

SEP 30 2014

JULIA C. DUDLEY, CLERK  
BY:   
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Charlottesville Division

JAMES KLEMIC, JOAN KLEMIC,  
CHARLOTTE REA, PETER J. OSBORNE  
and KAREN F. OSBORNE,

Plaintiffs,

v.

Civil Action No. 3:14-cv-00041

DOMINION TRANSMISSION, INC.

Defendant.

**COMPLAINT**

The Plaintiffs, by counsel, respectfully state the following as their Complaint in this action.

*Introduction*

Dominion Transmission, Inc. ("Dominion") is presently engaged in efforts to extend an interstate natural gas transmission pipeline through the Commonwealth of Virginia. The proposed route extends through Nelson County. As part of its preliminary work, Dominion has informed the Plaintiffs and others that it intends to enter upon their lands to conduct survey work and related activities which may include destruction of vegetation and digging.

While Dominion gave the Plaintiffs an opportunity to consent to its intrusion upon Plaintiffs' private property, it has also indicated that it will proceed to enter upon their lands whether they consent or not. Dominion asserts its right to enter without permission pursuant to a provision of Virginia law set forth in Va. Code Ann. § 56-49.01 (West 2014). This statute provides that any natural gas company may, solely for reasons of its own pecuniary self-interest, enter upon private property without the permission of the owner, and after entry may "make such examinations, tests, hand auger borings, appraisals, and surveys" as it desires.<sup>1</sup>

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<sup>1</sup>The full text of the statute is as follows:

A. Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i) to satisfy any regulatory requirements and (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities, and for such purposes, by its duly authorized officers, agents, or employees, may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C. A natural gas company may use motor vehicles, self-propelled machinery, and power equipment on property only after receiving the permission of the landowner or his agent.

B. A request for permission to inspect shall (i) be sent to the owner by certified mail, (ii) set forth the date such inspection is proposed to be made, and (iii) be made not less than 15 days prior to the date of the proposed inspection.

C. Notice of intent to enter shall (i) be sent to the owner by certified mail, (ii) set forth the date of the intended entry, and (iii)

The Supreme Court has long recognized that the right to exclude others from one's property "is universally held to be a fundamental element of the property right, [and] falls within th[e] category in interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Not only does this statute allow Dominion to violate Plaintiffs' most fundamental property rights, but it deprives them of the right to compensation that would ordinarily be available by categorically holding that such entry shall not constitute a trespass. Va. Code Ann. § 56-49.01(D). While the statute does provide that compensation must be made for "actual damages" caused by the entry, it does not provide for, and instead forecloses the possibility of, any compensation for the entry itself.

When a State takes away the property rights of its citizens, such taking amounts to one or more of the following: a taking under the Fifth Amendment, a seizure under the Fourth Amendment, or a deprivation under the Fourteenth Amendment; and the State is obligated to provide either compensation for the taking, or, when it is not a taking, due process prior to the seizure or deprivation. Yet both on its face and as applied, Va. Code Ann. § 56-49.01 provides

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be made not less than 15 days prior to the date of mailing of the notice of intent to enter.

D. Any entry authorized by this section shall not be deemed a trespass. The natural gas company shall make reimbursement for any actual damages resulting from such entry. Nothing in this section shall impair or limit any right of a natural gas company obtained by (i) the power of eminent domain, (ii) any easement granted by the landowner or his predecessor in title, or (iii) any right-of-way agreement, lease or other agreement by and between a natural gas company and a landowner or their predecessors in title or interest.

neither compensation nor due process and is therefore unconstitutional. The Court should so declare and should enjoin further reliance on the statute by Dominion Transmission or others acting on behalf of or in conjunction with Dominion Transmission.

*Jurisdiction and Venue*

1. This action is brought under 42 U.S.C. § 1983. Federal question jurisdiction exists under 28 U.S.C. § 1331.

2. Venue is proper in this District as a “substantial part of the events or omissions giving rise to the claim occurred” occurred or are occurring in the Western District of Virginia. Venue is proper in the Charlottesville Division of this Court as a substantial part of the events or omissions giving rise to the claim occurred in Nelson County. U.S.D.C. W.D. Va. Local Rule 2(b).

*Parties*

3. Plaintiffs James and Joan Klemic, husband and wife, are natural persons over the age of eighteen and residents of the Western District of Virginia.

4. Plaintiff Charlotte Rea, is a natural person over the age of eighteen and a resident of the Western District of Virginia.

5. Plaintiffs Peter and Karen Osborne, husband and wife, are natural persons over the age of eighteen and residents of the Western District of Virginia.

6. The Defendant Dominion Transmission, Inc. (“Dominion”), is, upon information and belief, a Delaware Corporation, with its principal place of business in Clarksburg, West Virginia, and authorized to do, and doing, business in the Commonwealth of Virginia.

### *Facts*

7. The Plaintiffs, as fee simple owners of their respective real estate, have the legal right to exclude third parties from their private property.

8. James and Joan Klemic are the fee simple owners, either individually or jointly, of six parcels of real estate located in Nelson County identified as Tax Map Parcel Nos. 6 A 158B, 7 A 87, 7 A 88, 7 A 93A, 13 A 1, and 13 A 1A, containing collectively approximately 196 acres, and commonly known as 8486 Rockfish Valley Highway, Afton, Virginia. The Klemics acquired the parcels (the "Klemic Parcels") over a period of years beginning in 1998.

9. The Klemic Parcels contain some cleared fields with the balance in woodland. Several of the Klemic Parcels abut the North Fork of the Rockfish River. One of the parcels is the site of the Klemics' home, which was designed by them and intended to be the home in which they would live for as long as they were physically able. The Klemic Parcels contain two Civil War era cemeteries, one of which is surrounded by a stone wall constructed by the Civilian Conservation Corps during the Great Depression. A number of streams traverse the Klemic Parcels and feed into the Rockfish River.

10. The Klemic Parcels are posted, and no commercial operation of any kind takes place on the Klemic Parcels.

11. Charlotte Rea is the fee simple owner of three parcels of real estate located in Nelson County identified as Tax Map Parcel Nos. 13 1 1A, 13 1 3, and 13 A 11A, containing collectively approximately 30 acres, and commonly known as 411 Bland Wade Lane, Afton, Virginia. Ms. Rea has owned the parcels (the "Rea Parcels") since 2003.

12. Ms. Rea served twenty-six years in the United States military without being stationed in the same location for more than two and one-half years, and devoted her life savings to the acquisition of the Rea Parcels after retirement from military service. She acquired the Rea Parcels with the intent of gaining a retreat in nature and a place to settle down after a lifetime of moving in the service of her country.

13. Ms. Rea's home sits on the center parcel. The property is mostly wooded and approximately two-thirds of it is forested wetland along the North Fork of the Rockfish River. The house sits on the raised part of the property that overlooks the floodplain where the forested wetlands lie. Ms. Rea has done considerable landscaping to the property around the home. A forest management plan is in place for the property.

14. The Rea parcels are posted, and no commercial activity of any kind takes place on the Rea Parcels.

15. Peter and Karen Osborne are the fee simple owners of a parcel of real estate located in Nelson County identified as Tax Map Parcel No. 23 A 19, containing approximately 101.2 acres, and commonly known as 3676 River Road, Faber, Virginia. The Osbornes have owned the parcel (the "Osborne Parcel") since 1979.

16. The Osborne Parcel has approximately 35 acres in mixed pasture, a pond, an active spring, and 25 acres of woodland which is principally oak. The balance of the property slopes up the southwest face of Pilot Mountain. This area is heavily wooded with two springs. Located on the Osborne Parcel is a pre-Civil War slave cemetery.

17. The Osborne Parcel is improved with the Osbornes' home, which they occupy as their primary residence. It is the Osbornes' intention to subdivide parcels from the

Osborne Parcel to convey to their children for their children to use for the construction of their own homes.

18. The Osborne Parcel is posted, and while they have occasionally sold timber from the property, no commercial activity takes place on the parcel.

19. The Plaintiffs' properties are located in the study corridor of Dominion's "Atlantic Coast Pipeline Project" ("the Project"), which is a natural gas pipeline project. The Project stretches approximately 550 miles through West Virginia, North Carolina, and Virginia. The Virginia segment of the Project is approximately 300 miles in length and will pass through Nelson County.

20. Each of the Plaintiffs has received one or more letters from Defendant Dominion purporting to inform the Plaintiffs that it intends to enter upon their private property without the Plaintiffs' permission, to conduct "surveys and studies" for the purposes of determining a route through the Plaintiffs' property for a proposed natural gas pipeline. A sample of this letter is attached hereto as Exhibit A.

21. The notices do not in any fashion indicate that the entry upon the Plaintiffs' private property is contingent upon any other event, or that entry is unlikely to occur. To the contrary, the notices recite that Dominion "intends to enter upon" the Plaintiffs properties "on or after" a date certain set forth in the notice. The notices imply that multiple entries will take place on different occasions, involving different agents or employees of Dominion.

22. Attached to the letter was a "Notice of Intent to Enter Property" (the "Notice") which indicated that entry would be made on or after certain dates and provided

greater detail regarding the Defendant's proposed actions upon the Plaintiffs' properties. A sample copy of the latest such Notice is attached hereto as Exhibit B.

23. The Notice states, in part:

[T]he first step will be for a contract survey crew to mark or "flag" the anticipated right of way. A traditional survey crew will follow and locate the route using transits and other surveying equipment. Accompanying this crew or shortly behind it will be technicians who will study the proposed route for any historical or archeological significance, endangered species, soil types, and other similar conditions.

During this process, there may be very minor earth disturbance during the search for historical artifacts. Any such disturbance will be promptly refilled and repaired. Our surveyors may also need to clear pathways through brush or other growth.

24. Dominion relies upon Va. Code Ann. § 56-49.01 for its asserted right to enter upon the Plaintiffs' private property, without any process, without any determination of public interest, without even any indication of what specific areas of Plaintiffs' property it intends to enter upon, to conduct such tests and explorations. To the contrary, Dominion has been asked by the Plaintiffs (and by the Nelson County Board of Supervisors) to produce maps reflecting the areas upon such properties it intends to enter and, as of the date of this pleading, Dominion has declined to provide such maps.

25. Each Plaintiff, wishing to maintain the privacy and personal use of his or her property, responded to the correspondence from Dominion by explicitly denying permission for Dominion to enter upon his or her private property. Dominion responded with additional correspondence, samples of which are attached as Exhibit B, indicating that it would obtain a court order before entering the Plaintiffs' properties.



### Count I – Fifth Amendment Taking

26. The allegations set forth above are reincorporated hereby.

27. The right to exclude others from one's property "is universally held to be a fundamental element of the property right, [and] falls within th[e] category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). Private property from which the owner cannot exclude others can hardly be characterized as private.

28. Virginia Code Ann. § 56-49.01 does not simply affect a regulatory taking of the Plaintiffs' property, but instead authorizes the actual invasion of the Plaintiffs' property by the Defendant without the consent of, and in fact in the face of, the actual prohibition by the Plaintiffs of such invasion.

29. Virginia Code Ann. § 56-49.01 provides no mechanism for compensation for the invasion (other than "actual damages" for injury to the property caused during the invasion) and declares that such invasion shall not constitute a trespass and is separate from any right of eminent domain. The statute thus forecloses any remedy for the taking of the right to exclude others by stating that such taking shall not permit a private right of action for trespass and excluding any access to ordinary eminent domain remedies.

30. There is no police power basis for the actions authorized by the statute. The statute permits the entry for no other reason than a gas company's "election of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities," all reasons which specify nothing more than a private pecuniary benefit or convenience to the gas company.

31. Virginia Code Ann. § 56-49.01 effects a taking of the Plaintiffs' fundamental property rights without just compensation and therefore violates the Fifth Amendment.

**Count II – Violation of Virginia Constitution, Art. I, § 11**

32. The allegations set forth above are reincorporated hereby.

33. The Virginia Constitution was recently amended by the citizens of the Commonwealth to strengthen the private property rights of Virginians. Article 1, § 11, provides as follows:

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. . . . A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.

34. The recent amendment to this Section was prompted by the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which affirmed the power of states to take private property and convey it to other private owners for ostensibly "public" purposes such as economic development. Section 11 makes clear that no taking may occur other than for truly public use; if the primary basis for the taking is "private gain, private benefit, [or] private enterprise" then a taking is simply not permitted. If the taking is by a public service

company “for the authorized provision of utility . . . services,” then the taking is permitted, but just compensation must be provided without exception.

35. Dominion may exercise the power of eminent domain to acquire private property for the Project only after receiving a Certificate of Public Convenience and Necessity (“CPCN”) from the Federal Energy Regulatory Commission (“FERC”) declaring that the Project is for the public benefit. Dominion has not received a CPCN from FERC declaring that the Project is for the public benefit.

36. Virginia Code Ann. § 56-49.01 violates Art. I, § 11 of the Virginia Constitution in that it permits the taking of the Plaintiffs’ property for purely private benefit (i.e., by permitting entry solely for the purposes of “selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities) and prior to the receipt of a CPCN, and even if the invasion is for public use it purports to permit such taking while eliminating any right to compensation for the invasion itself.

### **Count III – Fourth Amendment Unreasonable Seizure**

37. The allegations set forth above are reincorporated hereby.

38. The Fourth Amendment provides that “[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated.” U.S. Const. amend. IV. The Fourth Amendment’s protections extend to real property. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4<sup>th</sup> Cir. 2006). A seizure occurs whenever there has been a “meaningful interference with an individual’s possessory interests in that property.” *United States v. Place*, 462 U.S. 696, 705 (1983).

39. The right to exclude others from one's property "is universally held to be a fundamental element of the property right. . . ." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). The Plaintiffs' right to exclude the Defendant from their property has been eliminated by Va. Code Ann. § 56-49.01. The complete elimination of this fundamental right constitutes a meaningful interference with the Plaintiffs' rights to be secure in their private property.

40. There is no police power basis for the action. The statute permits the entry for no other reason than the gas company's "election of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities," all reasons which require nothing other than a private pecuniary benefit or convenience to the gas company.

41. The seizure of the Plaintiffs' fundamental property right under these circumstances is unreasonable and violates the Fourth Amendment.

#### **Count IV – Fourteenth Amendment Procedural Due Process**

42. The allegations set forth above are reincorporated hereby.

43. The Fourteenth Amendment provides, in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV.

44. While the requirements of procedural due process under the Fourteenth Amendment are flexible; at a minimum they require pre-deprivation notice and a meaningful opportunity to be heard. While Va. Code Ann. § 56-49.01 purports to require notice, its language

with regard to timing is obscure at best (*see, e.g.*, Section (C) appearing to require a notice to be sent before sending: “Notice of intent to enter shall (i) be sent to the owner by certified mail, . . . [and] be made not less than 15 days prior to the date of mailing of the notice of intent to enter.”), and the statute provides no pre-deprivation opportunity to be heard, even by the would-be invaders and much less by an impartial hearing officer.

45. Moreover, the statute explicitly states that there can be no post-deprivation compensation by simply declaring that such entry shall not constitute a trespass. It has thus foreclosed any post-deprivation remedy for the taking of the right to exclude others by stating that such taking shall not permit a private right of action for trespass.

46. Virginia Code Ann. § 56-49.01 deprives the Plaintiffs’ of their fundamental property right without due process and violates the Fourth Amendment.

WHEREFORE, the Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant, declaring that Va. Code Ann. § 56-49.01 is void and unenforceable, enjoining the Defendant from entering upon the Plaintiffs’ private property pursuant to Va. Code Ann. § 56-49.01, awarding the Plaintiff their costs and expenses incurred herein, including their reasonable attorney’s fees pursuant to 42 U.S.C. § 1985, and granting such other relief as the Court deems proper.

**TRIAL BY JURY IS DEMANDED**

Respectfully submitted,

JAMES KLEMIC, et al.,

by counsel.

**s/Neal L. Walters**

Neal L. Walters, Esq.

Virginia State Bar No. 32048

Attorney for Plaintiff

Scott | Kroner PLC

418 East Water Street

P.O. Box 2737

Charlottesville, VA 22902

Telephone: (434) 296-2161

Fax: (434) 293-2073

E-mail: [nwalters@scottkroner.com](mailto:nwalters@scottkroner.com)

Dominion Transmission, Inc.  
445 West Main Street, Clarksburg, WV 26301  
Web Address: www.dom.com



June 30, 2014

James Klemic  
8486 Rockfish Valley Hwy  
Afton, VA 22920

**Re: Dominion Transmission, Inc., Southeast Reliability Project;  
Tax Parcel # 7 A 87 Nelson County, VA**

Dear Landowner:

In May, Dominion wrote to you about a new natural gas pipeline project that the company is researching as a possibility for your area that we are referring to as the Southeast Reliability Project. Dominion wrote to you and other potentially affected landowners to request permission to access your property to conduct surveys and studies.

We're writing to you again because we have not yet received written permission from you to proceed with the surveys and studies on your property.

In our previous letter to you, we referenced section 56-49.01 of the Virginia Code that provides Dominion with the authority to make these surveys after providing notice to you. Enclosed you will find the notice required by the Code. Dominion plans to begin surveying in your area beginning on and after July 11, 2014.

If you have questions about this notice or Dominion's plans to begin the surveys and studies, please call us at toll free 1-888-895-8716 and one of our right of way representatives will follow up with you.

Very Truly Yours,

Russell W. Johnson  
Manager – Land, Lease & Right of Way



## NOTICE OF INTENT TO ENTER PROPERTY

James Klemic  
8486 Rockfish Valley Hwy  
Afton, VA 22920

**Re: Dominion Transmission, Inc., Southeast Reliability Project;  
Tax Parcel # 7 A 87, Nelson County, VA**

This NOTICE is provided by Dominion Transmission, Inc. (DTI). DTI intends to enter upon a tract of land you own located in the Commonwealth of Virginia in order to perform certain surveys and studies.

By a letter dated May 23, 2014 DTI explained that it is investigating routes for a proposed natural gas pipeline as part of the Southeast Reliability Project, which is designed to serve existing and growth markets for natural gas in the Mid-Atlantic Region. That letter sought your permission to perform surveys and studies via the return of a signed copy. To date, permission has not been received.

This NOTICE is provided pursuant to Virginia Code section 56-49.01, which authorizes certain natural gas companies to enter upon property, without permission, for examinations, tests, hand auger borings, appraisals and surveys for proposed natural gas lines in order to satisfy regulatory requirements and to select the most advantageous route.

The survey process was described in the earlier letter. Briefly, the first step will be for a contract survey crew to mark or "flag" the anticipated right of way. A traditional survey crew will follow and locate the route using transits and other surveying equipment. Accompanying this crew or shortly behind it will be technicians who will study the proposed route for any historical or archeological significance, endangered species, soil types, and other similar conditions.

During this process, there may be very minor earth disturbance during the search for historical artifacts. Any such disturbance will be promptly refilled and repaired. Our surveyors may also need to clear pathways through brush or other growth.

DTI intends to commence surveys on your property on or after July 11, 2014. The survey process will take several weeks to complete.

The survey process will not cause any damage to your property. However, DTI will reimburse you for any actual damage caused by the survey process in the unlikely event that damage occurs.

Please contact Dominion if you have any questions about the survey process or about the proposed natural gas pipeline at 1-888-895-8716.



Dominion Transmission, Inc.  
445 West Main Street, Clarksburg, WV 26301  
Web Address: www.dom.com



August 5, 2014

James & Joan Klemic  
8486 Rockfish Valley Hwy  
Afton, VA 22920

**Re: Dominion Transmission, Inc., Southeast Reliability Project;  
Tax Parcel #08-056, Nelson County, VA**

Dear Landowner:

In May, Dominion wrote to you about a new natural gas pipeline project that the company is researching as a possibility for your area that we are referring to as the Southeast Reliability Project. Dominion wrote to you and other potentially affected landowners to request permission to access your property to conduct surveys and studies. In June we sent you a second letter and a Notice of Intent to Enter.

We realize you have denied Dominion's request to grant survey permission. We are providing this update so you are aware when surveys will be conducted in your area. It is not Dominion's plan to enter your property without your permission or a court order.

In our previous letter to you, we referenced section 56-49.01 of the Virginia Code that provides Dominion with the authority to make these surveys after providing notice to you. Enclosed you will find the notice required by the Code. Dominion plans to begin surveying in your area beginning on and after August 21, 2014.

If you have questions about this notice or Dominion's plans to begin the surveys and studies, please call us at toll free 1-888-895-8716 and one of our right of way representatives will follow up with you.

Very Truly Yours,

A handwritten signature in cursive script that reads "Russell W. Johnson".

Russell W. Johnson  
Manager - Eand, Lease & Right of Way



Dominion Transmission, Inc.  
445 West Main Street, Clarksburg, WV 26301-2450



Mailing Address: P.O. Box 2450  
Clarksburg, WV 26302-2450  
Web Address: [www.dom.com](http://www.dom.com)

August 14, 2014

James Klemic  
8486 Rockfish Valley Hwy  
Afton, VA 22920

**Re: Property in Nelson County**  
**Parcel Number(s): 7 A 87**

Dear Landowner:

On August 3<sup>rd</sup> or 4<sup>th</sup>, 2014, Dominion Transmission, Inc. sent a letter which may have incorrectly referenced property owned by you. This was an administrative error and we apologize for any inconvenience this may have caused.

The information stated above is/are the correct parcel number(s) for the property you own. This information can be verified at the county courthouse.

If you have any additional questions or concerns, please contact the Southeast Reliability Pipeline call center at 1-888-895-8716 and one of our right of way representatives will follow up with you.

Kindest regards,

*Scott Lowther*

Scott Lowther  
Sr. Dominion Coordinator

SL/ac