

ASSURING PRIVATE PROPERTY RIGHTS OVER VAST  
ACCESS TO LAND ACT

DECEMBER 8, 2016.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3062]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3062) to prohibit the use of eminent domain in carrying out certain projects, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 3062 is to prohibit the use of eminent domain in carrying out certain projects.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3062 amends the Energy Policy Act of 2005 (EPA05) 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 federal eminent domain in certain circumstances. The goal of the bill is to ensure that states impacted by a specific federal eminent domain decision have a meaningful voice in the federal decision-making process.

Section 1222 of EPA05 authorizes the Secretary of Energy, acting through and in consultation with the Administrators of WAPA and SWPA, 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. One of the features of Section 1222, although not explicit in the statute, is that non-federal entities may pay for the federal agencies use of eminent domain authority on lands used for the transmission right-of-way.

The Department of Energy (DOE) concluded that it would use Section 1222 in March 2016 for the Plains and Eastern Clean Line project. Clean Line Energy, based in Chicago, Illinois, and Houston, Texas, first proposed using this authority for the project in 2010. According to the Department of Energy, the proposed project would consist of 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 with 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. The right-of-way for the proposed route would be approximately 150–200 feet wide and span over 721 linear miles. Much of this right-of-way would be on private land in rural communities.

Since DOE's participation in the project is a "federal action" under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), DOE completed and released a final Environmental Impact Statement (EIS) in November 2015 and announced its decision to participate in the development of the project in March 2016. A number of landowners in Arkansas voiced their opposition to the project's route. For example, Downwind Energy 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. The Arkansas State House and Senate have passed resolutions opposing the project and the Cherokee Nations voiced its opposition as well.

The Arkansas delegation introduced this bill last year in response to this project. Mr. Jordan Wimpy, a private property right attorney from Arkansas, testified at an October 28, 2015, Water, Power and Oceans Subcommittee hearing on H.R. 3062 that the project "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." The Arkansas delegation sent a letter on September 14, 2015, to DOE Secretary Ernest Moniz voicing concerns that the proposed project does not follow the requirements of Section 1222. The delegation's letter 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 project. Although DOE sent the Arkansas delegation a written response, many of the delegation's questions were partially answered or not answered.

A number of electricity user organizations voiced their support for H.R. 3062. The American Public Power Association, a trade organization of public utilities, stated:

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 [Power Marketing Administrations].

In addition, the National Association of Regulatory Utility Commissioners (NARUC) supports the bill:

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).

H.R. 3062 grants a state the right to approve or reject an electric transmission project prior to the federal government’s use of Section 1222 eminent domain authority. In addition, the bill requires a project carried out under this authority, to the maximum extent possible, be sited on federal land or on an existing federal right-of-way.

#### SECTION-BY-SECTION ANALYSIS

*Section 1. Short title.* This section provides a short title for the bill.

*Section 2. Prohibition on eminent domain for certain projects.* Section 2 of the bill amends Section 1222 of EPAct05 by inserting a new subsection that prohibits the Secretary and the Administrators of SWPA and WAPA 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.

## COMMITTEE ACTION

H.R. 3062 was introduced on July 14, 2015, by Congressman Steve Womack (R-AR). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Water, Power and Oceans. On October 28, 2015, the Subcommittee held a hearing on the bill. On June 14, 2016, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. Congressman Jared Huffman (D-CA) offered an amendment designated 171. The amendment was not adopted by voice vote. No additional amendments were offered, and on June 15, 2016, the bill was ordered favorably reported to the House of Representatives by a roll call vote of 19 yeas to 11 nays, as follows:

## Committee on Natural Resources

U.S. House of Representatives

114th Congress

Date: 06.15.16

Recorded Vote: #1

Attendance at FC Mark Up on 19 bills: **On Favorably Reporting H.R. 3062 (Rep. Steve Womack), "Assuring Private Property Rightsh Over Vast Access to Land Act"**

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
<b>Mr. Bishop, UT, Chairman</b>	X			<b>Mr. LaMalfa, CA</b>			
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mrs. Dingell, MI</i>		X	
<b>Mr. Young, AK</b>	X			<b>Mr. Denham, CA</b>	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Gallego, AZ</i>		X	
<b>Mr. Gohmert, TX</b>				<b>Mr. Cook, CA</b>	X		
<i>Mrs. Bordallo, Guam</i>				<i>Mrs. Capps, CA</i>			
<b>Mr. Lamborn, CO</b>	X			<b>Mr. Westerman, AR</b>	X		
<i>Mr. Costa, CA</i>				<i>Mr. Polis, CO</i>		X	
<b>Mr. Wittman, VA</b>	X			<b>Mr. Graves, LA</b>	X		
<i>Mr. Sablan, CNMI</i>		X		<i>Mr. Clay, MO</i>			
<b>Mr. Fleming, LA</b>	X			<b>Mr. Newhouse, WA</b>	X		
<i>Mrs. Tsongas, MA</i>		X		<b>Mr. Zinke, MT</b>	X		
<b>Mr. McClintock, CA</b>	X			<b>Mr. Hice, GA</b>			
<i>Mr. Pierluisi, Puerto Rico</i>				<b>Mrs. Radewagen, AS</b>			
<b>Mr. Thompson, PA</b>				<b>Mr. MacArthur, NJ</b>			
<i>Mr. Huffman, CA</i>		X		<b>Mr. Mooney, WV</b>	X		
<b>Mrs. Lummis, WY</b>	X			<b>Mr. Hardy, NV</b>	X		
<i>Mr. Ruiz, CA</i>		X		<b>Mr. LaHood, IL</b>	X		
<b>Mr. Benishek, MI</b>	X						
<i>Mr. Lowenthal, CA</i>		X					
<b>Mr. Duncan, SC</b>							
<i>Mr. Cartwright, PA</i>							
<b>Mr. Gosar, AZ</b>	X						
<i>Mr. Beyer, VA</i>		X					
<b>Mr. Labrador, ID</b>	X						
<i>Mrs. Torres, CA</i>				<b>TOTALS</b>	19	11	

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

## COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation and the Congressional Budget Act of 1974. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, November 18, 2016.*

Hon. ROB BISHOP,  
*Chairman, Committee on Natural Resources,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3062, the APPROVAL Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kathleen Gramp.

Sincerely,

KEITH HALL.

Enclosure.

*H.R. 3062—APPROVAL Act*

Summary: The Department of Energy (DOE) is authorized under current law to participate with nonfederal entities in the development of electric power transmission projects, subject to certain conditions. Under section 1222 of the Energy Policy Act of 2005, that participation may include owning, building, or operating transmission facilities that are located in any of the 19 states that have customers served by either the Southwestern or Western Area Power Administrations (SWPA or WAPA). As a federal agency, DOE may use eminent domain to acquire property and is exempt from other state, local, or tribal regulations.

H.R. 3062 would prohibit DOE from exercising the power of eminent domain for projects implemented under section 1222 unless certain state and tribal officials affected by such projects explicitly approve of them.

CBO estimates that enacting H.R. 3062 would reduce direct spending by about \$400 million over the 2017–2026 period by reducing the probability that the Department of Energy would participate as an owner, operator, or builder of such transmission projects. Because the bill would affect direct spending, pay-as-you-go procedures apply. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 3062 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3062 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary effect of H.R. 3062 is shown in the following table. The costs of this legislation fall within budget function 270 (energy).

	By fiscal year, in millions of dollars—											
	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2017– 2021	2017– 2026
	DECREASES INDIRECT SPENDING											
Estimated Budget Authority	0	–5	–50	–63	–75	–73	–70	–68	–65	–63	–193	–532
Estimated Outlays .....	0	0	–5	–23	–45	–63	–68	–68	–65	–63	–73	–400

Basis of estimate: DOE recently entered into an agreement under section 1222 to participate in a \$2.5 billion interstate transmission project in SWPA's service area. That agreement suggests that projects successfully implemented under section 1222 will depend on the involvement of the federal government.<sup>1</sup> For example, the agreement provides for DOE's ownership of all of the facilities in one of the states; asserts DOE's authority to use the power of eminent domain; and affirms DOE's exemption from state, local, and tribal laws regarding the siting of these facilities. In addition, DOE will be the co-chair of the project's coordinating committee and will retain and spend some of the gross revenues from the project. Given the anticipated use of sovereign power and the extent of federal control, CBO considers such projects to be federal activities and includes their full cost in the baseline.

In CBO's view, the financing provided by third parties (private parties borrowing on behalf of the federal government) for such projects is equivalent to the indefinite borrowing authority used by the federal government to finance transmission lines for the Tennessee Valley Authority and Bonneville Power Administration. Such indefinite borrowing authority is classified as direct spending because funding to cover the full cost of the project is not provided in advance in appropriation acts. The budget records direct spending for a project's construction and operating costs as they occur. Such spending would subsequently be offset by income received from the sale of transmission services, however that income would not be realized until much later. (Amounts borrowed to pay for government spending are not recorded in the budget as receipts—rather they are considered a means of financing spending.) Using publicly available information about the SWPA-area and other potential transmission projects, CBO estimates that, under current law, net outlays for section 1222 activities will total \$800 million over the 2017–2026 period and that those costs will be offset in the decades after 2026 by proceeds from the transmission project operations.

CBO expects that implementing H.R. 3062 would eliminate much of the advantage or rationale for private entities to partner with DOE to develop electricity transmission under section 1222. It is uncertain whether DOE would continue to participate in such projects if H.R. 3062 were enacted. To account for that uncertainty

<sup>1</sup>See Department of Energy, *Summary of Findings, In re Application of Clean Line Energy Partners LLC, Pursuant to Section 1222 of the Energy Policy Act of 2005*, March 25, 2016.

CBO reduced the potential savings under the bill by half and thus estimates that federal spending would be reduced by \$400 million over the 2017–2026 period.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays that are subject to those pay-as-you-go procedures are shown in the following table.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR H.R. 3062, AS ORDERED REPORTED BY THE  
HOUSE COMMITTEE ON NATURAL RESOURCES ON JUNE 15, 2016

	By fiscal year, in millions of dollars—											
	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2017– 2021	2017– 2026
NET DECREASE IN THE DEFICIT												
Statutory Pay-As-You-Go Impact .....	0	0	–5	–23	–45	–63	–68	–68	–65	–63	–73	–400

Increase in long-term direct spending and deficits: CBO estimates that enacting the legislation would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

Intergovernmental and private-sector impact: H.R. 3062 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Kathleen Gramp; Impact on State, Local, and Tribal Governments: Jon Sperl; Impact on the Private Sector: Amy Petz.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to prohibit the use of eminent domain in carrying out certain projects.

#### EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

#### COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

#### COMPLIANCE WITH H. RES. 5

Directed Rule Making. The Chairman does not believe that this bill directs any executive branch official to conduct any specific rule-making proceedings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress



pursuant to section 21 of Public Law 111–139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95–220, as amended by Public Law 98–169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**ENERGY POLICY ACT OF 2005**

\* \* \* \* \*

**TITLE XII—ELECTRICITY**

\* \* \* \* \*

**Subtitle B—Transmission Infrastructure  
Modernization**

\* \* \* \* \*

**SEC. 1222. 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 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), 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 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) 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.*

[(d)] (f) **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.*

[(e)] (g) **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.*

[(f)] (h) **SECRETARIAL DETERMINATIONS.**—*Any determination made pursuant to subsections (a) or (b) shall be based on findings by the Secretary using the best available data.*

[(g)] (i) **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.*

\* \* \* \* \*

## DISSENTING VIEWS

H.R. 3062 is a thinly veiled attempt to block construction of the Plains & Eastern Clean Line Project—a 700-mile transmission line that will deliver clean wind energy from the Oklahoma Panhandle (one of the windiest regions of the United States) to Arkansas, Tennessee, and the southeastern United States. The Plains & Eastern Clean Line Project (Clean Line Project) has already received a positive Final Record of Decision from the Department of Energy and construction is slated to begin in 2017.

Once completed, the Clean Line Project will be able to deliver 4,000 megawatts of low-cost wind power, which is enough energy to power more than one million homes every year. The Clean Line Project will also be 100 percent privately-financed and will create thousands of construction, operations and maintenance jobs. While House Republicans claim to support new, privately-financed energy infrastructure, their support for H.R. 3062 suggests that this support only applies to non-renewable energy projects.

Further, while some have criticized the proposed route of the Clean Line Project, every effort has been made to minimize the Project's footprint by using existing rights-of-way to the greatest extent possible. Much of the proposed route for the Clean Line Project is co-located with a major highway, a natural gas pipeline, and an existing electric transmission line. No residences or businesses are in the proposed path of the Clean Line Project.

In addition, the legal authorities being used to construct the Clean Line Project, which H.R. 3062 attempts to eliminate, were passed by a Republican Congress in 2005 and signed into law by a Republican President. Recent attempts on the Senate to dismantle these authorities in order to block the Clean Line Project were considered and strongly rejected by both Democratic and Republican Senators. The Republican Governor of Oklahoma, Mary Fallin, has also come out in support of the Clean Line Project, along with dozens of business, labor, and environmental groups across Oklahoma, Texas, Arkansas, and Tennessee.

If enacted, H.R. 3062 will block construction of what will be one of the largest clean energy projects in the United States and cost thousands of American jobs. For these reasons, we oppose H.R. 3062 as reported.

RAÚL M. GRIJALVA,  
*Ranking Member, Committee  
on Natural Resources.*  
GRACE F. NAPOLITANO.  
JARED POLIS.  
ALAN S. LOWENTHAL.