

Exhibit No. 401

Issues: Public Interest

Witness: Ron Calzone

Type: Rebuttal Testimony

Sponsoring Party: Show Me Concerned Landowners

Case No.: EA-2016-0358

Date of Testimony: January 24, 2017

**MISSOURI PUBLIC SERVICE COMMISSION
CASE NO. EA-2016-0358**

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Service Commission

**REBUTTAL TESTIMONY OF
RON CALZONE
ON BEHALF OF
SHOW ME CONCERNED LANDOWNERS**

January 24, 2017

Show Me Exhibit No. 401
Date 3.24.17 Reporter AF
File No. EA-2016-0358



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1 **I. INTRODUCTION AND PURPOSE OF TESTIMONY**

2 **Q. Please state your name and address.**

3 A. My name is Ron Calzone. I live on our family ranch in Maries County, Missouri at 33867
4 Highway E, Dixon MO, 65459.

5 **Q. Please explain your background and qualifications to comment on the Grain Belt Express
6 project.**

7 A. I raise cattle and Quarter Horses, but also own and operate a steel fabricating business for a
8 living. Additionally, for almost 20 years I have been a citizen activist involved in promoting
9 constitutional governance that respects free-market principles and individual liberty. I am one
10 of the founding directors of a think tank that focuses on those issues.

11 Perhaps more to the point, I was the chairman of Missouri Citizens for Property Rights,
12 which was an effort to amend the Missouri Constitution in a way that prevents taking private
13 property for private development purposes.

14 In the wake of the infamous 2005 *Kelo* decision, I coordinated and consolidated the
15 property rights ideas of some of the best constitutional minds in the country resulting in
16 proposed state constitutional amendments that drew support and praise from the leaders of
17 organizations such as Heritage Foundation, Property Rights Alliance, the Reason Foundation,
18 the American Policy Center, the Rutherford Institute, and others.

1 In 2008 we raised \$1 million and collected 428,000 signatures on two initiative
2 petitions. We failed to gain ballot access by just a few thousand signatures in one congressional
3 district.

4 In the course of those undertakings, I spent a great deal of time studying the history of
5 the Missouri Constitution as well as the writings that influenced the framers of the U.S.
6 Constitution.

7 **Q. Please describe the purpose of your testimony.**

8 A. The purpose of my testimony is to provide a historical background to the understanding of the
9 value of our property rights in the United States and the state of Missouri. As part of this
10 historical survey, I will of necessity discuss certain constitutional provisions and court
11 decisions. I do not intend to interpret those decisions as a lawyer would except to provide a
12 fundamental understanding of the public interest in protecting property rights. My conclusion is
13 that in evaluating the public interest in granting an application for a Certificate of Public
14 Convenience and Necessity, the supreme public interest is protecting the property rights of the
15 landowners of the state of Missouri.

16 I do not oppose the Grain Belt Express project per se. The historic traditions in the state
17 of Missouri support economic development driven by a free-market that respects private
18 property rights. Only by defending the Constitution and property rights to the maximum extent
19 possible can the public interest and free markets be served.

20 **Q. Do you have any personal or business interests in the Grain Belt Express project?**

21 A. My property is not threatened by the Grain Belt Express project and I know of no other ways
22 this project will provide either direct financial benefits or costs to me. I do believe, however,
23 that allowing the use of eminent domain in this or similar projects would undermine property
24 rights principles in ways that will harm all Missourians.

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II. HISTORICAL BACKGROUND OF MISSOURI EMINENT DOMAIN LAW

Q. How does the 2005 U.S. Supreme Court *Kelo* focus your discussion of property rights in the state of Missouri?

A. With *Kelo*, the Supreme Court turned the average American's *understanding* of eminent domain on its head. The fact is, though, *Kelo* was the culmination of decades of evolution in property rights theory – an evolution greatly out of step with the principles upon which America was founded.

In a nutshell, the most significant result of *Kelo* was that the Court's declaration that the Fifth Amendment does not protect private property from being taken for private use when there is a public benefit. **Essentially, the Court declared that “public use” and “public benefit” are equivalent terms even when the property ends up owned by a private entity.**

Of equal importance was the Court's declaration that although the U.S. Constitution has limited effects on private takings *state statutes* and *state constitutions* can provide *greater protection* of property rights. As I will discuss, the framers of the Missouri Constitution had already done just that.

Q. What is the historical background of the Missouri Constitution's property clauses?

A. From 1820 to 1875, the Missouri Constitution's takings clause was similar to that of the Fifth Amendment in the U.S. Constitution. Had it not been changed in 1875, there may not have been much to discuss today.

The adoption of the 1875 Missouri Constitution was on the heels of the horrific Civil War and the terrible reconstruction period that followed. There were a great deal of abuses of fundamental rights in the divided state of Missouri, and both Northern and Southern

1 sympathizers were ready for stronger constitutional protections.

2 During the constitutional convention of 1874, in a report from the committee dealing
3 with the Preamble, Bill of Rights and arbitrary seizures, Delegate Gantt referenced the concern
4 over abuses during and after the Civil War:

5 “But, in our own country, and I intend to be very brief, sir, and I do not intend to open a sore
6 - in our own country and within a comparatively recent period we have known quite enough
7 of the evils of arbitrary arrests, and arbitrary seizures and searches, to perceive the wisdom,
8 the necessity of erecting as many barriers against that abuse as it is possible for us to do.”

9 *Debates of the Missouri Constitutional Convention, 1875 – Volume I, P. 434 at 11, (emph.*
10 *added)*

11 Later, in the same report, Mr. Gantt pointed out the need for specific protections against
12 the suspension of the writ of habeas corpus – a need precipitated by events during the Civil War
13 and Reconstruction times:

14 “I do not believe fifteen years ago it entered into the minds of any gentleman who was at that
15 time old enough to have formed an opinion on the subject & to have reflected upon it, that it
16 was possible that in these United States the privilege of the writ of *habeas corpus* could ever
17 be suspended except in the actual presence of the armed hand in the front that law martial
18 which supersedes the civil law of necessity; and yet, sir, within those fifteen years we have
19 seen violations of the privilege of personal liberty which have made the citizens of European
20 governments, & especially of the British government, stand half incredulously half
21 wonderingly.”

22 *Debates of the Missouri Constitutional Convention, 1875 – Volume I, P. 444 at 26,*
23 *(emph. added)*

1 During the Constitutional Convention of 1874, other statements made in oral debate
2 make it abundantly clear that **there had also been a problem with the taking of private**
3 **property for private use.** Delegate Black mentioned “great outrages”, which included
4 property “taken for purposes which many times was really not public”. He said,

5 “Now it seems as I said the other day that sometimes there have been great outrages
6 committed but we have already adopted a section which completely overturns the law I take
7 it, as heretofore understood-when the Legislature has declared heretofore that it was
8 necessary for the public benefit and that the property was taken for the public benefit we
9 have generally conceded that it was, and that was the end of it, and then proceeded to the
10 condemnation. Now as we have adopted the 22d section the question as to whether it is for
11 public use or not is left open-to be adjudicated and determined. **Now that has been the**
12 **difficulty heretofore; property has been taken for purposes which many times was**
13 **really not public.”**

14 *Debates of the Missouri Constitutional Convention, 1875 – Volume IV, P. 193 at 34,*
15 (emph. added) (NOTE: § 22d was renumbered § 20 and eventually became the current Art. I,
16 § 28)

17
18 There is no doubt that the framers and people of Missouri wanted stronger codified
19 protections of their most basic liberties. *In 1875 the people adopted unique constitutional*
20 *prohibitions of taking property for private use that were not a mere reiteration of the*
21 *requirement that the use be public or benefit the public – they adopted a higher standard than*
22 *the Fifth Amendment to the U.S. Constitution – one which is intended to narrow the*
23 *application of eminent domain just as the Supreme Court said states could do, 130 years*
24 *later.*

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Q. What were the historical factors that particularly influenced the framers of the Missouri Constitution?

A. There are two clauses in the Missouri Constitution that, to my knowledge, do not exist in any of the other state constitutions, but are totally consistent with the core principles of an American constitutional republic.

Men like Thomas Jefferson and James Madison, as well as the other Founders, may have been influenced by the writings of John Locke more than any other man. Locke explained the *purpose* of society and government when he wrote, "The reason why men enter into society, is the preservation of their property; and the end why they chuse [sic] and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society". Locke, John, Two Treatise of Government, Book 2 Chapter XIX Section 222

When Locke wrote of "property", he meant not only real estate, but also belongings of a more personal nature -- the sorts of things Delegate Gantt had in mind when he spoke of the violations during the War and Reconstruction period. Like the American Founders, Gantt understood that ALL of our property rights sink or swim together, and he and the other drafters of the Missouri Constitution envisioned the most important role of our state's government to be *the securing of our property*.

The words of James Madison, the Drafter of the U.S. Constitution, help us understand these principles:

"In its larger and juster meaning,[the term property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one

1 else the like advantage. In the former sense, a man's land, or merchandize, or
2 money is called his property.

3 *In the latter sense, a man has a property in his **opinions and the free***
4 ***communication of them.** He has a property of peculiar value in his **religious***
5 ***opinions,** and in the profession and practice dictated by them. He has a property*
6 *very dear to him in the **safety and liberty of his person.** He has an equal property*
7 *in the **free use of his faculties** and free choice of the objects on which to employ*
8 *them.*

9 In a word, as a man is said to have a right to his property, he may be
10 equally said to have a property in his rights... ***Government is instituted to protect***
11 ***property of every sort;** as well that which lies in the various rights of individuals,*
12 *as that which the term particularly expresses. This being the end of government,*
13 *that alone is a just government, which impartially secures to every man, whatever*
14 *is his own...*

15 ***That is not a just government, nor is property secure under it, where the***
16 ***property which a man has in his personal safety and personal liberty, is violated***
17 ***by arbitrary seizures of one class of citizens for the service of the rest.”***

18 Hunt, Gaillard, The Writings of James Madison, (New York: G.P. Putnam's Sons, 1906),
19 Vol. VI, p. 102, "Property," March 29, 1792.

20
21 Of course, all of the above is consistent with the most fundamental of American
22 documents, the U.S. Declaration of Independence:

1 “We hold these truths to be self-evident, that all men are created equal, that they are
2 endowed by their Creator with certain unalienable Rights, that among these are *Life,*
3 *Liberty and the pursuit of Happiness.* That to secure these rights, Governments are
4 instituted among Men, deriving their just powers from the consent of the governed”

5 *U.S. Declaration of Independence* (emph. Added)

6 As most people are aware, in the first draft of the Declaration, Thomas Jefferson used
7 the term “property” instead of “happiness.”

8 **Q. What are the unusual or unique clauses in the Missouri Constitution that affect this issue?**

9 A. Everything in the Missouri Constitution should be understood in light of the first two clauses of
10 the Bill of Rights. They clearly spell out the affirmative duties of Missouri government, which
11 includes the Public Service Commission.

12 **Article I, Section 1:** *“In order to assert our rights, acknowledge our duties, and*
13 *proclaim the principles on which our government is founded, we declare:* That all
14 political power is vested in and *derived from the people;* that all government of right
15 *originates from the people,* is founded upon their will only, and is instituted *solely for*
16 *the good of the whole.”*

17
18 The phrase “solely for the good of the whole” and the “general welfare” clause in Section 2 are
19 declarations by the people that government power is NOT to be used to favor some individual
20 or subset of society.

21
22 **Article I, Section 2:** *“In order to assert our rights, acknowledge our duties, and proclaim*
23 *the principles on which our government is founded, we declare:* That all constitutional

1 government is intended to promote the *general welfare* of the people; that *all persons*
2 have a natural right to life, liberty, the pursuit of happiness *and the enjoyment of the*
3 *gains of their own industry*; that all persons are created equal and are entitled to equal
4 rights and opportunity under the law; that to give security to these things is the principal
5 office of government, and that when government does not confer this security, it fails in
6 its chief design.”

7
8 To my knowledge, no other state constitution guarantees the right to the “enjoyment of the gains
9 of [one's] own industry” and then declares that protecting that right is the *primary purpose of*
10 *government*.

11 Another pivotal and unique clause, also found in Missouri's Bill of Rights, is Article I,
12 Section 28. Here the framers and the Missourians who ratified the Constitution, declared “That
13 *private property shall not be taken for private use with or without compensation*, unless by
14 consent of the owner...” As I will explain in more detail later, this is the clause that elevates
15 the value of private property rights beyond the value expressed in the *Kelo* decision. The
16 framers of the Missouri Constitution had already expressed a higher value on property than did
17 the *Kelo* court.

18 And, as I will also discuss below, Article VI, Section 21 of the Missouri Constitution is
19 unique – at least its presence as a constitutional clause is unique, because many other states
20 have substantially similar provisions, but only in their statutes. Section 21 amounts to *an*
21 *exception* to Article I, Section 28's prohibition of the use of eminent domain for private use. It
22 allows “**for taking or permitting the taking, by eminent domain, of property for such**
23 **purposes**, and when so taken the fee simple title to the property shall vest in the owner, who
24 may sell or otherwise dispose of the property.”

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III. THE MISSOURI CONSTITUTION PROHIBITS EMINENT DOMAIN FOR PRIVATE USE

Q. What's the difference between a requirement that takings be for public use or public benefit and a prohibition of taking for private use?

A. The Missouri Constitution's Article I § 26 is similar to the Fifth Amendment. It begins with, "That private property shall not be taken or damaged for public use without just compensation." If this was all the Missouri Constitution had to say on the matter, we might conclude that the U.S. Supreme Court's *Kelo* opinion applied in Missouri, specifically, that "public use" equals "public benefit" and that the use of eminent domain is allowed when the property taken ends up in *private* ownership or use, *as long as the public benefits from such taking* and just compensation is provided.

But since the Missouri Constitution specifically prohibits the use of eminent domain for "private use", "with or without compensation", it doesn't matter if there is "public benefit" to the taking or not, any more than it matters that "just compensation" is provided. Article I § 28 says, in part, "That private property shall *not be taken for private use* with or without compensation, unless by consent of the owner...", but it might as well say, "That private property shall *not be taken for private use* with or without public benefit, unless by consent of the owner..."

Any way you slice it, taking private property for private use is forbidden. The key takeaway is that private property rights are highly valued in Missouri. The supreme public interest is the protection of those rights.

Q. Did the framers of the Missouri Constitution address the difference between public use and public benefit?

1 A. The Constitution does provide *exceptions* to the prohibition of taking private property for
2 private use – these exceptions are the ONLY times they intended for “public benefit” to be
3 pursued when there the taking of property also resulted in “private use.”

4 Right in § 28 it says taking property for private use is forbidden, “except for private
5 ways of necessity, and except for drains and ditches across the lands of others for agricultural
6 and sanitary purposes.” Swampy areas can present health hazards. Draining them is a “public
7 benefit”, but with § 28's prohibition of private use takings, public benefit isn't enough to justify
8 eminent domain – that's why the framers provided the exceptions back in 1875.

9 In full, Article I § 28 says:

10 “That private property shall not be taken for private use with or without compensation,
11 unless by consent of the owner, except for private ways of necessity, and except for drains
12 and ditches across the lands of others for agricultural and sanitary purposes, in the manner
13 prescribed by law; and that when an attempt is made to take private property for a use
14 alleged to be public, the question whether the contemplated use be public shall be judicially
15 determined without regard to any legislative declaration that the use is public.”

16
17 In the 1940's, city planners faced the “private use” prohibition again at a time when
18 redeveloping dilapidated inner city neighborhoods was a priority. Redeveloping such
19 neighborhoods clearly provided *public benefit*, but while other states were enacting *statutes*
20 that provided the use of eminent domain for private redevelopment, Missouri could not because
21 of the constitutional private use prohibition in § 28. To overcome that prohibition they needed a
22 constitutional amendment, not a mere statute. That's when Article VI § 21, one of the unique
23 clauses I mentioned previously, was proposed and ratified by voters in the new constitution of
24 1945. That section was *an additional exception* to the Article I § 28 prohibition on taking

1 private property for private use. Article VI § 21 says:

2 “Laws may be enacted, and any city or county operating under a constitutional charter may
3 enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and
4 rehabilitation of blighted, substandard or insanitary areas, and for recreational and other
5 facilities incidental or appurtenant thereto, **and for taking or permitting the taking, by
6 eminent domain, of property for such purposes**, and when so taken the fee simple title to
7 the property shall vest in the owner, who may sell or otherwise dispose of the property
8 subject to such restrictions as may be deemed in the public interest.”

9 It is clear from the history that the exceptions permitting a taking for a private use but with a
10 public benefit are very limited so as to protect private property rights.

11
12 **IV. THE NEED FOR EXCEPTIONS TO THE PROHIBITION OF PRIVATE TAKINGS**
13 **IS EVIDENCE THAT PUBLIC BENEFIT DOES NOT EQUAL PUBLIC USE**

14 **Q. Don't the clauses in the Missouri Constitution that clearly permit private taking support**
15 **the idea that a taking that results in public benefit IS a public and not private taking?**

16 A. No – just the opposite is true. The fact that there are specific exceptions to the general
17 prohibition against takings for private use is proof positive that the People, through their
18 Constitution, are declaring that takings resulting in public benefit are not normally to be
19 considered “public use” when the property ends up in private ownership.

20 **Q. What does the fact that exceptions exist to the prohibition on private takings say about the**
21 **difference between a *requirement* that takings be for public use or benefit and a *prohibition***
22 **of private takings?**

23 A. The only conclusion one can legitimately draw is that the citizens of Missouri place such a high
24 value on private property rights that they want their state's constitutional protection of those

1 rights to be even stronger than the protections afforded in the U.S. Constitution. The citizens of
2 Missouri are saying that, with only a few enumerated exceptions, the protection of individual
3 personal property rights trumps “public benefit” unless the public ends up owning the property
4 being taken. In effect, the people have said that the **greatest public interest** is preventing one
5 private party from diminishing another private party's property rights with misused
6 governmental power.

7
8 **Q. When evaluating the public interest of the Grain Belt Express project, what are the public
9 interest factors that should weigh most heavily on the Commission?**

10 **A.** I must conclude that the people place a supreme value on property rights. Therefore, the
11 supreme public interest in this and any governmental action such as this is the protection of
12 property rights. As I pointed out earlier, the People through the Missouri Constitution declared
13 exactly what they expect the government they created to **make the highest priority**. The
14 People saw fit to define that highest priority where it is abundantly easy to find – in the third
15 clause of the Constitution when they declared, “that to give security to these things [including
16 property rights] is the **principal office of government**, and that when government does not
17 confer this security, it **fails in its chief design.**” This is a high hurdle to overcome. I do not
18 believe Grain Belt Express can overcome that hurdle, most particularly because they would use
19 the proposed project for a private use and not a public one.

20 **Q.** Does this conclude your testimony?

21 **A.** Yes, it does.
22

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

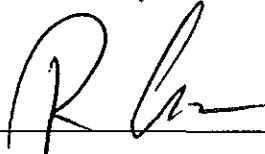
In the Matter of the Application of Grain Belt Express)
Clean Line LLC for a Certificate of Convenience and)
Necessity Authorizing it to Construct, Own, Control,)
Manage, Operate and Maintain a High Voltage, Direct)
Current Transmission Line and an Associated Converter)
Station Providing an Interconnection on the Maywood-)
Montgomery 345 kV Transmission Line)
Case No. EA-2016-0358

AFFIDAVIT OF RON CALZONE

STATE OF MISSOURI)
)
) ss
COUNTY OF Marion)


Ron Calzone, being first duly sworn on his oath, states:

1. My name is Ron Calzone.
2. Attached hereto and made a part hereof for all purposes is my Rebuttal Testimony on behalf of Show Me Concerned Landowners, consisting of 13 pages, having been prepared in written form for introduction into evidence in the above-captioned docket.
3. I have knowledge of the matters set forth therein. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded, including any attachments thereto, are true and accurate to the best of my knowledge, information and belief.



Ron Calzone

Subscribed and sworn before me this 23rd day of January, 2017.



Notary Public

