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Before the Committee on Natural Resources
Subcommittee on Water, Power and Oceans
Legislative Hearing on:

H.R. 3062 (Rep. Steve Womack), to prohibit the use of eminent domain in carrying out certain projects, *"Assuring Private Property Rights Over Vast Access to Land (APPROVAL) Act"*

October 29, 2015

My name is Jordan Wimpy. I am a participating member in a third-generation family farm in Northeast Arkansas and a practicing attorney with the firm of Gill Ragon Owen, P.A., in Little Rock, Arkansas. With these combined interests, I dedicate much of my developing professional life to advocating for property owners and agricultural operators that face continuing pressures from complicated bureaucratic requirements, environmental regulations, land use and zoning restrictions, commercial development, general uncertainty and, *increasingly*, the threat of condemnation of property to support certain infrastructure projects. It is this last point – the increasing threat of condemnation to support infrastructure -- that brings me here today to visit with Members of this Subcommittee, and I sit here on behalf of myself and as counsel to many Arkansas property owners facing the specter of federal condemnation if this Congress fails to move on the legislation discussed at this hearing. I thank the Subcommittee, its Members and its Staff for this opportunity.

Specifically, we are gathered to discuss H.R. 3062, also known as the *Assuring Private Property Rights Over Vast Access to Land Act* or, more simply, the *APPROVAL Act.* The APPROVAL Act offers to amend Section 1222 of the Energy Policy Act of 2005, see Pub. L. 109-58, Title XII, Subtitle B, § 1222 (codified at 42 U.S.C. § 16421), a law passed ten years ago to provide the United States Department of Energy with opportunities to partner with private entities in "designing, developing, constructing, operating, maintaining, or owning" electric energy transmission facilities under certain specific circumstances after sufficiently demonstrating satisfaction of specific criteria. See id., § 16421(b). The APPROVAL Act presents specific additions to the law that ensure (i) local, state-level review and approval of proposed projects prior to any exercise of federal eminent domain and (ii) that projects are sited to the maximum extent possible on public rather than private lands.

I support H.R. 3062 and, for the reasons stated herein, I strongly encourage this Subcommittee and its Members (of both parties) to support it as well.

To be clear, the views expressed today are not an indictment of or opposition to electric energy transmission lines or renewable energy development; rather, support of the APPROVAL Act is the growing recognition that the one, solitary example of § 1222

authority and implementation leaves impacted property owners, agricultural operators, state and local governments, and some legal practitioners with serious concerns. The concerns include the following, high-level legal and policy considerations:

- Nebulous Framework for § 1222 Review and Approval: At best, the framework for review and approval of § 1222 applications is shifty and secret. The impacted public, though allowed to submit public comments on the application, is closed off from the decision making process, including a complete lack of access to: contested hearings; the standards for review; the documents, recommendations, reports, communications and other evidence prepared, reviewed and considered by the relevant power marketing administrations and the Department of Energy; the scope of any mitigation measures and other stipulations attached to the federal government's participation; and, the guidelines and standards that will govern the rights of all impacted parties.

- Usurpation of State Review and Authority: Siting energy facilities is an oversight and regulatory function traditionally reserved to the exclusive jurisdiction of the states because local authorities remain the best "positioned to weigh the local factors that go into siting decisions, including environmental and scenery concerns, zoning issues, development plans, and safety issues." See Adam Vann, Cong. Research Serv., R40657, The Federal Government's Role in Electric Transmission Facility Siting 1 (2010). The Department of Energy's participation in the only currently proposed § 1222 project will likely work around the Arkansas Public Service Commission's tradition role of reviewing and siting electric energy transmission lines in our state. In fact, it will completely ignore and disregard that body's existing decision on the same.

- Lack of Procedural and Substantive Process for Impacted Parties: The Department of Energy's current review and likely approval of the Plains & Eastern Clean Line Transmission Line Project evidences a gross abuse of procedural and substantive due process. In nearly all applications to site and construct electric energy transmission facilities, the impacted parties (*e.g.*, property owners, agricultural operators, businesses, local governments, and the general public) maintain a right to some form of contested hearings. This is true at the state level and is true for most other circumstances of federal level review. See e.g., Energy Policy Act of 2005, § 1221, Publ. L. 109-58 (codified at 16 U.S.C. § 824p). The contested hearing is necessary for parties to present and rebut evidence and more fully develop the administrative record. The absence of such hearings for § 1222 review is a clear injustice, *period*.

- Private Property Owners Bear the Full Burden of Projects: Despite generalized claims that § 1222 will serve the greater public good and fill a public need, the truth is that private property owners will bear the full weight of the project. They will lose property rights and lose some uses of property. They will see reduced

land values, and see higher costs and lower returns on working lands. They will face industrial sized legal liability every single day. Simply put, impacted property owners will suffer the loss of use and enjoyment of their property with *no* direct benefit.

- Section 1222 Gives Disparate Treatment to Different States: The federal government's foray into public private partnerships for electric transmission facilities will treat the citizens of different states to different rights. For example, if the Plains and Eastern Project moves forward as envisioned, then citizens of Arkansas will face disparate, and grossly unfair, treatment from that of neighboring states. As envisioned, the project will result in federal ownership of rights-of-way and facilities in Arkansas, while the project will be privately owned in Oklahoma and Tennessee. This yields enormous consequences for procedural and substantive due process rights in condemnation proceedings, local property taxation and revenues, and enforcement of any civil liability. Arkansas citizens that have the least to gain from this project will also have the most to lose by federal participation.

- Section 1222 Departs from Traditional Transmission Planning and Siting: Traditionally, the siting and construction of electric transmission lines arrives only after exhaustive planning, identification of specific transmission needs, and state level review and approval. Under § 1222, the planning, identification and approval of necessary transmission lines is subordinated to an "if we build it, they will come" philosophy of transmission development. This is foolhardy. Without the development of appropriate planning, the Department of Energy may well embark on another unfortunate and embarrassing foray into the private sector, with still more financial consequences to electricity consumers, property owners and the general taxpaying public.

- Section 1222 Departs from the Traditional Role of the Power Marketing Administrations: The proposed participation of the federal Power Marketing Administrations ("PMAs") in the § 1222 process reflects a substantial departure from their singular purpose, which is the marketing of hydropower from federally-owned and operated hydroelectric dams. Neither the Department of Energy nor the relevant PMAs have come forward with any analysis concerning how or whether § 1222 projects will enhance that singular purpose. More alarming, those entities have failed to identify to the public how or whether the § 1222 projects will detract from that singular purpose. With limited resources and narrow focus, the PMAs should carefully evaluate the impacts to their effective and efficient operation.

That these issues and concerns exist cannot be disputed. They have been well documented by my firm's clients and by many, many others including: the Southwestern Power Resources Association, Southwestern Energy, numerous county and municipal

governments, the Attorney General of Oklahoma, the Arkansas General Assembly, and the entire Arkansas Congressional delegation. What is left then is the wherewithal to amend the statute and fix the process moving forward. That the opportunity exists to enact such amendments prior full implementation of the discussed consequences is an unusual circumstance that should not be discarded. H.R. 3062 is the amendment and now is the opportunity.

As previously discussed, H.R. 3062 proposes to amend § 1222 in order to clarify that the federal government's use of eminent domain to implement its role in a section § 1222 project is contingent upon an impacted state's approval of the same. Furthermore, H.R. 3062 proposes to amend the law to ensure that private landowners shall not bear a disproportionate share of a project's burden and, where feasible, § 1222 projects should be sited on public lands. Stated simply, the proposed sideboards to the § 1222 process work to alleviate many of the most significant concerns previously identified.

The proposed bill should restore the primary role of states in siting electric energy transmission projects and related infrastructure. It should facilitate local hearings and local review to guarantee proper process. It should ensure that private property owners do not lose the most and gain the least. It should guarantee that federal participation in transmission projects will, where possible, contain the burdens and impacts to the public's land -- *not* private lands. It is equally important to emphasize what the bill does not do. It does not alter the underlying authority to proceed with federal participation, and it does not even prohibit the exercise of eminent domain; it simply requires greater coordination, state level approval and, where possible, a shared burden.

All of these considerations are critical and require greater consideration when, as here, the federal government's potential participation (including condemnation) is to the benefit of private, for-profit ventures.

I share the foregoing considerations with you in the hopes that by understanding the concerns and discussing the issues, we can solidify some consensus that H.R. 3062 is an appropriate, necessary and effective path forward. A failure to act on H.R. 3062 will not only impact my home state -- the Natural State -- and my firm's clients and the many other impacted property owners, businesses and local governments in Arkansas, it will set the precedent and solidify the federal government's inappropriate and unjust process for future projects across the country and in many other states.

In closing, I thank you for the opportunity to visit with you concerning these matters and your thoughtful and careful consideration of this testimony.