move towards a system of condemnative water rights.

This paper finds not only that cities have tremendous power to obtain municipal water supplies, but also that the broad scope of this power, in light of climate change, population growth, and intensifying water rights conflicts, might forever change cities' position in urban law and politics.

#### I. THE TWIN PROBLEMS OF WATER SCARCITY AND OBTAINING MUNICIPAL WATER SUPPLIES

This paper first illuminates the two problems that have forced cities to exhibit power over water: (1) water scarcity; and (2) cities' procurement of enough municipal water to supply their residents.

*The Problem of Water Scarcity:* Water is essential for human survival, yet problems of water scarcity are felt around the world, including across the United States. Some areas of the country, such as the northeast states, are water-rich, but other areas, particularly the western states, are facing increasing water shortages.<sup>16</sup> Hydrologists estimate that demand for water will continue to increase as the world's population grows,<sup>17</sup> but access to freshwater supplies

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<sup>15</sup> A Dillon's Rule state has no provision in the state's constitution giving cities power over local affairs. In these states, there is a presumption of no local autonomy. Instead, to exercise power, local governments must point to specific authority. *Id.* at 2012 (stating that under Dillon's Rule, "state grants of authority are to be narrowly limited . . . to only those powers expressly granted, necessarily implied in the express grant, or essential for the accomplishment of state-prescribed purposes") (internal citation omitted).

<sup>16</sup> See, e.g., Vincent C. Tidwell et al., *Mapping Water Availability, Cost and Projected Consumptive Use in the Eastern United States with Comparisons to the West*, 13 ENVTL. RES. LETTERS 1 (2018).

<sup>17</sup> See generally, e.g., William J. Cosgrove & Daniel P. Loucks, *Water Management: Current*

will continue to decrease due to climate change, drought, and flooding.<sup>18</sup> According to the U.S. Government Accountability Office, forty states have at least one region that is expected to experience water shortage issues within the next decade.<sup>19</sup> In fact, Bank of America Merrill Lynch reports that water scarcity is the number one risk facing our planet.<sup>20</sup>

Thus, the arena of the U.S. water wars is set: As climate change and population growth combine to decrease our freshwater supply, and as our consumptive lifestyles continue to increase our demand for freshwater,<sup>21</sup> people around the country (and around the world) will struggle to obtain adequate water supplies. Therefore, any power that any entity, such as a city or its municipal corporations, has to obtain water (often at the expense of others) is a power that is both to be awed and to be feared. While this power is beneficial for the cities and their inhabitants, it could spell major problems for other entities, those living outside of cities, and the local environment. For example, if a city is transferring water out of the basin it originated from, then unconsumed water will not find its way back to its source. This can cause serious adverse environmental impacts in the source water basin, including harm to instream flows, water quality, and riparian habitats.<sup>22</sup>

*The Problem of Obtaining Municipal Water Supplies:* Providing an adequate residential water supply is one of the municipal government's primary functions.<sup>23</sup> Because municipalities must serve concentrated populations, municipal water providers must meet many types of needs, such as domestic residential demand, commercial industry and commerce requirements, and sewerage.<sup>24</sup> To meet the demand of all these needs, municipalities often must

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*and Future Challenges and Research Directions*, 51 WATER RESOURCES RES. 4823 (2015) (describing correlations between freshwater supplies and human population growth); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-430, FRESHWATER: SUPPLY CONCERNS CONTINUE, AND UNCERTAINTIES COMPLICATE PLANNING (2014) (same); DON HINRICHSSEN & HENRYLITO TACIO, THE COMING FRESHWATER CRISIS IS ALREADY HERE, *available at* <https://www.wilsoncenter.org/sites/default/files/popwawa2.pdf> (last visited May 8, 2019) (same).

<sup>18</sup> Ellie Kincaid, *California Isn't the Only State with Water Problems*, BUS. INSIDER (Apr. 21, 2015, 5:56 PM), <https://www.businessinsider.com/americas-about-to-hit-a-water-crisis-2015-4>.

<sup>19</sup> GAO-14-430, *supra* note 17, at 28.

<sup>20</sup> BEIJIA MA & FELIX TRAN, TRANSFORMING WORLD—Q2 2018 PRIMER PICKS 44 (2018), *available at* <https://netosnotes.files.wordpress.com/2019/03/transforming-world-primer-picks-q2-2018.pdf>; *see* Kincaid, *supra* note 18.

<sup>21</sup> *See generally, e.g.*, 2030 WATER RESOURCES GRP., CHARTING OUR WATER FUTURE: ECONOMIC FRAMEWORKS TO INFORM DECISIONMAKING 40–53 (2009), *available at* [http://www.2030wrg.org/wp-content/uploads/2012/06/Charting\\_Our\\_Water\\_Future\\_Final.pdf](http://www.2030wrg.org/wp-content/uploads/2012/06/Charting_Our_Water_Future_Final.pdf) (assessing projected increases in water demand versus existing water supplies).

<sup>22</sup> Christine A. Klein, *Water Transfers: The Case Against Transbasin Diversions in the Eastern States*, 25 J. ENVTL. L. 249, 272–73 (2006–2007).

<sup>23</sup> Wilbert L. Ziegler, *Acquisition and Protection of Water Supplies by Municipalities*, 57 MICH. L. REV. 349, 349 (1959).

<sup>24</sup> BARTON H. THOMPSON ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 98 (6th ed. 2018).

increase their municipal water supplies.<sup>25</sup> However, efforts to increase municipal water supplies frequently spark controversy.<sup>26</sup> Most commonly, these controversies arise when a municipality seeks to condemn private property to build a waterworks project,<sup>27</sup> to obtain a private waterworks project,<sup>28</sup> or to obtain the property's water supplies or water rights.<sup>29</sup> As more people move into cities, existing supplies are depleted, and climate change decreases total supplies, these controversies will likely increase in both number and frequency.

## II. HOW CAN CITIES EXERCISE POWER OVER WATER?

Cities can exercise the power of eminent domain to obtain municipal water supplies. Typically, water in the United States is allocated according to whichever system a state has decided to adopt: prior appropriation, riparianism, or some hybrid of the two.<sup>30</sup> Under the prior appropriation system of water allocation, a municipality is merely an appropriator: it has no greater rights than any other appropriator.<sup>31</sup> Thus, a municipality is governed by the same rules as any other appropriator: appropriation rights are limited to present, beneficial uses.<sup>32</sup> Similarly, under a riparian system of water allocation,<sup>33</sup> a municipality

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<sup>25</sup> See Corwin W. Johnson, *Condemnation of Water Rights*, 46 TEX. L. REV. 1054, 1055–56 (1968).

<sup>26</sup> See THOMPSON ET AL., *supra* note 24, at 97.

<sup>27</sup> See, e.g., *Ramsey v. Leeper*, 31 P.2d 852, 853–84 (Okla. 1933) (seeking to condemn private property to construct a “waterworks system, together with all reservoirs, dams, conduits, machinery and equipment that might be necessary to supply water for Oklahoma City”); *Tacoma v. Welcker*, 399 P.2d 330, 333 (Wash. 1965) (seeking to condemn private property to create a “buffer strip” or “surface filter blanket” to protect the water quality of a river that is the source of a city’s water supply); *Edwards v. Cheyenne*, 114 P. 677, 680 (Wyo. 1911) (seeking to condemn private property outside the city’s corporate boundaries to construct a waterworks project to supply the city’s inhabitants).

<sup>28</sup> See, e.g., *City of Missoula v. Mtn. Water Co.*, 378 P.3d 1113, 1117 (Mont. 2016) (seeking to condemn a privately-owned water system); *S. Bay Irrigation Dist. v. Cal.-Am. Water Co.*, 133 Cal. Rptr. 166, 175 (Ct. App. 1976) (likewise, condemnation of a privately-owned water system).

<sup>29</sup> See, e.g., *San Bernardino Valley Mun. Water Dist. v. Meeks & Daley Water Co.*, 38 Cal. Rptr. 51, 52 (Ct. App. 1964) (seeking to “condemn the prescriptive and appropriative water rights and the diversion facilities of [two private] companies”); *Thornton by Util. Bd. v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 385 (Colo. 1978) (en banc) (seeking to condemn private property, including its water, water rights, ditches, and ditch rights).

<sup>30</sup> THOMPSON ET AL., *supra* note 24, at 18–20.

<sup>31</sup> The prior appropriation system of water allocation essentially allocates water rights on a first come, first served basis to water users who put the water to a beneficial use. For a more thorough explanation of prior appropriation, see *id.* at 174–386.

<sup>32</sup> Allan D. Gross, *Condemnation of Water Rights for Preferred Uses—A Replacement for Prior Appropriation?*, 3 WILLAMETTE L.J. 263, 269 (1965) (citing *City & Cty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 997 (1954)).

<sup>33</sup> The riparian system of water allocation allocates water rights “to landowners whose lands adjoin and in some cases also underlie the watercourse.” THOMPSON ET AL., *supra* note 24, at 27. For a more thorough explanation of riparianism, see *id.* at 27–172.

has the same rights as a private individual.<sup>34</sup> However, unlike other water users, cities have another way they can acquire water and water rights: specific state statutory or constitutional authorizations to condemn water rights and related private property in order to provide water for their residents.<sup>35</sup> This condemnation power also often extends to water rights and private property located outside the cities' municipal boundaries.<sup>36</sup>

The power of eminent domain refers to the government's power to take private property and put it to public use.<sup>37</sup> In accordance with the Fifth Amendment of the U.S. Constitution, the government can exercise this power only if it provides just compensation to the private property owners whose property has been taken.<sup>38</sup> Thus, the power of eminent domain presents two issues: (1) whether the property is being put to a "public use" and (2) whether the property owner has received "just compensation." "As a general rule municipal use is public and justifies exercise of eminent domain."<sup>39</sup> More specifically, furnishing the domestic water needs of a city has long been considered a public use.<sup>40</sup> As such, the only real question in condemnation actions concerning municipal water supplies is the value of the "just compensation."<sup>41</sup> Given, however, the fact that the focus of this paper is simply on identifying and analyzing a city's eminent domain power, further exploration into the question of "just compensation" is beyond its scope.

As a municipality or municipal corporation is not "the government," a city

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<sup>34</sup> Gross, *supra* note 32, at 269.

<sup>35</sup> *Id.* at 270 (citing WYO. CONST. art. XIII, § 5; ARIZ. REV. STAT. ANN. §§ 12-1111, 12-1114 (1956); CAL. GOV'T CODE § 38730 (West 1949); COLO. REV. STAT. § 139-32-1(78) (1963); KAN. STAT. ANN. § 12-809 (1964); UTAH CODE ANN. § 10-7-4 (1953); WASH. REV. CODE ANN. § 8.12.030 (West 1965)); *see also* COLO. REV. STAT. §§ 38-6-201 to 38-6-216 (2018) (current statutes in Colorado governing municipal condemnation of water rights).

<sup>36</sup> *Id.* (citing, for example, MONT. REV. CODE § 11-977 (1947); NEV. REV. STAT. § 350.370 (1961)); *see also* MONT. CODE ANN. § 7-5-4106 (West 2019) (current statute in Montana).

<sup>37</sup> *Eminent Domain*, WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/eminent\\_domain](https://www.law.cornell.edu/wex/eminent_domain) (last visited Oct. 28, 2018).

<sup>38</sup> *See* U.S. CONST. amend. V.

<sup>39</sup> Richard Harnsberger, *Eminent Domain and Water Law*, 48 NEB. L. REV. 325, 367 (1969) (citing NICHOLS ON EMINENT DOMAIN § 7.5153 (Matthew Bender, rev. 3d ed. 1964); EUGENE MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 32.63 (3d ed. 1964)).

<sup>40</sup> *See, e.g.,* Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 689 (1897) ("That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation."); *see also* Bowden v. York Shore Water Co., 95 A. 779 (Me. 1915); Watson v. Inhabitants of Needham, 37 N.E. 204, 208 (Mass. 1894); Rowell v. City of Lawton, 288 P. 344 (Okla. 1930); Truitt v. Ambridge Water Auth., 133 A.2d 797 (Pa. 1957); Tacoma v. Welcker, 399 P.2d 330, 335 (en banc) (Wash. 1965).

<sup>41</sup> *See* THOMPSON ET AL., *supra* note 24, at 100.

does not have inherent eminent domain powers.<sup>42</sup> It can exercise the power of eminent domain only when it is expressly authorized to do so by the state legislature.<sup>43</sup> Most state legislatures have granted such authorization in one way or another. To understand how cities have come to obtain this power, this Part explores ways in which state legislatures have authorized cities to exercise eminent domain. Section A describes how most states have granted cities the right to exercise eminent domain within their municipal boundaries and provides an example of the types of conflicts that arise when cities exercise this power. Section B describes the two ways in which some states have granted cities the right to exercise eminent domain powers outside the cities' municipal limits and provides examples of conflicts that arise. Finally, Section C describes additional advantages that cities have when obtaining municipal water supplies, apart from the power of eminent domain. While most of the cases cited in this Part are quite old, they are still important as water scarcity issues will only increase due to climate change and population growth, increasing the likelihood that these types of conflicts may come before the courts again. In other words, these cases may become increasingly relevant once again as cities exercise their eminent domain powers in increasingly burdensome and conflicting ways.

A. *Most states have authorized cities to exercise eminent domain inside their borders to obtain municipal water supplies.*

The most common and least contested use of cities' eminent domain power is when it is used within a city's municipal boundaries. Most states have enacted legislation explicitly giving cities the power of eminent domain inside their boundaries.<sup>44</sup> These laws confer general eminent domain powers, however, not those specifically for the purpose of obtaining municipal *water* supplies. For example, a Massachusetts law provides that

The aldermen of any city, except Boston, or the selectmen of a town may purchase, or take by eminent domain under chapter seventy-nine, any land, easement or right therein within the city or town not already appropriated to public use, for any municipal purpose for which the purchase or taking of land, easement or right therein is not otherwise authorized or directed by statute.<sup>45</sup>

Coupled with a municipality's police power, these general eminent domain

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<sup>42</sup> See *Tacoma*, 399 P.2d at 334.

<sup>43</sup> *Id.*

<sup>44</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED (2006) (discussing, in a nationwide study, the extent to which eminent domain can be used by state and local governments).

<sup>45</sup> MASS. ANN. LAWS ch. 40, § 14 (LexisNexis 1967).

powers enable cities to provide and protect municipal water supplies within their boundaries.<sup>46</sup>

Some states have also enacted legislation allowing cities to exercise eminent domain within their municipal boundaries specifically for the purpose of acquiring municipal water supplies.<sup>47</sup> For example, an Alabama law allows municipal corporations “[t]o acquire, purchase, lease as lessee, construct, reconstruct, improve, extend, operate, and maintain any water system or part thereof or any sewer system or part thereof or any combination thereof within or without or partly within and partly without the corporate limits of the city . . . .”<sup>48</sup>

However, not all states have granted as broad an eminent domain authority as Alabama. For example, Arkansas limits municipalities to using eminent domain to acquire water resources “only as a last resort.”<sup>49</sup> The “only as a last resort” provision implies that Arkansas cities must attempt to obtain water supplies in a more cooperative, less forceful manner before they can exercise their eminent domain power. Nevertheless, this law still gives Arkansas cities relatively broad authority to condemn private property when needed. Thus, these broad grants of eminent domain power have effectively given cities a preference over other water users as long as the private property owners whose lands, property, or water rights are taken are justly compensated.<sup>50</sup>

As these laws are fairly explicit in their delegations of eminent domain authority, there have not been many reported cases protesting them. The few cases that have arisen have all had one common theme: the courts will not mess with express grants of statutory authority to condemn property within municipal limits to provide water to a city and its inhabitants. For example, a 1925 case in Indiana involved a municipal water company trying to appropriate private property to build a dam and water plant that would be used to provide water to the city and its residents.<sup>51</sup> In that case, both the state trial and Supreme Court analyzed whether the water company had the power of eminent domain by evaluating whether the company was a municipal public utility.<sup>52</sup> Finding that the company *was* a municipal public utility, and thus *did* have the right to exercise eminent domain for the purpose of supplying the city and its residents with water, both courts upheld the company’s right to appropriate lands for the

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<sup>46</sup> Ziegler, *supra* note 23, at 351 (citing EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 24.265 (3d ed. 1949)).

<sup>47</sup> See, e.g., ALA. CODE § 11-50-4 (1975); ARIZ. REV. STAT. ANN. § 9-511 (1987); ARK. CODE ANN. § 18-15-601 (West 2019); COLO. REV. STAT. § 38-6-201 (2016); FLA. STAT. § 166.411 (2005); GA. CODE ANN. § 36-34-5 (2010); KY. REV. STAT. ANN. § 106.220 (West 1954).

<sup>48</sup> ALA. CODE § 11-50-343(a)(5).

<sup>49</sup> ARK. CODE ANN. § 18-15-601(c) (2012).

<sup>50</sup> Harnsberger, *supra* note 39, at 366–67.

<sup>51</sup> Matlock v. Bloomington Water Co., 146 N.E. 852, 854 (Ind. 1925).

<sup>52</sup> *Id.* at 854–55.

dam and water plant.<sup>53</sup> Moreover, the Indiana Supreme Court clarified that “an express grant of statutory authority to take lands for [a specific] purpose will not be given a construction which would have the practical effect of nullifying the grant.”<sup>54</sup> Thus, in states where the state legislature has seen fit to explicitly grant cities and municipal corporations the power of eminent domain over water supplies, the courts will likely uphold that power.

B. *Some states have also authorized cities to exercise eminent domain outside their borders to obtain municipal water supplies.*

Not only can cities exercise eminent domain to obtain municipal water supplies within their borders, but some cities can also exercise this power extraterritorially. This extraterritorial power comes from one of two sources: either (1) states can explicitly allow their cities to exercise this power extraterritorially via statute, or (2) the courts can confer this extraterritorial power by inferring it from the cities’ other, expressly granted powers.

1. Some states have passed legislation explicitly providing that cities can exercise eminent domain outside their borders.

Some states have statutes explicitly giving cities extraterritorial eminent domain power for the purpose of obtaining municipal water supplies.<sup>55</sup> For example, the Alabama and Arkansas laws quoted in Part II.A also allow for municipalities to exercise eminent domain outside of their corporate limits. In relevant part, the Arkansas law provides:

All municipal corporations in this state . . . , which supply any town, city, or village in this state, or the inhabitants thereof, with water . . . , are authorized to exercise the power of eminent domain to condemn, take, and use private property for the use of the corporations when necessary to carry out the purposes and objects of the corporations . . . , *regardless of whether or not the private property is located within or outside of the boundaries of the city, town, or village* which the municipal or other corporation, including not-for-profit corporations and water associations, serves.<sup>56</sup>

There are also few cases concerning conflicts over explicit grants of extraterritorial eminent domain power. A 1972 case in Arizona, however, illustrates that the courts likely will uphold these provisions. In *Citizens Utilities Water Co. v. Superior Court*, the Arizona Supreme Court held that a city had a right to condemn a private water company’s properties that were outside the

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<sup>53</sup> *Id.* at 855.

<sup>54</sup> *Id.* (citing *Pocantico Water-Works Co. v. Bird*, 29 N.E. 246 (N.Y. 1891)).

<sup>55</sup> *See, e.g.*, ARK. CODE ANN. § 18-15-601(a); ARIZ. REV. STAT. § 9-511.

<sup>56</sup> ARK. CODE ANN. § 18-15-601(a) (emphasis added).

city's boundaries, unconnected with the city, and not used to serve the city's citizens because those takings were for public use, pursuant to the state's constitution.<sup>57</sup> In reaching its decision, the court relied on an Arizona statute that "grants cities the power to exercise the right of eminent domain within or without the city limits to acquire and build water works, pipe lines, and sites therefor."<sup>58</sup> Thus, in this seemingly straightforward case, a state supreme court upheld a state law expressly delegating to a city the power to exercise eminent domain outside that city's municipal boundaries for the purpose of obtaining municipal water supplies.

2. In other states, the courts have held that cities have implied authority to exercise eminent domain outside their borders.

In some states that do not have statutes explicitly conferring extraterritorial eminent domain power to obtain municipal water supplies, courts have held that such power can be implied either: (a) from an express grant of power to condemn that does not specify where the city can exercise said power; or (b) from the general proposition that municipal corporations possess implied power to purchase property outside their corporate limits whenever necessary for the exercise of an express grant of power.

- a. Some courts allow cities to exercise eminent domain power extraterritorially when that city has an explicit grant of eminent domain power without geographical limitations.

In some states, the courts have allowed extraterritorial eminent domain power to be implied from a city's express grant of eminent domain power where the express grant has no geographical limitations. In these states, the states' supreme courts have stated that where a city has an express delegation of condemnation power to obtain a water supply and the delegation includes no express limitations on the territory in which the water can be obtained, the city can condemn land outside its municipal boundaries to obtain municipal water supplies.<sup>59</sup>

For example, in *Edwards v. Cheyenne*, a Wyoming city condemned private property outside its corporate limits to build a dam for the city's water supply.<sup>60</sup> The landowners of the private property filed a complaint against the city to

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<sup>57</sup> *Citizens Util. Water Co. v. Superior Court*, 497 P.2d 55, 58 (Ariz. 1972).

<sup>58</sup> *Id.* at 56 (citing ARIZ. REV. STAT. § 9-511 (1972)).

<sup>59</sup> *See, e.g., Superior Waters, Light & Power Co. v. Superior*, 181 N.W. 113 (Wis. 1921); *Hall v. Mayor & Council of Calhoun*, 79 S.E. 533 (Ga. 1913); *Edwards v. Cheyenne*, 114 P. 677 (Wyo. 1911); *White v. Romney*, 73 S.E. 323 (W.Va. 1911).

<sup>60</sup> 114 P. at 680.

enjoin it from claiming title after the condemnation proceeding.<sup>61</sup> Section 2915 of the Wyoming Revised Statutes of 1899 provided that,

[W]henever any water company or incorporated city or town of this state shall require any land, real estate, or claim, or right of way, for construction and maintenance of water works; or any land which may be affected by any operation connected with the construction or maintenance of the same, such water company or incorporated city or town may acquire such land, real estate, claim or right of way, in the same manner as is provided by section 3084, and said section shall be so construed to be as applicable to such water company, incorporated city or town as it is now applicable to road, ditch or telegraph companies specifically named therein.<sup>62</sup>

Interpreting this language, the Wyoming Supreme Court stated, “[i]t was manifestly intended to confer power to procure an adequate supply of water for the municipality and its inhabitants.”<sup>63</sup> The court held that “authority was conferred upon the city by the section aforesaid to exercise the power of eminent domain for the purpose of acquiring any land within or without the limits of the city required for the construction and maintenance of its municipal waterworks or which might be affected by any operation thereof.”<sup>64</sup>

Similarly, the Georgia Supreme Court has found that where a city had charter power to establish a waterworks system, and it was necessary for the city to look outside its boundaries for a water supply, the city could contract to use the spring of a private property owner located outside the city’s limits.<sup>65</sup>

Finally, the Wisconsin Supreme Court has stated that “[t]he question of the power of the city to acquire and own property beyond the state as well as city boundaries is . . . not seriously doubted.”<sup>66</sup> In holding that a city could condemn property beyond the city’s boundaries, the court reasoned,

The city is authorized not only by its charter but by the public utility law to acquire, own, and operate a waterworks plant. If the only available or practicable supply of pure and wholesome water for a boundary-line city lies across the state boundary, the power granted generally to municipalities of this state to own and operate waterworks plants would be denied to our boundary-line cities if they could not extend pipes and mains across the boundary line to such available water supply.<sup>67</sup>

Thus, as long as a state has given its cities eminent domain power and has not

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 681.

<sup>63</sup> *Id.* at 682.

<sup>64</sup> *Id.* (citation omitted).

<sup>65</sup> *Hall v. Mayor & Council of Calhoun*, 79 S.E. 533, 533–34 (Ga. 1913).

<sup>66</sup> *Superior Waters, Light & Power Co. v. Superior*, 181 N.W. 113, 125 (Wis. 1921).

<sup>67</sup> *Id.*

expressly provided that the power must be used within the city's municipal boundaries, courts may allow the express delegation of eminent domain authority to carry outside the city's limits.

- b. There is also a general proposition that municipal corporations have implied powers to exercise express grants of power extraterritorially.

Courts might also imply extraterritorial eminent domain power from the general proposition "[t]hat municipal corporations possess implied power to purchase property outside their corporate limits whenever that power is necessary for the exercise of an express grant of power."<sup>68</sup> This broader rule derives from the fact that land within the corporate limits of the municipality may not be suitable or sufficient for the exercise of express powers; thus, rather than limit the exercise of an express grant of power, the power to purchase extraterritorial property, if reasonably necessary for the exercise of an express power, is implied.<sup>69</sup>

Based on this general proposition, some courts have held that "where municipalities have been expressly empowered . . . to supply water, . . . they have implied power to purchase extraterritorial land in order to . . . secure a water supply."<sup>70</sup>

However, it is important to note that this is not the case in all states. In Michigan, for example, "[w]hen the power to exercise eminent domain for certain purposes is expressly granted to a municipal corporation, land outside its territorial limits cannot be condemned without special authority."<sup>71</sup> In *Houghton v. Huron Copper Mining Co.*, the Michigan Supreme Court held that although Houghton had statutory authority to condemn within its corporate limits, it could not condemn land outside of its corporate limits because such power was not expressly (statutorily) granted.<sup>72</sup> Nevertheless, decisions in Colorado,<sup>73</sup> Illinois,<sup>74</sup> and Washington,<sup>75</sup> although they do not involve water supplies,

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<sup>68</sup> *Birge v. Town of Easton*, 337 A.2d 435, 438 (Md. 1975); *see, e.g., S. Cal. Gas Co. v. City of L.A.*, 329 P.2d 289 (Cal. 1958) (sewer works); *McBean v. City of Fresno*, 44 P. 358 (Cal. 1896) (sewer works); *Miller v. City of Owensboro*, 343 S.W.2d 398 (Ky. 1961) (electric plant); *Freeman v. Trimble*, 129 N.W. 83 (N.D. 1910) (drain outlet); *Schneider v. City of Menasha*, 95 N.W. 94 (Wis. 1903) (quarry).

<sup>69</sup> *Birge*, 337 A.2d at 439 (citing 56 AM. JUR. 2D *Municipal Corporations* § 228 (1971)).

<sup>70</sup> *Id.* at 438; *see also* cases cited *supra* note 68.

<sup>71</sup> 1A Nichols on Eminent Domain Ch. 3 § 3.03(7)(c)(ii) (Matthew Bender, 3rd ed. 2018).

<sup>72</sup> 24 N.W. 820, 824 (1885).

<sup>73</sup> *Colo. Cent. Power Co. v. Englewood*, 89 F.2d 233 (10th Cir. 1937) (taking a power plant); *Pub. Serv. Co. v. Loveland*, 245 P. 493 (Colo. 1926) (likewise, taking a power plant).

<sup>74</sup> *Maywood Co. v. Maywood*, 29 N.E. 704 (Ill. 1892) (taking extraterritorial land for a municipal sewage system).

<sup>75</sup> *Puyallup v. Lacey*, 86 P. 215 (Wash. 1906) (straightening a stream, one bank of which was beyond the city's limits).

indicate that the Michigan rule is in the minority.<sup>76</sup>

In summary, cities may enjoy broad authority to exercise the power of eminent domain both inside and outside their municipal limits to provide water for their residents.

*C. Cities also have other advantages in obtaining municipal water supplies.*

Aside from the power of eminent domain, there are also at least two key advantages that cities have when obtaining municipal water supplies: (1) cities enjoy two exemptions from the anti-speculation principle, allowing them to acquire water rights in advance of demand; and (2) cities have increasingly broad rights to pump groundwater.

First, cities benefit from two exemptions to the anti-speculation principle which allow them to acquire water rights before there is demand for that water. The anti-speculation principle states that water rights cannot be held for speculative (future) purposes.<sup>77</sup> Put simply, the principle attempts to ensure that water rights are widely distributed among those users that can presently put the water to beneficial use.<sup>78</sup> It prohibits people from holding onto water rights for future use when they could otherwise be used currently.

The two exemptions from this principle that cities enjoy are the growing cities doctrine and the progressive growth doctrine. Under the largest of the two exemptions, the growing cities doctrine, cities can “perfect a water right to the amount of water that they will need to meet reasonably anticipated future growth.”<sup>79</sup> Originally, the doctrine was meant to be an extension of prior appropriation, “justified by Wiel as necessary to allow an appropriator to clear additional land for irrigation without having to risk that the water would not be available as a result [of] intervening appropriations.”<sup>80</sup> However, “[t]he future needed amount had to be claimed at the time of the appropriation, the enlargement could not exceed the original ditch, and the future amount could only be held for a reasonable time.”<sup>81</sup> New Mexico later extended this rule to

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<sup>76</sup> Ziegler, *supra* note 23, at 356.

<sup>77</sup> A. Dan Tarlock, *We Are All Water Lawyers Now: Water Law's Potential but Limited Impact on Urban Growth Management*, in *WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?* 57, 80 (Craig Anthony (Tony) Arnold ed., 2005).

<sup>78</sup> *Id.*; see also, e.g., *Colo. Water Conservancy Dist. v. Vidler Tunner Water Co.*, 594 P.2d 566, 568 (Colo. 1979) (“Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for [u]se, not merely for profit.”).

<sup>79</sup> ANTHONY DAN TARLOCK & JASON ANTHONY ROBISON, *L. OF WATER RIGHTS & RESOURCES* § 5:73 (2018) (citing, for example, *St. Onge v. Blakely*, 245 P. 532 (Mont. 1926)).

<sup>80</sup> *Id.* at § 5:73 n.4 (citing SAMUEL C. WIEL, *WATER RIGHTS IN THE WESTERN STATES* §§ 483–85a (3d ed. 1911)).

<sup>81</sup> *Id.*

cities with little discussion of the impacts of doing so.<sup>82</sup> For example, in a leading case, the New Mexico Supreme Court saw “no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase in population.”<sup>83</sup> The doctrine is limited, however, cities cannot always hold the future right for an unlimited amount of time. For example, “[a]n intermediate appellate court refused to exempt a municipality from a statutory requirement that water be put to beneficial use within five years after the issuance of a permit,<sup>[84]</sup> but the legislature amended the statute to extend the construction time to 20 years.”<sup>85</sup>

Under the second exemption, the progressive growth doctrine, “a claimant can perfect a water right based on an anticipated need for the water.”<sup>86</sup> Thus, cities can appropriate water, but not immediately use it’s full extent as long as the city has a bona fide intent to use the water and proceeds with due diligence.<sup>87</sup> However, most cases recognizing this exemption have been agricultural ones: the water is being reserved for future irrigation purposes.<sup>88</sup>

Second, some cities have an advantage in obtaining water supplies from groundwater aquifers. This is a major advantage because over half the U.S. population depends on groundwater for domestic water needs.<sup>89</sup> Historically, groundwater was appropriated according to the reasonable use rule,<sup>90</sup> which limits use of the “water to those uses that have a reasonable relationship to the use of the overlying land.”<sup>91</sup> Under this rule, a municipal corporation cannot

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<sup>82</sup> *E.g.*, Reynolds v. City of Roswell, 654 P.2d 537 (N.M. 1982); State *ex rel.* Reynolds v. Rio Rancho Estates, Inc., 624 P.2d 502 (N.M. 1981); State *ex rel.* State Eng’r v. Crider, 431 P.2d 45, 49 (N.M. 1967).

<sup>83</sup> TARLOCK & ROBISON, *supra* note 79 (citing *Crider*, 431 P.2d at 49).

<sup>84</sup> *Id.* (citing *Waterwatch of Oregon, Inc. v. Water Resources Comm’n*, 88 P.3d 327 (Or. Ct. App. 2004), *vacated*, 119 P.3d 221 (Or. 2005)).

<sup>85</sup> *Id.* (citing OR. REV. STAT. § 537.230 (2018)).

<sup>86</sup> Tarlock, *supra* note 77, at 81 (citing, for example, *St Onge v. Blakely*, 245 P. 532 (Mont. 1925) (lapse of time alone is not abandonment of perfected water rights); *Crider*, 431 P.2d 45 (no future need for cemetery association’s appropriation)); TARLOCK & ROBISON, *supra* note 79, (citing, for example, *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 29–30 (Colo. 1996); *City & Cty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992 (Colo. 1954); *City & Cty. of Denver v. Sheriff*, 96 P.2d 836 (Colo. 1939)).

<sup>87</sup> Darryl V. Wareham, *Washington Water Rights Based on Actual Use or on Delivery System Capacity?* Department of Ecology v. Theodoratus, 24 Seattle Univ. L. Rev. 187, 201 (2000).

<sup>88</sup> *See, e.g.*, *Hewitt v. Story*, 64 F. 510 (9th Cir. 1894); Department of Ecology v. Theodoratus, 957 P.2d 1241 (Wash. 1998); *Crider*, 431 P.2d 45; *In re Water Rights in Alpowa Creek*, 224 P. 29 (Wash. 1924).

<sup>89</sup> ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA’S FRESH WATERS 31 (2002).

<sup>90</sup> *See, e.g.*, *Katz v. Walkinshaw*, 70 P. 663 (Cal. 1902); *Koch v. Wick*, 87 So.2d 47 (Fla. 1956); *Meeker v. East Orange*, 74 A. 379 (N.J. 1909); *Forbell v. New York*, 58 N.E. 644 (N.Y. 1900).

<sup>91</sup> WATER SYS. COUNCIL, WHO OWNS THE WATER? 1 (2003), [https://www.Watersystems.council.org/download/wellcare\\_information\\_sheets/other\\_information\\_sheets/1836033IN\\_WHO\\_O](https://www.Watersystems.council.org/download/wellcare_information_sheets/other_information_sheets/1836033IN_WHO_O)

divert groundwater some distance away from the groundwater aquifer for municipal use if such diversions injure other groundwater users.<sup>92</sup> Thus, the rule technically prohibits cities from pumping groundwater unless they can pay damages or exercise their eminent domain power.<sup>93</sup> However, a few states, including California, Nebraska, and New Jersey, recently have replaced the reasonable use rule with the correlative rights rule,<sup>94</sup> which states that “[o]wners of overlying land and nonowners or transporters have co-equal or correlative rights in the reasonable, beneficial use of ground water.”<sup>95</sup> “New Jersey . . . allow[s] municipalities to pump without compensating injured, small well owners.”<sup>96</sup> “California has developed special rules for municipalities that ensure that the state’s correlative rights rule does not cut off access to needed supplies.”<sup>97</sup>

In summary, not only do some cities have power in obtaining municipal water supplies through eminent domain, but both surface and groundwater regimes have evolved to give some cities additional advantages in the race to acquire water.

### III. WHAT ARE THE POTENTIAL IMPLICATIONS OF CITIES’ EMINENT DOMAIN POWERS?

There are two main implications of cities’ expansive eminent domain powers. First, as cities condemn land farther outside their borders in order to obtain municipal water supplies, conflicts with other cities seeking to do the same inevitably will increase. Such conflicts will force courts to prioritize some municipal water needs over others. Second, as cities’ eminent domain power has the potential to become vital in the face of looming water scarcity problems, obtaining water by condemnation might itself become one of the major systems of water allocation in the United States.

#### A. *Increasing city-to-city conflicts will force the courts to prioritize municipal water needs and perhaps even the municipalities themselves.*

As cities’ populations grow and cities are required to obtain increasingly more

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WNS.PDF (last visited Nov. 9, 2018).

<sup>92</sup> *Forbell*, 58 N.E. 644; *Canada v. Shawnee*, 64 P.2d 694 (Okla. 1937).

<sup>93</sup> See Barton H. Thompson, Jr., *Water Management and Land Use Planning: Is It Time for Closer Coordination?*, in *WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?* 99 (Craig Anthony (Tony) Arnold ed., 2005) (citing, for example, *Martin v. City of Linden*, 667 So.2d 732 (Ala. 1995)).

<sup>94</sup> Tarlock, *supra* note 77, at 89.

<sup>95</sup> WATER SYS. COUNCIL, *supra* note 91, at 1.

<sup>96</sup> Tarlock, *supra* note 77, at 89 (citing, for example, *Woodsum v. Twp. of Pemberton*, 412 A.2d 1064 (N.J. Super. Ct. 1980) (correlative rights rule does not include a right to lift)).

<sup>97</sup> *Id.*

water for their residents, city-to-city conflicts over water will increase. As a result, courts will need to determine which municipal uses have priority over others and perhaps even which cities have priority over other cities. In making such determinations, courts will most likely use the standard already in place to determine the result of an eminent domain action where the land is already devoted to a public use: “more necessary public use.”<sup>98</sup> This standard exists in the eminent domain statutes of many states<sup>99</sup> and so it would be convenient for the courts to employ it when adjudicating city-to-city water conflicts.

However, use of this standard could be highly controversial, especially in a time and place of water scarcity where multiple cities need the same private property for the survival of their inhabitants. If the “more necessary public use” standard is applied in such a conflict, then courts will be forced to determine which city’s needs are “more necessary.” Exactly how courts will do this is beyond the scope of this paper, but it is important to understand how significant these decisions could be. Will courts simply make case-by-case determinations of which city’s need is more imminent? Will courts protect some cities (for example, wealthier cities or cities with key political positions) at the expense of others (for example, poorer cities or cities that have little influence on national politics)? The answers to these questions could be vitally important, not only for the cities trying to obtain the water for their inhabitants’ survival, but also for the future of urban law and politics.<sup>100</sup>

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<sup>98</sup> See, e.g., *Schroeder Inv., L.C. v. Edwards*, 301 P.3d 994 (Utah 2013) (applying a statutory “more necessary public use” provision to a parcel of land used as a detention pond when a property owner sought to condemn it to construct an access road to the development the property owner planned to build on its property); see generally Norman E. Matteoni, *The California Roadway—“A More Necessary Public Use”*, 20 HASTINGS L.J. 551 (1968) (discussing the “more necessary public use” provision in California’s eminent domain legislation).

<sup>99</sup> See, e.g., ALASKA STAT. § 09.55.270(3) (2018) (“if already appropriated to a public use, the public use to which it is to be applied [must be] a more necessary public use”); ARIZ. REV. STAT. ANN. § 12-1112(3) (2019) (“If the property is already appropriated to some public use, the public use to which it is to be applied [must be] a more necessary public use.”); CAL. CIV. PROC. CODE § 1240.610 (West 2019) (“Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated.”); IDAHO CODE § 7-704(3) (2019) (“If already appropriated to some public use, . . . the public use to which it is to be applied [must be] a more necessary public use.”); MONT. CODE ANN. § 70-30-111(1)(c) (West 2019) (“if already being used for a public use, . . . the public use for which the property is proposed to be used [must be] a more necessary public use”); NEV. REV. STAT. ANN. § 37.030(1)(d) (West 2019) (“property shall not be taken unless for a more necessary public use than that to which it has been already appropriated”); N.D. CENT. CODE § 32-15-04(3) (2019) (“property shall not be taken unless for a more necessary public use than that to which it has been appropriated already”); UTAH CODE ANN. § 78B-6-504(1)(d) (West 2008) (“if already appropriated to some public use, the public use to which [the property] is to be applied [must be] a more necessary public use”).

<sup>100</sup> For example, if courts begin to protect wealthier cities at the expense of poorer cities, how might that affect urbanization, urban growth, and class-based politics and trends?

B. *Condemnative water rights might become one of the major systems of U.S. water allocation.*

As ever-increasing demands for water due to climate change, population growth, and our consumptive way of life forces cities, as well as other water users, to seek ever-increasing water supplies,<sup>101</sup> eminent domain may “become not merely an incidental aspect of projects based upon water rights acquired by other means, but a major factor in reallocation of water.”<sup>102</sup> This argument has been posed and predicted by scholars since the early twentieth century. In 1911, Samuel Wiel predicted that “in time . . . a system of condemnative water rights” might develop.<sup>103</sup> In 1965, Allan Gross argued that condemnation of water rights by both municipalities and individuals “will become a common occurrence” and may replace the prior appropriation system as the prevailing method of water allocation.<sup>104</sup> In 1968, Corwin Johnson identified and examined the problems that might emerge should a system of condemnative water rights become one of the major water allocation systems in U.S. water law.<sup>105</sup> At the time, Johnson noted that “[o]nly a handful of cases have been found in which the power of eminent domain was exercised for the principal purpose of acquiring water rights . . . [and as such,] [o]ne might be tempted to conclude that eminent domain has not played, and probably will not play, a major role in water allocation.”<sup>106</sup> However, after examining “scattered references” to instances of condemnative water rights that existed in the literature but that failed to reach the appellate courts, Johnson concluded that “the impact of eminent domain upon water allocation, though difficult or impossible to measure, may have been substantial.”<sup>107</sup> And if cities continue or begin exercising their eminent domain powers to obtain water, this trend will continue, reaffirming Johnson’s conclusion that the impact of eminent domain upon water allocation may become, if it is not already, substantial.

If condemnation of water rights indeed becomes one of the major systems of water allocation in the United States, cities’ eminent domain powers could have significant implications for urbanization and cities’ positions in the U.S. political arena. Estimating and understanding these potential impacts is far beyond the scope of this paper, however. Nevertheless, the potential implications are far-reaching. Would cities’ power to acquire water draw people toward cities at higher rates? Would it create a feedback loop where the more people that move into a municipality, the more water that municipality needs, causing more

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<sup>101</sup> See *supra* Part I.

<sup>102</sup> Johnson, *supra* note 25, at 1054.

<sup>103</sup> *Id.* (citing SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 618 (3d ed. 1911)).

<sup>104</sup> Gross, *supra* note 32, at 283.

<sup>105</sup> Johnson, *supra* note 25.

<sup>106</sup> *Id.* at 1055.

<sup>107</sup> *Id.*

people living in regions from which the municipality is diverting water to move to the city in search of water? What impact would such a population increase have on city planning and infrastructure? Will it make it difficult for others to obtain water or keep their existing water rights, private waterworks, and riparian lands? At what point might states step in if cities begin to inhibit the abilities of others to obtain water? At a time when states are beginning to reexamine their water allocation policies,<sup>108</sup> how might courts adjudicating allocation disputes begin to chip away at this power? These questions may become of increasing concern and importance if cities begin exercising their eminent domain powers more frequently and conflicts with extraterritorial water users increase.

#### CONCLUSION

In conclusion, although some scholars debate the power of the modern city, cities have significant power in obtaining municipal water supplies. Cities may obtain municipal water supplies using their power of eminent domain. They can use their eminent domain power to condemn private property on which they want to build waterworks, to obtain the water and water rights of a private property, or to condemn a private property's existing waterworks. This power is especially important in the western states where issues of water scarcity are prevalent, and it will continue to increase in importance as water scarcity intensifies and spreads geographically. As water scarcity worsens and water conflicts increase, courts will be forced to prioritize some water needs over others and perhaps even some cities' needs over others. In time, cities' power over water might become so significant and expansive that condemnation of water might become one of the major doctrines of water allocation in the United States. If such changes occur, they will open the door to many questions about U.S. water rights, urbanization, and the future of cities' position in U.S. politics.

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<sup>108</sup> See generally, e.g., Nell Green Nylan et al, ADDRESSING INSTITUTIONAL VULNERABILITIES IN CALIFORNIA'S DROUGHT WATER ALLOCATION PART 2: IMPROVING WATER RIGHTS ADMINISTRATION AND OVERSIGHT FOR FUTURE DROUGHTS (2018), available at [http://www.climateassessment.ca.gov/techreports/docs/20180827-Water\\_CCCA4-CNRA-2018-010.pdf](http://www.climateassessment.ca.gov/techreports/docs/20180827-Water_CCCA4-CNRA-2018-010.pdf) (providing recommendations as to how California can revise its water allocation policies in light of the recent droughts and climate change); Letter from the Wheeler Institute for Water Law & Policy, University of California, Berkeley, to the California State Water Resources Control Board (Oct. 15, 2014), available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/dryyear\\_report/comments2014oct/docs/nell\\_greennylen.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/dryyear_report/comments2014oct/docs/nell_greennylen.pdf) (same).