

Modifies provisions for eminent domain for utility purposes



Executive Summary

HB 2033 (2020) restricts eminent domain for transmission line projects by allowing only rural electric cooperatives and some other electric corporations to use eminent domain for above-ground power line projects. The proposed legislation is the latest of several steps that regulators within the state have taken since 2014 over the use of eminent domain to acquire property and the authority to build the transmission lines for private companies such as the Grain Belt Express.¹ The power of eminent domain authorizes the government to take private property for public use if there is an associated direct or indirect public benefit. Eminent domain has been used by private interests if the primary objective of the taking leads to a scheme that will eventually promote economic development, public welfare, or advantage. More recently, Missouri has used eminent domain by private entities more narrowly and economic development alone is not sufficient for land acquisitions.

Highlights

- Studies do not find that using eminent domain in infrastructure or utility projects makes the construction of infrastructure more efficient.
- States that have restricted the use of eminent domain have seen no adverse effects in terms of state employment and gross state product or county employment.
- Eminent domain can be both a rent-seeking tool and a solution to market failure when it comes to land assembly.

Limitations

- Reducing the scope of eminent domain may limit future energy transport projects in Missouri, potentially making the transition to renewable energy more difficult.
- The real economic effects from restricting eminent domain for utility purposes are not known, since studies have not looked specifically at utilities projects.

Research Background

Eminent domain used for public benefit

Eminent domain is the power of a state or national government to take private property for public use. Public use definitions vary across jurisdictions and the U.S. Supreme Court has consistently deferred to the right of states to make their own determinations of "public use".^{1,2} States typically interpret the public use doctrine to justify eminent domain in two ways: the narrow view of the "use by the public" and the broad "advantage-to-the-public" view. The first requires the public to

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directly benefit from the proposed condemnation.³ In 1967, the Nebraska Supreme Court applied the narrow public use approach against a private company that tried to clear the surface of the lands in the city of Beatrice using eminent domain. However, the court decided that eminent domain was void because there were no direct public benefit. The court ruled that the increased employment and business due to condemnation were not enough to justify the eminent domain claim.⁴

The broader "use-for-public-advantage" view is applied on the grounds that the social and economic benefits to the area are important enough to justify the use of eminent domain by private companies. One example is the *Poletown Neighborhood Council v. City of Detroit* case (Michigan, 1981), where the Supreme Court upheld the city of Detroit's plan to condemn and remove an entire city neighborhood for the construction of a General Motors assembly plant. Public use justified eminent domain because the private acquisition would bring additional public benefits, including economic development and employment.⁵ Similarly, in the Supreme Court case of *Kelo v. City of New London* (Connecticut, 2005), private land was taken for the purpose of economic re-development. Since the Kelo decision, over 41 states have amended their statutes to limit "economic development takings" under state law, therefore limiting the government acquisition of private property to be transferred to new private owners.⁶

Public use for power transmission and infrastructure

Private oil companies, gas companies and electric utilities often use eminent domain to build oil pipelines, gas pipelines, electric transmission lines, and other types of infrastructure for energy transport and natural resource developments. More recently, energy projects have justified the provision of new energy sources (wind, solar, hydropower) using economic development as well as environmental benefits- cleaner air and water and potentially reduced carbon emissions. In that context, some states may decide that energy projects represent a "public use" depending on the type of the energy source. For example, if a state's goal is to transition to renewable energy sources, then fossil fuel transport may be no longer considered a public good, but other more renewable projects may be given the eminent domain justification.⁷ On the other hand, states that are opposed to further renewable power imports or exports may decide to block the use of eminent domain for projects that would transmit power from such sources.⁸⁸ Last, states can also declare that power transport only supports "public use" if the state public utility commission finds that it serves certain values, such as increasing the reliability, affordability, or sustainability of the power grid to the community the transmit power is based on. Since land in the state of Missouri cannot be condemned for economic development purposes only,⁸ using eminent domain for transmission projects of oil, gas, or wind would likely be allowed if the resources were intended largely for in-state use.

How does eminent domain affect economic development?

The real economic effects from restricting eminent domain for utility purposes are not known, since there are no impact assessment studies looking specifically at utilities projects. However, the most common way to measure eminent domain in utility is in terms of efficiency, or, more precisely, the necessity of eminent domain to assure efficient construction of infrastructure. However, theoretical, and applied efficiency considerations for eminent domain fail to find evidence that such superior efficiency exists.⁹

Research on the economic development due to eminent domain is scarce and suggests that although takings are associated with increased per-capita disposable income,¹⁰ states that have restricted the use of eminent domain have experienced no adverse effects in terms of state employment and gross state product or county employment and county income in the states' most densely populated counties.^{11,12}

Generally, the rationale for eminent domain solves the market failure problem of land assembly. This means that the private sector would be unable to supply the efficient amount of land-extensive developments if the land-owners did not want to sell their properties (holdout problems).¹³ However, depending on the situation, eminent domain in land assembly has been used as a rent-seeking tool, such as the instances where private properties of small businesses and land-owners are transferred to big businesses and developers.¹⁴

Lastly, in theory, if land is being transferred to a private entity, then the community must enjoy the public benefit at large. This means that the public use taking must affect a portion of the population, contingent on the numbers of people participating in, or benefiting from, the purported public use. However, courts do not use a specific formula to calculate this number and they find it unnecessary that the entire community or even a considerable portion of it enjoys the public benefit, as long as there are benefits such as decrease in unemployment, an increase in tax base, and a revitalization of local industries.^{15,16}

Other cost and benefit considerations

Eminent domain in projects of high-voltage transmission lines have been used due to the renewable energy benefits associated with new energy sources, such as wind energy. Proponents of building these lines argue that this can displace coal-fired electricity and other fossil fuels and help to decarbonize the nation's electric grid.¹⁷ However, states and their landowners oppose such lines because of their impact on local land values and aesthetics.^{18,19} Overall, there are mismatches between local costs and regional or national benefits, since the transmission line companies often pay enhanced land values for such takings, or generous taxes and other payments to local communities, while at the same time, excessive harms may be imposed on local landowners as compared to the benefits that flow to other states.^{20,21}

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