

SB 417

**An Act Repealing the Kansas Department of Wildlife and Parks' Authority to Use Eminent Domain
To
The House Committee on Agriculture and Natural Resources**

**By Brad Loveless, Secretary
Kansas Department of Wildlife and Parks**

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SB 417 would repeal the Kansas Department of Wildlife and Park's authority to Use Eminent Domain to acquire property. **The Kansas Department of Wildlife and Parks (KDWP) stands neutral on this bill.** However, it is an important issue that should be discussed from time to time, and I am glad to have the opportunity to address the Committee on an issue many are curious about.

Eminent Domain Background

Eminent Domain is a seldom used but potentially important tool for maintaining wildlife areas and parks. The Kansas Department of Wildlife and Parks (KDWP) came into existence by executive reorganization order in 1987 when the State Park and Resources Authority and the Kansas Fish and Game Commission were combined. Since its formation, eminent domain has been used in rare occasions.

The most notable use of eminent domain occurred by KDWP's predecessor (called the Forestry, Fish and Game Commission at the time). The Commission filed a petition for condemnation in Linn County District Court in April of 1954, which was subsequently dismissed by the Commission prior to the conclusion of the litigation. See *State v. Boicourt Hunting Asso.*, 183 Kan. 187 (1958), and *Ottawa Hunting Asso., Inc. v. State*, 178 Kan. 460 (1955). The most recent occurrence of eminent domain use by KDWP happened during the expansion of K-18 South of Fort Riley. The Kansas Department of Transportation filed a condemnation proceeding in District Court approximately 15 years-ago to expand the road right-of-way. KDWP, being represented by Attorney General Phil Kline's office, joined the case to obtain a property interest in the KDOT easement to guarantee public access to a boat ramp on the Kansas River that would have been cut off by the expanded highway.

Restrictions on Eminent Domain

Existing law does not grant KDWP unfettered right to eminent domain but imposes multi-faceted criteria on the agency in order to justify its narrowly tailored use. These limitations are why the agency's eminent domain authority was not modified during the major overhaul of statutory eminent domain authority during the 2006 Legislative Session.

Under existing law, K.S.A. 32-840 only allows eminent domain when it is necessary to "Carry out the provisions of the wildlife and parks laws of the state" which the legislature has previously enacted, or "to protect, add to and improve" existing conservation or recreational lands or facilities. Please note these

restrictions would not allow KDWP to carry out the purposes of another public or governmental entity (state, local or federal), unless and until the conditions of K.S.A. 32-840 are met.

Checks and Balances

Should KDWP desire to use eminent domain, the Attorney General's Office, not KDWP staff, would be the actual public entity responsible for initiating a condemnation proceeding. The Secretary would request the use of eminent domain, and the Attorney General would "proceed by proper action..." Illegal, unconstitutional, or abusive attempts to utilize eminent domain would not be a proper action, so a condemnation proceeding would not be initiated. Proceeding could only begin when and if the Attorney General is satisfied the criterion set forth in K.S.A. 32-840 has been met.

Additionally, the Governor's administrative supervision of KDWP and the Legislature's budgetary oversight provide further safeguards. The Secretary being a cabinet level position answerable to the Governor for the executive actions of the agency. KDWP's land acquisition funds, which would be expended to condemn and acquire property, are annually appropriated via the legislative budgetary process.

Most Likely Use of Eminent Domain

Although few historical examples of eminent domain by KDWP exist that does not mean it is an unnecessary tool for a conservation agency to possess. It's foreseeable that the use of eminent domain could become required at some future date. The most likely scenario would be in the form of obtaining small possessory interests in real property rights, as there is not a real possibility of any large-scale property development consistent with K.S.A. 32-840 given budget restrictions and lack of available locations.

The first step taken to acquire additional property rights is for KDWP staff to ask a landowner to freely transfer the needed property interests to the state. The second step would be to purchase such property rights from the landowner or, in the case of an existing easement holder, the dominant estate. These methods have been very successful, as most people view KDWP as good neighbor and are supportive of its mission. However, some landowner in the future may be unwilling to assist when help is desperately needed for the public good; further, they may be an absent landowner or the title to the property could be clouded. This would make such an eminent domain proceeding vital.

Hypothetical examples of necessary eminent domain use would include, but not be limited to, obtaining property interests in the following:

- Road right-of-way access to remote public lands. This could be as a result of clouded title issues (Skidmore, Kansas) or a significant weather event, such as a flood and/or erosion, that undermines the viability of an existing roadway.
- Utility easements (gas, water or electric) to existing parks or wildlife areas.
- Sub-easements crossing an already existing easement for utilities, a roadway, or rail crossing.
- Temporary construction easements to replace damaged or failing infrastructure, such as bridges, roads, levies, or dams.
- Additional land needed to expand or replace failing or non-compliant infrastructure, such as a dams or bridges (changing regulations require larger sized and more expansive dams).
- Access to landlocked parcels KDWP has an obligation to monitor (former BLM parcels).
- Perfecting water rights needed for existing facilities when the water right holder is absent, or the rights have been divided so no interest holder can access the water right (Iola, Kansas).
- Land needed to protect a species in need of conservation to keep it from becoming federally listed.
- Polluted land that poses a risk to KDWP properties or critical habitat so that environmental remediation can be performed on site.
- Structures, a portion of which, were wrongly constructed on public land (Pleasanton, KS).

30 x 30 Initiative

Much interest surrounds the federal government's 30 X 30 initiative. KDWP has never been involved with that initiative, nor does not have plans to do so. KDWP focuses on respecting and prioritizing individual property rights. The agency is only successful if it has the support of its neighbors. Any suggestion the agency could utilize eminent domain for the purpose of supporting the federal program is not only misplaced, but such an action would be violative of existing Kansas law.