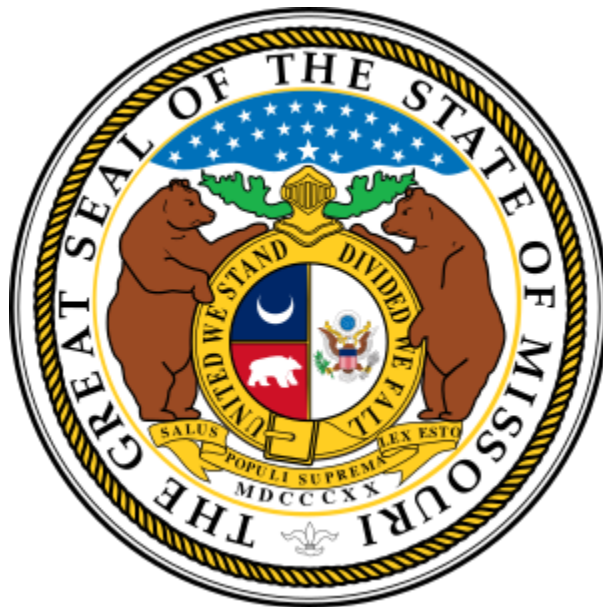


State of Missouri
Office of Ombudsman for Property Rights

2021 Annual Report



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Introduction

The United States Constitution's Takings Clause states, "*nor shall private property be taken for public use, without just compensation.*" The Missouri Constitution expands this protection to damaged property stating, "[t]hat private property shall not be taken or damaged for public use without just compensation."¹ Condemnation of private property by government or authority granted by government, under the power of eminent domain, must be for a *public use* and it requires *just compensation* to the property owner.

Lawmakers across the country reviewed their eminent domain laws following the U.S. Supreme Court's 2005 opinion in *Kelo v. City of New London* upholding a Connecticut property taking for purposes of private redevelopment.² Following *Kelo*, the Missouri General Assembly passed H.B. 1944 (2006), providing additional protections for landowners, and creating the Missouri Office of the Ombudsman for Property Rights.

The Ombudsman assists Missouri citizens "*by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures.*"³ The Ombudsman also documents the use of eminent domain in Missouri along with any issues associated with its use and submits that information in an annual report to the General Assembly.

2021 Eminent Domain in Missouri

Missouri landowners in 2021 contacted the Ombudsman regarding eminent domain activities in counties and municipalities all across the State, typically following receipt of notice by an entity with eminent domain authority advising that it sought to acquire for public use an interest in the owner's real property.

Notice to landowners is required at least sixty days before the entity may file a petition for condemnation in circuit court.⁴ These "sixty day notices" describe the property, provide the purpose for acquiring the property, and include a statement that the property owner has the following rights:

- Seek legal counsel at the owner's expense,
- Make a counteroffer and engage in further negotiation,
- Obtain such owner's own appraisal of just compensation,

¹ Missouri Constitution, Article 1, § 26.

² *Kelo v. City of New London*, 545 U.S. 469 (2005).

³ Mo. Rev. Stat § 523.277 (2006).

⁴ Mo. Rev. Stat § 523.250 (2006).

- Have just compensation determined by court-appointed condemnation commissioners, and ultimately, a jury,
- Seek assistance from the Ombudsman for Property Rights,
- Contest the right to condemn in the condemnation proceeding, and
- Exercise the rights to request vacation of an easement.

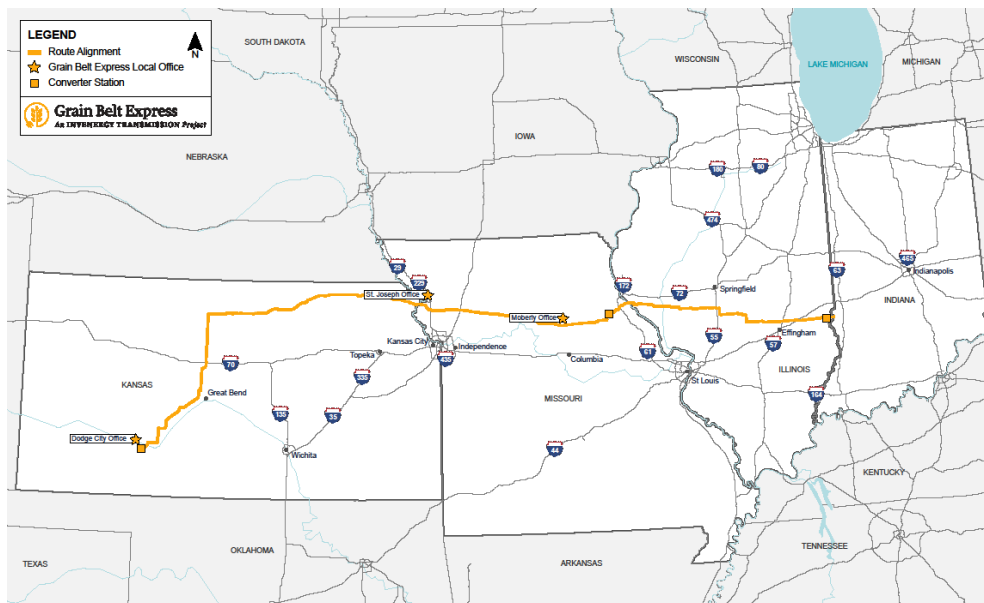
The Ombudsman provided guidance on a wide range of eminent domain projects in 2021. This report highlights the projects and issues that prompted the most landowners to reach out for guidance.

A. Transmission Lines

Landowners sought guidance on electric utility plans to construct transmission lines across their property, or expand existing easements to accommodate larger voltage lines. Landowners sought guidance primarily on the Grain Belt, Limestone Ridge, or the Central Electric Power Cooperative transmission line projects.

- Grain Belt Express

Grain Belt Express, LLC is moving ahead with its plan to build a high voltage electric transmission line to carry energy across northern Missouri for energy uses in Missouri, Illinois, and Indiana.



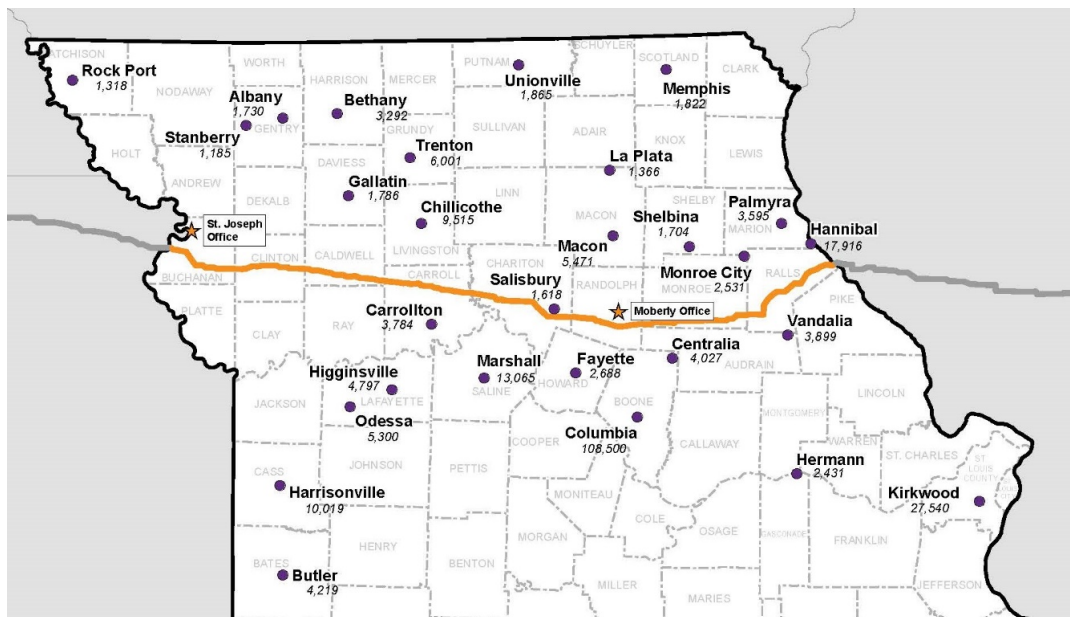
Proposed route of the 800-mile Grain Belt Express transmission line.⁵

⁵ Map source: <https://grainbeltexpress.com/overview.html>.

Grain Belt has acquired easements for over half of the affected Missouri properties. Landowners reached out to the Ombudsman in 2021 seeking guidance on the Grain Belt project on issues involving appraisal values, proper considerations for damages, lost income from taken property, and more.

On September 17, 2021, Grain Belt filed its first condemnation action against a property owner in the path of the proposed line.⁶ The petition seeks to use Grain Belt’s power of eminent domain to acquire an easement on farmland in Buchanan County. A condemnation hearing is scheduled for February 2, 2022.

Grain Belt also filed petitions for condemnations in December 2021 against four other landowners, one each in Carroll, Chariton, Clinton, and Monroe Counties.⁷



Grain Belt will cross 206 miles in northern Missouri.⁸

Grain Belt and its parent Invenergy Transmission, LLC were also respondents in a complaint heard by the Public Service Commission (PSC). Landowners argued that Grain Belt’s certificate of convenience and necessity (CCN) was no longer valid because Grain Belt announced new plans that were materially different from its plans when the

⁶ *Grain Belt Express LLC v. Bradley L. Horn, et al.*, Case No. 21BU-CC01216.

⁷ See, *Grain Belt Express LLC v. Juanita A. Trussell, et al*, Case No. 21CR-CC00158; *Grain Belt Express LLC v. Larry W. Kelley, et al*, Case No. 21CH-CC00016; *Grain Belt Express LLC v. Phillip C. Brown, et al*, Case No. 21MN-CV00258; and *Grain Belt Express LLC v. Sadina M. Miller, et al*, Case No. 21CN-CC00080.

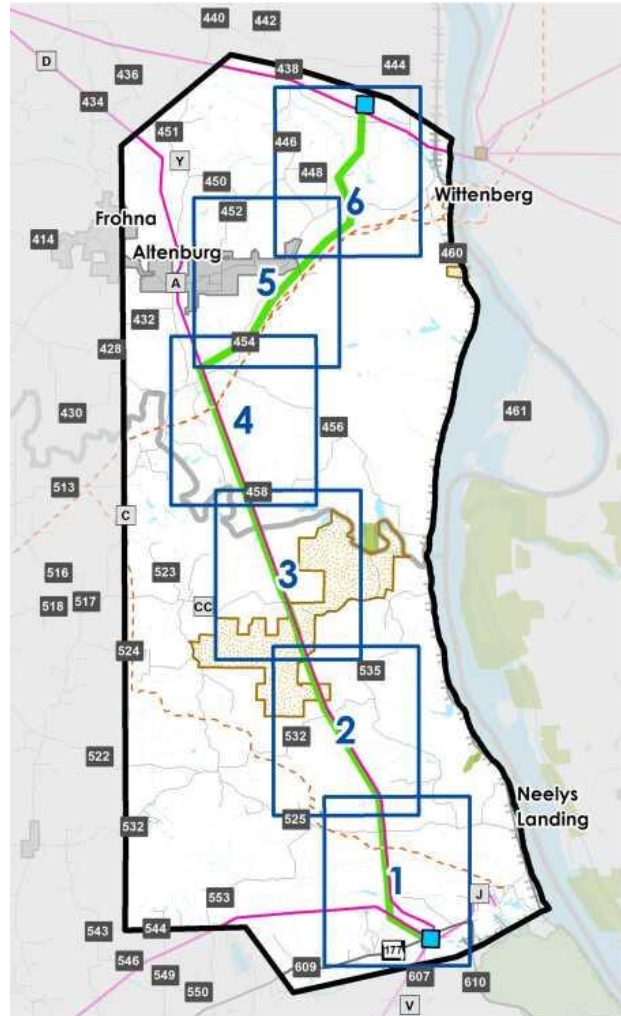
⁸ Map source: <https://grainbeltexpress.com/missouri.html>.

PSC granted the CCN. Grain Belt’s changes included an expansion in capacity and the addition of broadband infrastructure. The PSC denied the petition and found Grain Belt’s CCN is still valid and that the PSC lacks the authority to revoke a CCN.⁹

- **Limestone Ridge**

Limestone Ridge is a 138 kV transmission line proposed by Ameren Transmission Company of Illinois (ATXI) to connect two substations in Cape Girardeau and Perry Counties. The transmission line will require a 125-foot wide easement for its 15-mile path. ATXI plans to install structures that are capable of being outfitted with an additional transmission circuit at a voltage of up to 345 kV in the future.

On November 3, 2021, the PSC granted ATXI a CCN to build and operate the proposed transmission line, finding it “necessary and convenient for the public service.”¹⁰ The PSC’s order approves conditions agreed to by ATXI that includes additional communication with landowners beyond statutory requirements. Prior to clearing vegetation from the easement corridor, ATXI will offer landowners a reasonable opportunity to harvest any marketable timber. The order also requires additional PSC approval should ATXI need to deviate from the proposed route and acquire easements over additional parcels. ATXI anticipates construction to begin in 2023.



⁹ *Missouri Landowners Alliance, et al. v. Grain Belt Express, LLC and Invenergy Transmission, LLC*, PSC Case No. EC-2021-0059, [Report and Order](#), August 4, 2021, citing *State ex rel. City of Sikeston v. Public Service Commission of Missouri*, 82 S.W.2d 105 (Mo. 1935).

¹⁰ *In the Matter of the Application of Ameren Transmission Company of Illinois for a Certificate of Public Convenience and Necessity to Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage a 138 kV Transmission Line and associated facilities in Perry and Cape Girardeau Counties, Missouri*, Case No. EA-2021-0087, [Order Approving Unanimous Stipulation](#), November 3, 2021.

- **Central Electric Power Cooperative**

Central Electric Power Cooperative (CEPC) proposes to build a 40-45 mile, 345 kV transmission line from Loose Creek to Barnett to address power issues in an area south of Jefferson City. The new line requires an additional 125 feet of easement for a new transmission path next to an existing 100 ft. transmission easement, for a total of 225 feet for the two easements combined. CEPC is in the early stages of negotiating with landowners. Several landowners contacted the Ombudsman regarding concerns with the project, including a concern with ensuring they are being properly compensated.

B. Fiber Optic Infrastructure

Several landowners contacted the Ombudsman seeking guidance regarding electric utilities expanding a transmission line right-of-way easement to include fiber optic infrastructure.¹¹ Most landowners sought guidance on valuing “just compensation” for the expanded use of the easement.

C. Tree and Vegetation Removal and Maintenance

An issue frequently raised with the Ombudsman from landowners is tree and vegetation removal under the power of eminent domain. These concerns include:

- Losing the economic value of no longer harvesting wood,
- Losing forest that benefits Missouri’s wildlife and conservation efforts;
- Losing the benefits that shade trees provide for homes; and
- Losing aesthetic and other benefits valued by landowners.

Missouri landowners also raised issues with the ongoing maintenance of power line easements by electric companies and their contractors. Some landowners disagree with and question the tree trimming and tree removal practices for utilities maintaining an existing easement. This typically involves tree trimming along the edges of the easement and even beyond the easement boundary.

¹¹ For additional information on expanding electric utility easements for fiber optic infrastructure, see Matthew Neuman, [Exceeding the Scope of an Easement: “Expanded Use” Within a Single Cable](#), 83 MO. L. REV. (2018), analyzing *Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795 (8th Cir. 2017).

D. Redevelopment and Other Complete Parcel Takings

Urban efforts to redevelop or otherwise acquire entire parcels of property for public purposes are often very impactful on landowners and others with an interest in real estate such as tenants, because such takings can displace owners and tenants from their homes. Landowners facing possible redevelopment takings that reached out to the Ombudsman either opposed the taking or sought guidance on the condemnation process and how ensure they receive just compensation.

E. Inverse Condemnation

"At times a public entity does not initiate condemnation proceedings but nonetheless intentionally or accidentally takes private property," and "[i]n such cases, property owners may pursue claims for 'inverse condemnation.'"¹²

Missouri landowners raised a number of inverse condemnation concerns following government or utility actions that the landowners interpreted to be damaging or taking property without following proper legal channels and providing just compensation. These include claims of a sewer company digging in a neighborhood to install infrastructure outside the authorized utility easement boundary, and a telecommunications company installing poles and wires along a private drive that had no utility easement, which the telecommunications company's workers wrongly believed was a public roadway that included a utility easement.

Inverse condemnation actions are often problematic for landowners in that the *landowner* must initiate the legal process and prove he/she is entitled to damages,¹³ whereas in a proper condemnation proceeding the entity condemning property must initiate the proceeding and prove a proposed taking is justified.

F. Court Decisions on Eminent Domain

1. Opinions Directly Affecting Missouri Landowners

In 2021, appellate courts decided the following noteworthy cases interpreting eminent domain and condemnation laws that affected Missouri landowners, thereby establishing precedent for similar challenges in the future.

¹² *JTC Oil Co. v. City of Grandview*, 604 S.W.3d 806, 812 (Mo. App. 2020).

¹³ *Id.* 604 S.W.3d at 813 (Mo. App. 2020) ("in inverse condemnation case, "[t]he burden of proof rested upon the plaintiffs to establish the pleaded interest in the described real estate").

- **Randolph v. City of Kansas City**, 620 S.W.3d 636 (Mo. Ct. App. 2021)

This action arose when Mr. Randolph filed a petition against the City of Kansas City to quiet title in his favor over a strip of land adjacent to and between two properties that he owned. Mr. Randolph acquired title to his pieces of property in 1995 and 2013. The prior owners of one of Mr. Randolph's pieces of property also owned the strip of disputed land in approximately 1906.

In 1906-07, the City began condemnation proceedings to create a public street over the strip of land. Mr. Randolph alleged that the condemnation was invalid due to problems in the condemnation proceeding itself and that the City did not properly complete the public street. Both Mr. Randolph and the City filed motions for summary judgment and the trial court granted the City's motion and denied Mr. Randolph's motion.

On appeal, the Western District Court of Appeals affirmed the trial court on two grounds. First, actions for recovery of lands, which include challenges to condemnation proceedings, must be brought within ten years. Because Mr. Randolph did not challenge the condemnation prior to 1916 or 1917, he could not maintain the suit. Second, because Mr. Randolph did not own any of the land in question when the City condemned it or attempted to condemn it, and first obtained his interest in the adjoining land over 80 years later, he had no standing to challenge the condemnation.

This opinion will affect the time in which future cases challenging condemnation proceedings may be brought and who may bring such cases.

- **Spire STL Pipeline LLC v. 3.31 Acres of Land**, 2021 U.S. Dist. LEXIS 227236 (E.D. Mo. Nov. 23, 2021)

This opinion addresses Spire STL Pipeline LLC's ("Spire") motion for entry of final order and judgment as to three tracts of land. Spire filed the motion after the United States Court of Appeals for the D.C. Circuit issued its mandate vacating Spire's original FERC CCN to operate the pipeline and FERC issued a temporary CCN to Spire to operate the pipeline. Landowners opposed the motion, arguing in part, that a "temporary certificate does not confer eminent domain authority" and that Spire "does not have condemnation authority from the Court under the temporary certificate."

The Natural Gas Act confers eminent domain authority that allows the holder of the CCN to obtain rights to the necessary right-of-way to "construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations,

pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines[.]”

The Eastern District of Missouri concluded that Spire held a valid CCN. It also decided that “the temporary certificate confers eminent domain authority” because FERC issued it “under the previously approved terms, conditions, authorizations, and tariff” and “eminent domain authority is one of the previously approved authorizations.” The Court further concluded that FERC Order 871-B did not presumptively stay Spire’s eminent domain authority. FERC Order 871-B stated that “with respect to orders issued pursuant to 15 U.S.C. § 717f(c) ‘no authorization to proceed with construction activities will be issued’ until after a specified period of time.” Because Spire had already completed construction of the pipeline and the temporary certificate did not permit Spire to engage in any construction or provide any new service, FERC Order 871-B did not affect Spire’s eminent domain authority. Therefore, the Court sustained Spire’s motions and issued Final Orders and Judgments as to the property owners’ land.

This decision may be cited as supporting a broad exercise of eminent domain authority, even when a reviewing court has invalidated a CCN.

2. **Other Federal Eminent Domain Opinions**

Opinions from other jurisdictions set precedent that could affect Missouri landowners and entities with eminent domain authority. Following are a few of the more noteworthy opinions from 2021.

- **Cedar Point Nursery v. Hassid**, 141 S. Ct. 2063 (U.S. 2021)

A California regulation granted labor organizations a “right to take access” to an agricultural employee’s property to solicit union support from workers. Two growers sued in federal court arguing that the regulation constituted an appropriation of property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. A divided panel of the U.S. Supreme Court found in favor of the growers, concluding that the regulation constitutes a *per se* takings.

- **PennEast Pipeline Co., LLC v. New Jersey**, 141 S. Ct. 2244 (U.S. 2021)

The Federal Energy Regulatory Commission (FERC) granted PennEast Pipeline Company a certificate of public convenience and necessity to construct a 116-mile natural gas pipeline from New Jersey to Pennsylvania. PennEast sought to exercise eminent domain to obtain a right-of-way for the pipeline, including land owned by

New Jersey. New Jersey sought to dismiss PennEast's attempts on grounds of sovereign immunity. The U.S. Supreme Court found in favor of PennEast's authority to condemn New Jersey's property, holding 15 U.S.C.S. 717(h) of the Natural Gas Act authorizes FERC issued certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States. The Court's opinion in *PennEast* includes a good summary of eminent domain generally, that forms the basis of the Court's opinion:

"Eminent domain is the power of the government to take property for public use without the consent of the owner. It can be exercised either by public officials or by private parties to whom the power has been delegated. And it can be exercised either through the initiation of legal proceedings or simply by taking possession up front, with compensation to follow. Since the founding, the United States has used its eminent domain authority to build a variety of infrastructure projects. It has done so on its own and through private delegates, and it has relied on legal proceedings and upfront takings. It has also used its power against both private property and property owned by the States."

Conclusion

An issue many landowners raise is the cost of hiring an attorney to represent them in a condemnation hearing, and the cost of hiring an appraiser. Many landowners cannot afford either. Often the amount of likely damages is low enough that hiring an attorney or an appraiser could offset or exceed the amount of damages from the taking.

Regarding appraisals, landowners are typically relieved when explained the process of the appraisal conducted by the three appointed commissioners ("disinterested residents of the county") at no cost to them, and their ability to provide input to the commissioners during their inspection of the property in question.

The lack of legal counsel for landowners remains a concern for condemnations and condemnation hearings, especially where the landowner wants to challenge the condemnation but cannot afford counsel. The entity asserting eminent domain is always represented by the counsel that filed the petition for condemnation.

The Ombudsman provides "guidance, which shall not be legal advice," and encourages landowners to consult with an attorney that provides free initial consultations, which may help the landowner better evaluate the costs and benefits of hiring an attorney.

For questions about this report, please contact Marc Poston, Public Counsel, at (573) 751-4857 or marc.poston@opc.mo.gov.