



Marc Poston
Public Counsel

State of Missouri

Mike Parson
Governor

Office of the Public Counsel
Governor Office Building
200 Madison, Suite 650
PO Box 2230
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: <https://opc.mo.gov/>
Relay Missouri
1-800-735-2966 TDD
1-866-922-22959 Voice

January 1, 2020

Ms. Dana Rademan
Chief Clerk of the House
201 West Capitol Ave, Room 317
Jefferson City, MO 65101

Ms. Sara Hoover
Secretary of the Senate
201 West Capitol Ave, Room 325
Jefferson City, MO 65101

2019 Report of the Ombudsman for Property Rights

The Office of the Ombudsman for Property Rights, created in 2006 by House Bill 1944 and located within the Office of the Public Counsel, is tasked with assisting “citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures.” Mo. Rev. Stat § 523.277 (2006). The Ombudsman is further required by Section 523.277, RSMo to document the use of eminent domain within the state, along with any issues associated with its use, and submit that information in an annual report to the General Assembly on January 1 of each year.

Missouri property owners contacted the Ombudsman over 35 times in 2019, resulting in more than 45 hours spent reviewing a wide variety of eminent

domain questions. The guidance provided by the Ombudsman included, but was not limited to, the following issues:

- Statutory provisions, case law, rules of civil procedure, constitutional provisions, and other legal authority concerning the topic of condemnation;
- The jurisdictional limitations of our office including that we do not have the power to represent individuals in condemnation proceedings, even in situations where the cost to litigate preclude access to justice;
- The procedural timeframe involved in the condemnation of property;
- The valuation of property subject to condemnation;
- The valuation of a partial taking as compared to the valuation of a full taking;
- The requirement of a condemning authority to negotiate with property owners in good faith prior to filing a petition for a condemnation order;
- The significance of the enactment of Sections 394.080 and 394.085, RSMo, regarding electric cooperatives and broadband communications;
- The legal authority to bring a private lawsuit when an entity caused damages to a property owner through trespass or inverse condemnation or refusal to follow Chapter 523;
- The heritage value of property taken by eminent domain; and
- The process of selecting the commissioners in a condemnation proceeding.

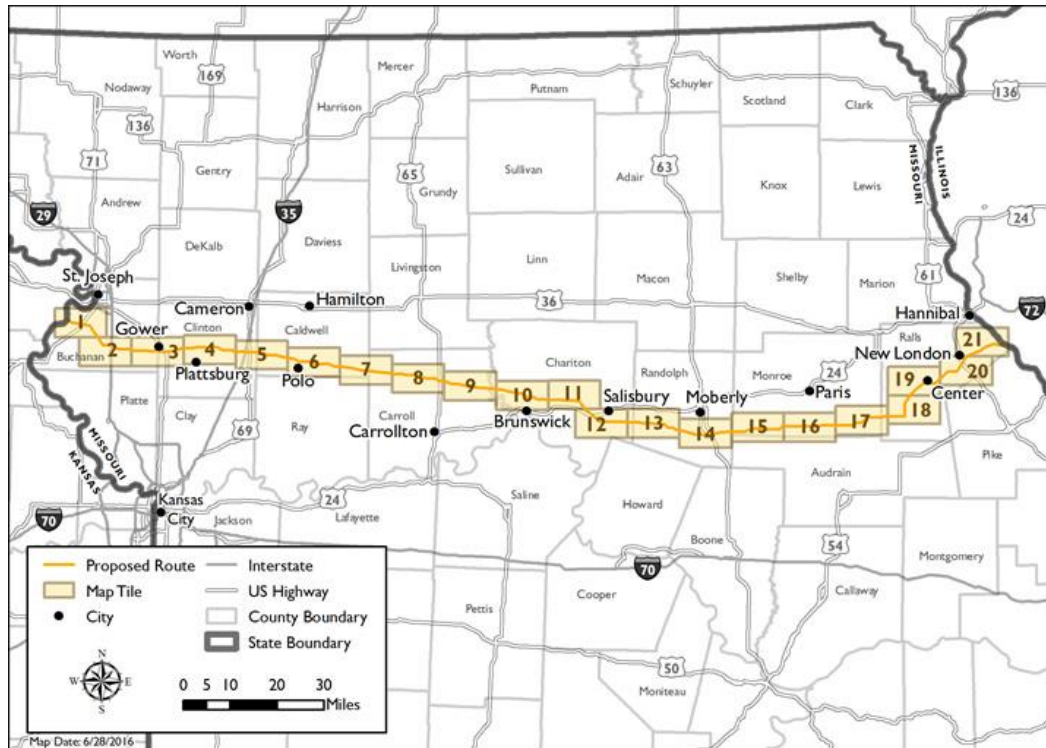
The below data includes summaries of specific projects involving eminent domain and summaries of relevant Missouri and Federal case law regarding eminent domain.

A. Status of Missouri Projects Involving Eminent Domain in 2019.

1. Grain Belt Express

The Grain Belt Express Clean Line is a \$2.35 billion proposed construction project for approximately 780-miles of overhead, direct current transmission line that would deliver wind energy from western Kansas to

various utilities in Missouri, Illinois, Indiana, and other neighboring states. The project is designed to convey roughly 4,000 megawatts of energy, of which 500 megawatts would be eligible for utilization in Missouri and the remaining 3,500 megawatts delivered to the states further east. The Missouri portion of the project would cover nearly 206 miles across northern Missouri and would affect the following counties: Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls. Grain Belt’s proposed route is as follows:



In 2015, the Missouri Public Service Commission (Commission) denied the request for a certificate of convenience and necessity authorizing Grain Belt Express Clean Line, LLC (“Grain Belt”) to construct the proposed transmission line. (Case No. EA-2014-0207). The Commission reached this decision based on its conclusion that Grain Belt failed to satisfy its burden to demonstrate that the project was necessary or convenient for the public.

In 2016, Grain Belt filed a second application with the Commission requesting approval of the project (Case No. EA-2016-0358). In this new filing, Grain Belt offered updated information by claiming that they had entered into a transmission service agreement with the Missouri Joint Municipal Electric

Utility Commission, which agreed to purchase 225 megawatts of capacity for the project.

The Commission entered a report and order for case No. EA-2016-0358 on August 16, 2017. In its report, the Commission noted that by 2012 Grain Belt had already obtained initial county assents for the project from all eight of the affected counties. However, the Commission went on to note that in 2014 the county commissions of Clinton, Chariton, Caldwell, Ralls, and Monroe counties attempted to rescind the previously granted county assent. Relying on the Western District's *In re Transmission Co. v. Commission* decision as controlling authority, the Commission denied Grain Belt its certificate of convenience and necessity because Grain Belt failed to establish that it had obtained county assents from each county affected by the project before approval.

Grain Belt appealed the decision to the Missouri Court of Appeals for the Eastern District. (ED105932). On review, the Eastern District observed that the statutory language requiring utilities to seek a certificate of convenience and necessity from the Commission recognized two distinct types of certificates: line certificates and area certificates. The Eastern District further noted that the *In re Transmission Co. v. Commission* decision, in which the Western District had reversed the Commission's granting of a line certificate based upon a failure by the utility to acquire full county consent, had relied solely on the area certificate statutory language in reaching its conclusion. Based on these two observations, the Eastern District concluded that the Western District's *In re Transmission Co. v. Commission* case was incorrectly decided and that a utility seeking only a line certificate was under no obligation to seek county assent. The Eastern District consequently reversed the Commission's decision.

The Grain Belt case was then presented to the Commission again on remand. A second evidentiary hearing was held on December 18th and 19th of 2018 before the Commission. At the time of last year's Ombudsman report, the case was still pending. Since then the Commission approved Grain Belt's certificate application on March 20, 2019 with a Report and Order on Remand. The Missouri Farm Bureau appealed the Commission's latest decision to the Western District Court of Appeals (WD82842), while the Eastern Missouri

Landowners Alliance d/b/a Show Me Concerned Landowners (Show Me Concerned Landowners) and Christina Reichert appealed to the Eastern District Court of Appeals (ED107886). The Commission moved to transfer the Western District case to the Eastern District, and consolidate it with Show Me Concerned Landowners' appeal. The Western District granted the Commission's request on June 20, 2019. Oral arguments were held before the Eastern District on December 4, 2019, and the Court released its opinion affirming the Commission's certificate approval for Grain Belt on December 17, 2019.

The Eastern District Appellate Court held that Grain Belt was an "electrical corporation" for statutory purposes, and therefore the Commission could rightfully approve a certificate to construct a transmission line. The Eastern Appellate Court also denied Show Me Concerned Landowners' evidentiary arguments on appeal.

Related, but in a separate docket, Invenergy Transmission LLC (Invenergy) and Grain Belt jointly filed an application for the Commission to approve the sale of Grain Belt to Invenergy on February 1, 2019. (Case No. EM-2019-0150). The Commission approved the transaction on June 5, 2019. The Show Me Concerned Landowners, and Joseph and Rose Kroner appealed the Commission's decision to Missouri's Western Appellate Court (WD83236). On November 12, 2019, Show Me Concerned Landowners and the Kroners filed a motion asking the Court to allow additional evidence to be considered on appeal beyond what was included in the record considered by the Commission. Show Me Concerned Landowners and the Kroners specifically asked the Court to either treat the EA-2016-0358 Commission Report and Order on Remand as part of the record or take judicial notice the Order. The Commission opposed the motion. The Court denied the motion to supplement the record, but did take judicial notice of the EA-2016-0358 Order. Show Me Concerned Landowners and the Kroners' first brief is due January 7, 2020.

B. Other Eminent Domain Cases in Missouri Appellate Courts in 2019.

1. *City of Cape Girardeau v. Elmwood Farms, L.P.*, 575 S.W.3d 280 (Mo. App. E.D. 2019)

Missouri's Eastern District Appellate Court clarified how "heritage value" is determined following a condemnation proceeding. Missouri statute provides three alternative means to determine the compensation owed to a property owner following a condemnation proceeding with directions that the method ultimately chosen be the one that produces the most compensation. Mo. Rev. Stat. § 523.039 (2006). Subdivision (3) of Section 523.039, RSMo, provides that when the condemnation prevents the owner from "utilizing property in substantially the same manner" as it was being utilized on the day the taking occurs, and the subject property has been in common family ownership for fifty or more years, the owner shall be entitled to compensation equivalent to the fair market value plus heritage value. "Heritage value" is fifty percent of the fair market value.

The City of Cape Girardeau initiated a condemnation proceeding to acquire a road right-of-way and permanent trail easement on a portion of property owned by Elmwood Farms. The City's eminent domain claim affected 1.95 acres of the entire 17.2 acre property. Elmwood acquired the property by Spanish land grant in 1798, and it had remained in the possession of common family lineage for over two centuries.

After contesting the eminent domain claim, Elmwood's owners entered into a stipulation for a consent decree with the City. Cape Girardeau agreed to pay \$90,000 for the fair market value compensation for the taking. The City and Elmwood's owners agreed that heritage valuation would be determined by the Court. The Circuit Judge determined the heritage value for the acquired parcel to be \$45,000. The City challenged that determination, arguing that heritage value was to be determined by looking at the remaining property not affected by eminent domain, and that the Court misinterpreted the word "utilize."

The City argued that since the vast majority of the Elmwood property was not impacted by eminent domain, the Court should have concluded that the owners'

ability to “utilize” the land in the same manner as before the condemnation had not been changed. The City also maintained that the Missouri Legislature intended the word “utilizing” to focus on active use of the land as opposed to passive uses such as scenery or aesthetic enjoyment.

The Eastern District disagreed with the City and affirmed the Circuit Court’s determination of heritage value. The Eastern District noted that the Legislature’s use of the word “property” in Section 523.039 did not indicate a desire to consider only the condemned parcel when determining whether the condemnation altered the owners’ ability to utilize the land just as they had before the taking. Rather, the Court held that the entire property is to be considered when adjudicating heritage value. Although the Eastern District did not expressly say that passive use of land qualifies as “utilizing,” its explicit rejection of the City’s challenge and its reading of “utilize” indicates an endorsement that aesthetic enjoyment of land enjoys statutory protection.

The Missouri Supreme Court later denied the City’s request for transfer on June 4, 2019.

2. *Childress v. Lovins*, 582 S.W.3d 129 (Mo. App. S.D. 2019)

Missouri’s Southern District Appellate Court affirmed that private individuals may condemn land for cemetery purposes. The Childress family has several members buried in a Webster County cemetery dating back to the 1850’s. In the early 2000’s the Lovins family acquired land in Webster County, including the Childress cemetery and plots. Since the acquisition, the Childress’ took issue with the Lovins’ farming activity that impeded access to the cemetery.

Section 214.080, RSMo, provides that five or more people with an interest in enlarging a cemetery may petition a Court to condemn land through eminent domain to enlarge the cemetery when condemnation is “absolutely necessary” to do so. The Childress family invoked Section 214.080, and the Circuit Court granted title to the cemetery to the Childress family. The Lovins family appealed on the grounds that the condemnation was not for a “public purpose,” that the Childress family did not constitute the “public,” that the condemnation was not “absolutely necessary,” and that court costs were not properly assessed.

The Appellate Court determined that the Circuit Court had sufficient evidence to conclude that the condemnation of the cemetery was for a public purpose, and done by the public, in accordance with Section 214.080. However, the Appellate Court did agree with the Lovins family that the trial court did not properly assess court costs, and ordered the trial court to assign costs to the Childress family.

3. *City of St. Louis v. Bank of Washington*, (ED107699) (Dec. 24, 2019)

Missouri's Eastern District Appellate Court clarified how to properly preserve the appeal of a compensation award following condemnation. The City of St. Louis has been in the process of acquiring several acres of North St. Louis as part of its bid to attract the National Geo-Spatial Intelligence Agency as the Agency relocates. The land at issue was owned by the LCRA Holding Corporation, upon which the Bank of Washington (Bank) held deeds of trust.

The City had been negotiating with LCRA Holding Corporation and the Bank for the sale of several parcels. However, as those negotiations soured, the City then filed a condemnation pleading within the Circuit Court of St. Louis against LCRA Holding Corporation and the Bank. The Court approved the condemnation, issued a judgement to distribute compensation, and found that the Bank did not have a compensable interest in the property. As a result, the Bank received no portion of LCRA Holding Corporation's award.

The Bank did not appeal the Court's holding that the Bank had no interest in the property, but instead relied upon the Bank's prior filing asking for a jury determination of damages rather than the judicially created commission. The Bank's request was denied after the Court's award of damages. The Bank argued to the Eastern District that the Circuit Court's Order was not final and appealable until it decided the Bank's jury request. The Appellate Court disagreed, ruling that the determination of condemnation value and interests thereto is a separate, appealable judgment, which the Bank should have appealed instead.

C. Eminent Domain Cases in Federal Courts Interpreting Missouri Law.

Public Counsel found no published federal opinion interpreting Missouri's eminent domain laws decided during the 2019 calendar year.

D. 2019 Eminent Domain/Condemnation Data From State Courts Administrator

E. Condemnation Filings from 01/01/2019 to 12/04/2019			
County	Circuit Court Eminent Domain/Condemn Other	Circuit Court Eminent Domain/Condemn State	Grand Total
Boone County	3	0	3
Camden County	1	0	1
Cape Girardeau County	1	0	1
Christian County	0	1	1
City of St Louis	2	0	2
Clay County	1	0	1
Greene County	1	5	6
Jackson County	3	2	5
Jasper County	1	0	1
Jefferson County	1	1	2
Miller County	0	1	1
Phelps County	1	0	1
Platte County	3	0	3
St. Charles County	13	0	13
St. Louis County	8	2	10
Taney County	1	0	1
Webster County	1	1	2
Grand Total	41	13	54

Condemnation Dispositions from 01/01/2019 to 12/04/2019			
County & Disposition	Circuit Court Eminent Domain/Condemn Other	Circuit Court Eminent Domain/Condemn State	Grand Total
Adair County	4	0	4
Dismiss by Parties	2	0	2
Other Final Disposition	2	0	2
Barry County	1	0	1
Other Final Disposition	1	0	1
Boone County	2	0	2
Dismiss by Ct w/o Prejudice	1	0	1
Tried by Court- Civil	1	0	1
Buchanan County	1	0	1
Dismissed by Parties	1	0	1
Camden County	1	0	1
Other Final Disposition	1	0	1
City of St Louis	1	0	1
Tried by Court-Civil	1	0	1
Clay County	3	0	3
Dismissed by Parties	1	0	1
Other Final Disposition	2	0	2
Cole County	1	0	1
Tried by Court-Civil	1	0	1
Franklin County	1	0	1
Dismissed by Parties	1	0	1
Greene County	0	2	2
Dismiss by Ct w/ Prejudice	0	1	1
Dismissed by Parties	0	1	1

Jackson County	3	1	4
Dismissed by Parties	1	0	1
Jury Verdict- Civil	1	0	1
Other Final Disposition	1	0	1
Removed to Fed Court	0	1	1
Jasper County	1	0	1
Other Final Disposition	1	0	1
Jefferson County	2	0	2
Dismissed by Parties	2	0	2
Knox County	6	0	6
Dismissed by Parties	5	0	5
Uncontested	1	0	1
Lewis County	1	0	1
Dismissed by Parties	1	0	1
Marion County	2	0	2
Dismissed by Parties	2	0	2
Miller County	0	1	1
Consent Judgement	0	1	1
Phelps County	1	0	1
Dismissed by Parties	1	0	1
Platte County	1	0	1
Tried by Court-Civil	1	0	1
Polk County	1	0	1
Dismiss by Ct w/ Prejudice	1	0	1
Ray County	2	0	2
Dismissed by Parties	1	0	1
Jury Verdict- Civil	1	0	1
Saline County	1	0	1
Uncontested	1	0	1

St. Charles County	8	1	9
Dismiss by Ct w/o Prejudice	1	0	1
Dismissed by Parties	1	1	2
Other Final Disposition	5	0	5
Tried by Court- Civil	1	0	1
St. Louis County	4	0	4
Dismiss by Ct w/o Prejudice	1	0	1
Dismissed by Parties	2	0	2
Tried by Court-Civil	1	0	1
Taney County	1	0	1
Other Final Disposition	1	0	1
Webster County	0	1	1
Other Final Disposition	0	1	1
Grand Total	49	6	55

E. Department of Transportation Data

The Missouri Department of Transportation acquired 608 parcels of real property for state projects in Calendar Year 2019 to date.¹ 430 were resolved by negotiation, 178 were donated to the Department, and 2 required a condemnation lawsuit. Property owner satisfaction rating, overall, for CY 2018 to date was a 4.64 out of 5.²

F. Conclusion

Property rights are some of the most fundamental for the providence of all people. The critical nature of property rights is evident by its protection within the Federal Constitution's due process clause, as well as the echoing of that promise within Missouri's State Constitution. U.S. Const. Amend. 5; Mo.

¹ Data taken on November 25, 2018.

² As compared to a 4.83 in 2018, 4.80 in 2017, 4.63 in 2016, 4.7 in 2015, 4.47 in 2014, 4.8 in 2013, 4.6 in 2012, and 4.8 in 2011.

Const. Art. I § 10. The U.S. Supreme Court ruled in 1963 that the Sixth Amendment to the Constitution's prescriptive language necessitated an implicit right to counsel that was to be furnished by the government when people are criminally accused. *Gideon v. Wainwright*, 372 U.S. 335. By analogy, the Office of the Public Counsel sees the Office of the Property Right's Ombudsman as the requisite assistance to help protect the due process rights of property owners. Just as *Gideon* required adequate assistance before the State could deprive him of his liberty, the Public Counsel believes that Missourians and other affected property owners should receive effective assistance of counsel before their property is taken via eminent domain.

Unfortunately, the current structure of the Ombudsman's office prevents full assistance. Public Counsel is unable to represent individually affected land owners, and the majority of advice given to concerned citizens is to seek private counsel with significant expense. For property owners that lack the capital to retain representation, the condemnation process can be one of unequal power and knowledge, where condemning authorities have far more expertise than average property owners.

For questions or concerns about this report, please contact Marc Poston, Public Counsel, at (573) 751-4857.

Respectfully Submitted,

/s/ Marc Poston

Public Counsel

/s/ Caleb Hall

Senior Counsel

Ombudsman for Property Rights
Office of the Public Counsel
Post Office Box 2230
Jefferson City, MO 65102
(573) 751-4857(Telephone)
(573) 751-5562 (Facsimile)