

Subcommittee on Water, Power and Oceans  
John Fleming, Chairman  
Hearing Memorandum

October 26, 2015

To: All Subcommittee on Water, Power and Oceans Members

From: Majority Committee Staff–Subcommittee on Water, Power and Oceans (x5-8331)

Hearing: Legislative Hearing on H.R. 3062 (Rep. Womack, R-AR), To prohibit the use of eminent domain in carrying out certain projects.

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**H.R. 3062 (Rep. Womack, R-AR), the “Assuring Private Property Rights  
Over Vast Access to Land (Approval) Act.”**

**Hearing Overview:**

On October 28, 2015 at 2:30 p.m. in 1324 Longworth, the House Water, Power and Oceans Subcommittee will hold a legislative hearing on H.R. 3062 (Womack, R-AR), the “Assuring Private Property Rights Over Vast Access to Land (Approval) Act.” This one-panel hearing will also include consideration of two other bills.

**Bill Summary:**

H.R. 3062 amends the Energy Policy Act of 2005 to prevent the Secretary of Energy and the Administrators of the Western Area Power Administration (WAPA) and of the Southwestern Power Administration (SWPA) from using eminent domain in certain electricity transmission infrastructure circumstances.

**Co-Sponsors:**

Reps. Rick Crawford (R-AR), French Hill (R-AR) and Bruce Westerman (R-AR)

**Witnesses:**

*Mr. Jordan Wimpy*

Associate

Gill Ragon Owen, P.A.

Little Rock, Arkansas

\*Mr. Wimpy will represent Downwind, LLC and Golden Bridge, LLC

*Mr. Bill Burchette*

Partner

Holland and Knight, LLP

Washington, DC

\*Mr. Burchette will represent East Texas Electric Cooperative, Inc.

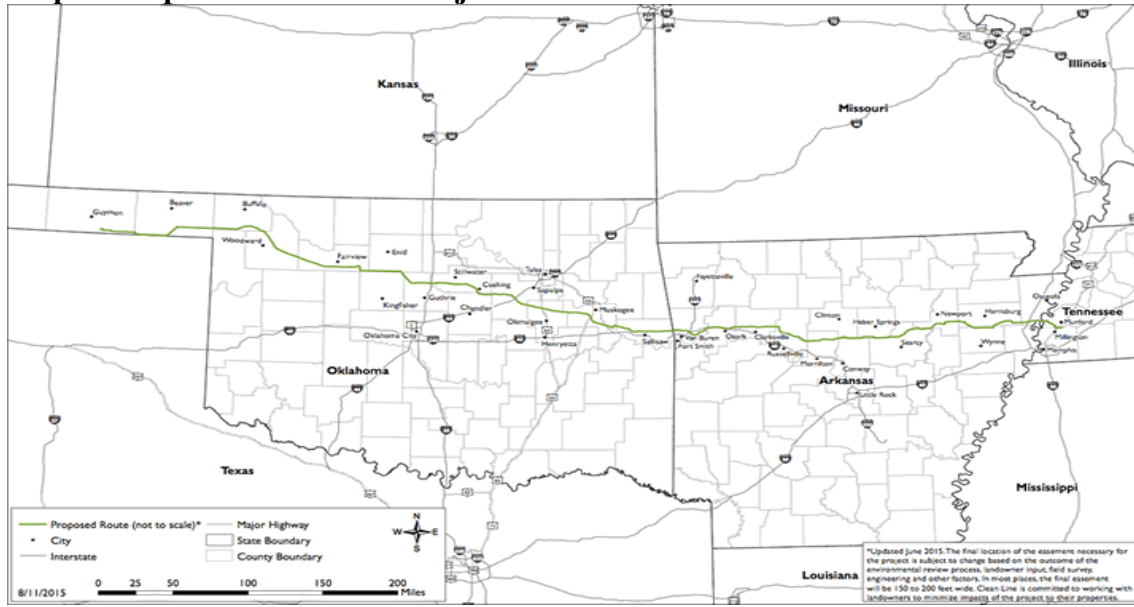
*The Department of Energy* (invited to attend, but declined)

## **Background:**

H.R. 3062 has, in part, been introduced in response to a proposed electricity transmission line that relies on federal eminent domain authority included in the Energy Policy Act of 2005 (P.L. 109-58 or the Act). Specifically, Section 1222 of the Act authorizes the Secretary of Energy, acting through and in consultation with the Administrators of the Southwestern (Southwestern) and Western Area Power Administrations (Western) to participate with other entities in designing, developing, constructing, operating, maintaining, or owning new electric power transmission facilities and related facilities located within any state within these agencies service territories under certain circumstances.<sup>1</sup> Although not explicit in the statute, one of the features of Section 1222 is that non-federal entities may pay for the federal agencies use of eminent domain authority on the lands that would serve as the transmission right-of-way.<sup>2</sup>

To date, a transmission project has not been constructed under Section 1222. But, Clean Line Energy, based in Chicago, Illinois and Houston, Texas first proposed triggering the authority for the “Plains and Eastern Clean Line” project (project) in 2010.<sup>3</sup> The proposed project, as updated in 2011, would include an overhead 600 kilovolt (kV) High Voltage Direct Current electric transmission system and related facilities with the capacity to deliver approximately 3,500 megawatts, primarily of wind energy generation facilities in the Oklahoma and Texas Panhandle regions, to load-serving entities in the Mid-South and Southeast United States via an interconnection with the Tennessee Valley Authority in Tennessee (see Map 1 below).<sup>4</sup>

### **Map of Proposed Clean Line Project Route.**



Source: <http://www.plainsandeasterncleanline.com/site/page/location>

<sup>1</sup> <http://energy.gov/sites/prod/files/2014/12/f19/EIS-0486-DEIS-Summary-2014.pdf>, at S-2.

<sup>2</sup> Id, at S-30.

<sup>3</sup> Id, at S-2.

<sup>4</sup> Id, at S-20.

The proposed route would cover 721 linear miles. The right-of-way including the steel structures and power lines would be approximately 150-200 feet wide. Much of this right-of-way would be on private land in rural counties.<sup>5</sup> While the Department of Energy (DOE) document did not quantify the number of jobs associated with the project, Clean Line estimated that 5,000 construction jobs and 500 operations jobs and over \$2 billion in infrastructure investments would be created if the project went forward.<sup>6</sup>

Since DOE's potential participation in the project is a "federal action" under the National Environmental Policy Act, the Department is completing an Environmental Impact Statement (EIS) process to determine environmental and other impacts. DOE released a draft EIS in December 2014.<sup>7</sup> The Final EIS could be released at any time.

The project is controversial. A number of landowners in Arkansas have mobilized in opposition to the proposed route. For example, Downwind LLC submitted comments to the Draft EIS that questioned the project's applicability to Section 1222 and indicated that it would "severely" impact agricultural operations.<sup>8</sup> A Downwind, LLC representative will testify at this hearing. The Arkansas state House and Senate have passed resolutions opposing Clean Line and the Cherokee Nation voiced its opposition as well. The Sierra Club of Arkansas supports the Clean Line project, according to Mr. Glen Hooks, chapter director: "It is going to undoubtedly lead to retirement of older and dirtier coal plans."<sup>9</sup> In addition, the project has garnered the endorsement of chambers of commerce and one local electric cooperative utility in Texas (which will testify against H.R. 3062 at this hearing).<sup>10</sup>

The issue prompted the entire Arkansas congressional delegation earlier this year to introduce companion bills (H.R. 3062 and S. 485) prohibiting DOE from using eminent domain under Section 1222 unless an affected Governor and a state's public utility commission approve of such action. Clean Line opposes the bill, indicating that it "changes the rules in the middle of the game," makes it more "difficult to build important interstate energy infrastructure," and is the "opposite direction of the Keystone XL pipeline approval."<sup>11</sup>

The American Public Power Association, a trade organization of public utilities, supports the bills: "As not-for-profit electric utilities whose purpose is to provide affordable, reliable electricity with appropriate environmental stewardship, this legislation was particularly welcome to us. Our members have been concerned that, as implemented, Section 1222 of EPAct05 could require them to pay for transmission lines that they do not need and are outside the statutory mission of the PMAs."<sup>12</sup> In addition, the National Association of Regulatory Utility Commissioners (NARUC) supports the bills:

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<sup>5</sup> Id, at S-22.

<sup>6</sup> <http://www.cleanlineenergy.com/projects>

<sup>7</sup> <http://energy.gov/sites/prod/files/2014/12/f19/EIS-0486-DEIS-Summary-2014.pdf>

<sup>8</sup> Downwind LLC's Comments Concerning DOE's Draft EIS (DOE/EIS-0486), at 10;

<http://energy.gov/sites/prod/files/2015/06/f23/Comment%20from%20Downwind,%20LLC%206-11-15.pdf>

<sup>9</sup> <http://www.arktimes.com/arkansas/the-messy-clean-line-issue/Content?oid=3908284>

<sup>10</sup> [http://www.cleanlineenergy.com/sites/cleanline/media/news/East\\_Texas\\_Cooperatives\\_Press\\_Release\\_FINAL.pdf](http://www.cleanlineenergy.com/sites/cleanline/media/news/East_Texas_Cooperatives_Press_Release_FINAL.pdf)

<sup>11</sup> "Support Energy Infrastructure and Jobs by Opposing S. 485 and H.R. 3062" Clean Line Energy Partners, July 2015.

<sup>12</sup> American Public Power Association Letter in Support of S. 485, June 1, 2015

“NARUC has a long standing position that the siting of electric transmission facilities should be subject to the exclusive jurisdiction of the States, notwithstanding the limited “backstop” siting provision in Section 1221 of the Energy Policy Act of 2005 – which NARUC strongly opposed. We continue to believe that Congress should not expand federal authority over transmission siting either through amendments to the Federal Power Act or through other federal legislation.

Since 2005, Congress and the federal government agencies have attempted to establish federal eminent domain authority for electric transmission at the expense of the States. Your bill begins the process of restraining this federal overreach by placing eminent domain authority with the States for projects carried out by the Secretary of the Department of Energy, the Southwestern Power Administration (SWAPA), and the Western Area Power Administration (WAPA).”<sup>13</sup>

Meanwhile, the Arkansas delegation sent a [letter](#) on September 14, 2015 to DOE Secretary Ernest Moniz to voice concerns that the project did not follow the requirements of Section 1222.<sup>14</sup> Specifically, the delegation questioned whether the project adhered to the statute’s requirements that a project be “necessary to accommodate an actual or projected increase in demand for electric transmission capacity.” In addition, the letter asked DOE to “provide a comprehensive and detailed accounting of Department activities, including financial transactions and resources expended,” relating to Section 1222 and the specific project.<sup>15</sup> Although DOE staff has met with the Arkansas delegation to discuss the letter, it is unclear whether there will be a written response.

DOE also declined to provide a witness for this hearing. Witnesses will discuss the national and local implications of the precedent-setting nature of DOE’s potential Section 1222 decision and H.R. 3062.

### **Major Provisions/Analysis of H.R. 3062:**

Section 2 of the bill amends Section 1222 of the Energy Policy Act of 2005 by inserting a new subsection that prohibits the Secretary and the Administrators of Southwestern and Western from using eminent domain under this section unless the Governor and the head of each applicable public utility commission or public service commission of the affected State and the head of the governing body of each Indian tribe the land of which would be affected explicitly authorizes such use.

Section 2 also adds a subsection to stipulate that, to the maximum extent practicable, a Project carried out under Section 1222 shall be sited on an existing federal right-of-way or federal land managed by the Bureau of Land Management, the U.S. Forest Service, the Bureau of Reclamation or the Army Corps of Engineers.

### **Cost:**

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<sup>13</sup> NARUC letter in support of S. 485, July 21, 2015

<sup>14</sup> [http://www.boozman.senate.gov/public/index.cfm/files/serve?File\\_id=03e649d1-eb67-45de-8128-0a005e3520c1](http://www.boozman.senate.gov/public/index.cfm/files/serve?File_id=03e649d1-eb67-45de-8128-0a005e3520c1)

<sup>15</sup> <http://agcouncil.net/2015/09/arkansas-congressional-delegation-sends-letter-on-clean-line-project/>

The Congressional Budget Office (CBO) has not completed a cost estimate of the bill, although it is expected that no federal monies will be expended.

**Administration Position:**

Unknown.

**Ramseyer:**

**Showing Current Law as Amended by HR 3062**

[new text highlighted in yellow; text to be deleted bracketed and highlighted in blue]

**Energy Policy Act of 2005 (42 USC 16421)**

**16421. Third-party finance**

**(a) Existing facilities**

The Secretary, acting through the Administrator of the Western Area Power Administration (hereinafter in this section referred to as "WAPA"), or through the Administrator of the Southwestern Power Administration (hereinafter in this section referred to as "SWPA"), or both, may design, develop, construct, operate, maintain, or own, or participate with other entities in designing, developing, constructing, operating, maintaining, or owning, an electric power transmission facility and related facilities ("Project") needed to upgrade existing transmission facilities owned by SWPA or WAPA if the Secretary, in consultation with the applicable Administrator, determines that the proposed Project-

(1)(A) is located in a national interest electric transmission corridor designated under section 216(a) of the Federal Power Act [16 U.S.C. 824p(a)] and will reduce congestion of electric transmission in interstate commerce; or

(B) is necessary to accommodate an actual or projected increase in demand for electric transmission capacity;

(2) is consistent with-

(A) transmission needs identified, in a transmission expansion plan or otherwise, by the appropriate Transmission Organization (as defined in the Federal Power Act [16 U.S.C. 791a et seq.]), if any, or approved regional reliability organization; and

(B) efficient and reliable operation of the transmission grid; and

(3) would be operated in conformance with prudent utility practice.

**(b) New facilities**

The Secretary, acting through WAPA or SWPA, or both, may design, develop, construct, operate, maintain, or own, or participate with other entities in designing, developing, constructing, operating, maintaining, or owning, a new electric power transmission facility and related facilities ("Project") located within any State in which WAPA or SWPA operates if the Secretary, in consultation with the applicable Administrator, determines that the proposed Project-

(1)(A) is located in an area designated under section 216(a) of the Federal Power Act [16 U.S.C. 824p(a)] and will reduce congestion of electric transmission in interstate commerce; or

(B) is necessary to accommodate an actual or projected increase in demand for electric transmission capacity;

(2) is consistent with-

(A) transmission needs identified, in a transmission expansion plan or otherwise, by the appropriate Transmission Organization (as defined in the Federal Power Act [16 U.S.C. 791a et seq.]) if any, or approved regional reliability organization; and

(B) efficient and reliable operation of the transmission grid;

(3) will be operated in conformance with prudent utility practice;

(4) will be operated by, or in conformance with the rules of, the appropriate (A) Transmission Organization, if any, or (B) if such an organization does not exist, regional reliability organization; and

(5) will not duplicate the functions of existing transmission facilities or proposed facilities which are the subject of ongoing or approved siting and related permitting proceedings.

### **(c) Other funds**

#### **(1) In general**

In carrying out a Project under subsection (a) or (b), the Secretary may accept and use funds contributed by another entity for the purpose of carrying out the Project.

#### **(2) Availability**

The contributed funds shall be available for expenditure for the purpose of carrying out the Project-

(A) without fiscal year limitation; and

(B) as if the funds had been appropriated specifically for that Project.

#### **(3) Allocation of costs**

In carrying out a Project under subsection (a) or (b), any costs of the Project not paid for by contributions from another entity shall be collected through rates charged to customers using the new transmission capability provided by the Project and allocated equitably among these project beneficiaries using the new transmission capability.

(d) PROHIBITION ON EMINENT DOMAIN.—Notwithstanding any other provision of law (including regulations), the Secretary, SWPA, and WAPA may not carry out any Project under this section through the use of eminent domain, unless the use of eminent domain is explicitly authorized by—

(1) the Governor and the head of each applicable public utility commission or public service commission of the affected State; and

(2) the head of the governing body of each Indian tribe the land of which would be affected.

(e) SITING REQUIREMENT.—To the maximum extent practicable, a Project carried out under this section shall be sited on—

(1) an existing Federal right-of-way; or

(2) Federal land managed by—

(A) the Bureau of Land Management;

(B) the Forest Service;

(C) the Bureau of Reclamation; or

(D) the Corps of Engineers.

**(f) [(d)] Relationship to other laws**

Nothing in this section affects any requirement of-

- (1) any Federal environmental law, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);
- (2) any Federal or State law relating to the siting of energy facilities; or
- (3) any existing authorizing statutes.

**(g) [(e)] Savings clause**

Nothing in this section shall constrain or restrict an Administrator in the utilization of other authority delegated to the Administrator of WAPA or SWPA.

**(h) [(f)] Secretarial determinations**

Any determination made pursuant to subsections <sup>1</sup>(a) or (b) shall be based on findings by the Secretary using the best available data.

**(i) [(g)] Maximum funding amount**

The Secretary shall not accept and use more than \$100,000,000 under subsection (c)(1) for the period encompassing fiscal years 2006 through 2015.