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MEMORANDUM

TO: Transportation Commission

FROM: Karla L. Engle

DATE: July 6, 2021

RE: July 13, 2021 Transportation Commission Meeting

Attached are the following documents that are being provided in connection with the contested case hearing to be held by the Commission on Tuesday, July 13, 2021:

1. Notice of Hearing for July 13, 2021;
2. Hearing Officer's Proposed Findings of Fact and Conclusions of Law;
3. Certificate of Service for Hearing Officer's Proposed Findings of Fact and Conclusions of Law;
4. South Dakota Codified Laws 49-16A-75 through 49-16A-75.4;
5. South Dakota Codified Law 49-16A-78; and
6. Administrative Rules of South Dakota Chapter 70:08:01.

Thank you.

KLE
Enclosure

SOUTH DAKOTA TRANSPORTATION COMMISSION

**IN THE MATTER OF THE APPLICATION
FOR AUTHORITY TO EXERCISE
EMINENT DOMAIN BY RCP&E
RAILROAD, INC.**

NOTICE OF HEARING

TO: Steven Williams & Chad Knight
Attorneys for RCP&E
Knight Nicastro MacKay, L.L.C.
27 Shiloh Rd., Suite 10
Billings MT 59106

Jeffery D. Collins
Attorney for RCP&E
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph St. #800
Rapid City, SD 57701

Patrick Burns
Attorney for Dena Kinsella
Burns Law Firm, P.L.L.C.
1624 Harmon Place, Suite 300E
Minneapolis MN 55403

PLEASE TAKE NOTICE that a teleconference hearing in the above-entitled matter will be held before the South Dakota Transportation Commission (the "Commission") on Tuesday, July 13, 2021, at 1:00 p.m. Central Time, or as soon thereafter as the parties can be heard. Parties may participate in the teleconference hearing by dialing (866) 410 – 8397 and using the conference code of 1289 182 255. In the alternative, parties may participate in the teleconference hearing at the Commission Room of the Becker-Hansen Building, 700 E. Broadway Avenue, Pierre, South Dakota, 57501.

This hearing is held pursuant to the Commission's authority and jurisdiction granted by SDCL 49-16A-75, *et seq.*, and SDCL Chapter 1-26, and the provisions of ARSD Chapter 70:08:01.

The purpose of the hearing is to consider the findings of fact and conclusions of law proposed by the hearing examiner, David Gienapp. At the hearing, the parties will be afforded an opportunity to make objections to these proposed findings of facts and conclusions of law. The Commission may accept, reject, or modify the findings of fact and conclusions of law proposed by the hearing examiner.

The issues to be decided by the Commission are:

Has RCP&E negotiated in good faith to privately acquire sufficient property without the use of eminent domain?

Should RCP&E be granted authority to exercise the right of eminent domain based upon a determination that RCPE's exercise of this right would be for a public use consistent with public necessity?

Dated this 29th day of June, 2021, at Canton, South Dakota.



Larry A. Nelson, Chair
South Dakota Transportation Commission

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of June, 2021, at Pierre, South Dakota, a true and correct copy of this Notice of Hearing was mailed by United States first-class mail, postage prepaid, to counsel for the parties listed below and to the hearing examiner for the South Dakota Transportation Commission:

Steven Williams & Chad Knight
Knight Nicastro MacKay, L.L.C.
27 Shiloh Rd., Suite 10
Billings MT 59106

Jeffery D. Collins
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph St. #800
Rapid City, SD 57701

Patrick Burns
Burns Law Firm, P.L.L.C.
1624 Harmon Place, Suite 300E
Minneapolis MN 55403

Hon. David Gienapp
PO Box 14
Madison, SD 57042-0014

The undersigned further certifies that on the 30th day of June, 2021, a true and correct copy of this Notice of Hearing was sent by electronic mail to the following at the e-mail addresses below:

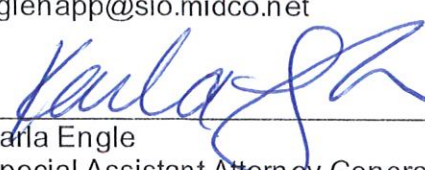
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Karla Engle
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SOUTH DAKOTA TRANSPORTATION COMMISSION

IN THE MATTER OF THE APPLICATION
FOR AUTHORITY TO EXERCISE
EMINENT DOMAIN BY RCP&E
RAILROAD, INC.

HEARING OFFICERS PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The RCP&E Railroad, Inc [hereinafter referred to Railroad] having filed an Application for Authority to exercise Eminent Domain, pursuant to SDCL 49-16A-75 et seq relating to land owned by Dena Kinsella [hereinafter referred to Kinsella]. A hearing was held on June 23, 2021, before the South Dakota Transportation Commission with David R. Gienapp serving as hearing officer. The Railroad was represented by Attorneys Steven Williams and Jefferey Collins and Kinsella being represented by Attorney Patrick Burns and testimony and exhibits having been received, the hearing officer, David R. Gienapp hereby enters the following proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The following Findings of Fact are hereby made:

1] The Railroad filed an Application for Authority to exercise Eminent Domain which was received by chief legal counsel for the Department of Transportation on April 19,2021, which was deemed not complete and a fully conforming application, which is the subject of the hearing was received by chief legal counsel for the Department of Transportation on May 5, 2021.

2] The Railroad maintains a Railroad track that extends from Colony, Wyoming to Mankato, Minnesota, and this track runs through Stanley, County, South Dakota and across property in Stanley County, South Dakota owned by Kinsella. The Railroad has 654 miles of track in South Dakota. Kinsella leased the Stanley County property involved in 1987 and purchased the property in 1991. The Kinsella property consists of 394 acres.

3] In 2019 flooding existed on The Bad River which river crosses the Kinsella property, and also goes under a bridge over which the railroad track runs and which is maintained by the railroad.

4] The Railroad does not have access to the bridge and adjoining track area without gaining access by crossing the Kinsella property.

5] The 2019 flood caused damage necessitating repairs to the Railroad track in the area of the bridge and areas where the track crosses the Kinsella property. The flood primarily caused damage because of erosion and the changing route of the Bad River.

6] That Kinsella didn't initially consent to access by the Railroad, as was the experience of the Railroad with other landowners crossed by the Rail line.

7] That negotiations took place between the Railroad and Kinsella relating to establishing a road across the Kinsella property to access the area of the track needing repair.

8] A contract was eventually entered into relating to the temporary constriction of an access road across the Kinsella property, however there was a delay in the repair during the time lapse while access was being negotiated and agreed upon between the Railroad and Kinsella. This delay necessitated the Railroad temporarily suspending commercial rail traffic across South Dakota resulting in losses to the Railroad and commercial utilizers of the Railroad primarily from Wyoming and Rapid City, South Dakota.

9] The Railroad transports significant amounts of Bentonite from Wyoming and product from GCC in Rapid City across South Dakota to eastern locations. The delay in not repairing the damage earlier resulted in a three week suspension of rail traffic. Having permanent access is one of the reasons for Eminent Domain to insure such suspension and interruption of service does not occur again. This suspension and delay is costly to the Railroad and the business utilizing the Railroads service.

10] A dispute arose between Kinsella and the Railroad over whether or not the Railroad complied with certain payment requirements of the 2019 Contract. This dispute is scheduled for arbitration in October, 2021. This Arbitration is separate and distinct to the claim for permission to commence Eminent Domain proceedings.

11] The area the Railroad seeks to obtain is in the area of the previously constructed road built in 2019 for temporary access. The road measures approximately 1,900 feet long and 20 feet across plus a lay down area adjacent to the bridge which is approximately 50 feet by 100 feet. This requested taking amounts to approximately one acre of land.

12] The Railroad attempted, shortly before the hearing, to have the exact location of the requested taking surveyed and Kinsella denied access to the surveyor.

13] The Railroad indicated at the hearing that the Railroad desired fee title to the property that they were requesting permission to acquire via Eminent Domain. The reason given by the Railroad for requesting fee title as opposed to an easement was basically because of the past claimed problems with Kinsella.

14] The Railroad initiated negotiations with Kinsella to privately acquire the land without the necessity of Eminent Domain. The Railroad offered \$15,000. For the one acre of land which was based on the Railroad's belief that the present real estate values in the area establishes \$12,000. per acre as the fair market value. Kinsella rejected this offer and made no counter offer.

15] The Railroad is mandated by federal law to inspect and maintain their rail lines and the access requested is necessary to comply with this federal mandate.

CONCLUSIONS OF LAW

1] The Railroad has conformed with South Dakota statutes having properly applying for the right to exercise Eminent Domain.

2] The Railroad has met the Railroad's required burden of proof by a preponderance of evidence that the requested exercise of Eminent Domain constitutes a public use consistent with public necessity. The ability to maintain tracks and deal with repairs constitutes a public necessity to maintain use of the railroad for public benefit

3] That the necessary public use, consistent with public necessity, is met by authorizing eminent domain for an easement over the Kinsella property as opposed to the requested fee title request. The claimed reason for needing fee title is not established by a preponderance of evidence, but the need for an easement is established by a preponderance evidence. The claim by the Railroad that fee title is needed because of past claimed disruption by Kinsella doesn't establish a priority for fee title since such disruptions, if established, would be contrary to either fee title or an easement. The use of the property by the Railroad would only be periodic. In addition a fee acquisition would create severance damages to the Kinsella property which is not necessary.

4] The Railroad has met it's burden of complying with ARSD 70:08:01:03(5)(c). An offer was made by the Railroad based on claimed land values. It was rejected by Kinsella with no counter offer for acquisition of the property. Efforts would not require a party to bid against themselves. The effort necessary by Administrative rule relates only to the potential Eminent Domain action and not the contract dispute.

5] Kinsella is required to give the Railroad access to conduct a survey to create a legal description of the easement being acquired pursuant to authority given in SDCL 49-16A-78. This legal description shall conform as near as possible to the measurement and amount of property involved embodied in Finding of Fact #10.

6] The dispute between the parties involved relating to a previous contract where arbitration is presently pending has no relevance to the issues dealt with herein and does not establish equitable estoppel.

7] Kinsella's claim relating to ripeness of the issue's involved herein is not supported by the evidence and is denied.

8] The application for eminent domain filed by the Railroad is granted as it relates to the acquisition of an easement as set forth in Conclusions of Law #3.

Dated this 3rd day of July, 2021



David R. Gienapp

Hearing Officer

SOUTH DAKOTA TRANSPORTATION COMMISSION

**IN THE MATTER OF THE APPLICATION
FOR AUTHORITY TO EXERCISE
EMINENT DOMAIN BY RCP&E
RAILROAD, INC.**

**CERTIFICATE
OF SERVICE**

The undersigned hereby certifies that on the 6th day of July, 2021, at Pierre, South Dakota, a true and correct copy of the Hearing Officer's Proposed Findings of Fact and Conclusions of Law was mailed by United States first-class mail, postage prepaid, to counsel for the parties listed below and to the hearing examiner for the South Dakota Transportation Commission:

Steven Williams & Chad Knight
Knight Nicastro MacKay, L.L.C.
27 Shiloh Rd., Suite 10
Billings MT 59106

Jeffery D. Collins
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909 St. Joseph St. #800
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Patrick Burns
Burns Law Firm, P.L.L.C.
1624 Harmon Place, Suite 300E
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Hon. David Gienapp
PO Box 14
Madison, SD 57042-0014

The undersigned further certifies that on the 6th day of July, 2021, a true and correct copy of the Hearing Officer's Proposed Findings of Fact and Conclusions of Law was sent by electronic mail to the following at the e-mail addresses below:

Steven Williams
williams@knightnicastro.com

Chad Knight
knight@knightnicastro.com

Patrick Burns
Patrick@burns-law.mn

Hon. David Gienapp
dgienapp@sio.midco.net

Jeffery Collins
jcollins@lynnjackson.com

Dated this 6th day of July 2021.

A handwritten signature in blue ink, appearing to read "Karla Engle", written over a horizontal line.

Karla Engle
Special Assistant Attorney General
S.D. Dept. of Transportation
700 E. Broadway Ave.
Pierre, SD 57501
(605)773-3262

49-16A-75. Eminent domain power--Authorization by Governor or commission required--Hearing on application.

A railroad may exercise the right of eminent domain in acquiring right-of-way as provided by statute, but only upon obtaining authority from the Governor or if directed by the Governor, or the commission, based upon a determination by the Governor or the commission that the railroad's exercise of the right of eminent domain would be for a public use consistent with public necessity. The Governor or the commission shall consider the requirements of §§ 49-16A-75.1 to 49-16A-75.3, inclusive, when granting or denying an application for authority to use eminent domain. The decision to grant or deny an application shall be made after reasonable notice and opportunity to be heard, pursuant to chapter 1-26. However, an impartial hearing examiner may be appointed by the Governor or the commission to administer the proceedings or make recommendations. Any parties who are united in interest or representation shall unite in the filing of an affidavit for change of hearing examiner under the provisions of § 1-26D-10. The filing of such affidavit by one party is deemed to be filed by all of the parties. No more than one change of hearing examiner may be granted on request or affidavit made by or on behalf of the same party or parties united in interest under the provisions of § 1-26D-10. However, the filing of an affidavit and the first change of hearing examiner does not prevent any other party to the action or any party's attorney from obtaining a change in hearing examiner upon a showing of an unacceptable risk of actual bias or prejudice concerning a party. The Governor or the chair of the commission shall replace the hearing examiner within five business days upon any recusal. A hearing shall be held and a decision rendered on any application within ninety days following the receipt of a new application and upon any application pending before the Governor or the commission on July 1, 2008.

The denial or withdrawal of an application does not prejudice the ability of a railroad to resubmit an application. Any appeal, pursuant to chapter 1-26, taken from a decision of the Governor or the commission shall be handled as an expedited appeal by the courts of this state.

Source: SL 1980, ch 322, § 74; SL 1999, ch 222, § 4; SL 2008, ch 238, § 1.

49-16A-75.1. Commission to promulgate rules for railroad seeking to exercise eminent domain.

The commission shall in accordance with chapter 1-26, promulgate rules:

- (1) Establishing a form upon which a railroad may apply for authority to exercise the right of eminent domain;
- (2) Specifying the information to be submitted by an applicant; and
- (3) Administering applications for authority to exercise the right of eminent domain.

Source: SL 1999, ch 222, § 5.

49-16A-75.2. Railroad carries burden of proof to show public necessity.

The applicant has the burden of proving by a preponderance of the evidence that the exercise of the right of eminent domain is a public use consistent with public necessity.

Source: SL 1999, ch 222, § 6.

49-16A-75.3. Determination of public use consistent with public necessity--Appeal.

A railroad's exercise of the right of eminent domain is a public use consistent with public necessity only if the use of eminent domain is proposed by an applicant who has negotiated in good faith to privately acquire sufficient property without the use of eminent domain. No determination of public use or necessity or any other issue properly decided by the Governor or the commission may be addressed by the circuit court in an action for condemnation. Such a determination may only be challenged upon direct appeal of that determination. Notwithstanding appeal of such determination, the railroad may proceed at any time by action in circuit court for possession and determination of compensation for any real property taken or damaged.

Source: SL 1999, ch 222, § 7; SL 2006, ch 232, § 1; SL 2008, ch 238, § 2.

49-16A-75.4. Proceedings to establish compensation--Physical possession.

Upon a failure to reach agreement on compensation following a determination pursuant to § 49-16A-75.3, either party may bring a proceeding in state court to establish compensation to be paid for the property taken or damaged. The court shall expedite the proceedings. A railroad is not entitled to physical possession of the property to be taken pursuant to the exercise of eminent domain except upon the earlier to occur of either:

- (1) Execution of a written agreement between the parties as to fair market value of compensation;
- (2) Entry of a judgment of condemnation in the circuit court; or
- (3) Upon posting by the railroad of a bond to be established by the court as soon as possible but no later than one hundred twenty days following petition by the railroad for possession. The bond shall be in an amount the court determines to be a preliminary estimate of compensation based on the best information available, but is not determinative of final compensation or admissible as evidence thereon.

Source: SL 2008, ch 238, § 3.

SDCL 49-16A-78. Entries upon land--Appropriation of land--Purposes of appropriation.

Each railroad authorized to construct, operate, or maintain a road within this state may enter upon any land for the purpose of examining and surveying its road, and may take, hold, and appropriate so much real property as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine shops, switches, sidetracks, snow defenses, and water stations. It may take all materials for the construction of the road and its appurtenances, and the right of way over adjacent land sufficient to enable the railroad to construct and repair its road. The railroad may obtain the right to such real property by purchase or condemnation in the manner provided by law.

Source: SDC 1939, § 52.0811; SDCL, § 49-20-1; SL 1980, ch 322, § 77.

**ARTICLE 70:08
RAILROAD'S EXERCISE OF EMINENT DOMAIN**

Chapter

[70:08:01](#) General provisions.

**CHAPTER 70:08:01
GENERAL PROVISIONS**

Section

[70:08:01:01](#) Definitions.
[70:08:01:02](#) Application for authority to exercise eminent domain.
[70:08:01:03](#) Information to be included in application.
[70:08:01:04](#) Procedure.

70:08:01:01. Definitions. Terms used in this chapter have the same meaning as those terms defined by SDCL [49-16A-1](#).

Source: 26 SDR 44, effective October 4, 1999.

General Authority: SDCL [49-16A-75.1](#).

Law Implemented: SDCL [49-16A-75.1](#).

70:08:01:02. Application for authority to exercise eminent domain. Any railroad desiring to exercise the right of eminent domain for the acquisition of right-of way necessary for the construction or reconstruction of its road shall make application for authority to do so to the department on a form approved by the department. The truth and accuracy of the application shall be verified by the applicant.

Source: 26 SDR 44, effective October 4, 1999.

General Authority: SDCL [49-16A-75.1](#).

Law Implemented: SDCL [49-16A-75.1](#).

70:08:01:03. Information to be included in application. The application required by § 70:08:01:02 shall include the following:

- (1) The applicant's name, state of incorporation, principal place of business, and telephone, email, and FAX numbers;
- (2) The names of the corporate officers and directors;
- (3) The registered agent for service of process in this state;

(4) A general description of the proposed project and its purpose in accordance with the provisions of SDCL [49-16A-75.3](#); and

(5) For each landowner with respect to whom the railroad may seek authority to exercise the right of eminent domain, as known at the time of the application, based on the railroad's expectations for land acquisition at that stage of the project:

(a) The landowner's name and mailing address;

(b) A description of the property presently known to be needed to complete the project both for right-of-way and for any temporary easement needed for construction purposes, including the consideration of any proposed alternative routes or potential land acquisitions that may be needed as known to date; and;

(c) A description of the efforts made by the railroad to acquire sufficient property for the project without needing to exercise the right of eminent domain.

If the applicant is required to submit the same or similar information to another state or federal agency having jurisdiction, the information required by this section may be submitted in the same format as it will be submitted to the other agency.

Source: 26 SDR 44, effective October 4, 1999; 34 SDR 88, effective September 10, 2007.

General Authority: SDCL [49-16A-75.1](#).

Law Implemented: SDCL [49-16A-75.1](#), [49-16A-75.3](#).

70:08:01:04. Procedure. Upon receipt of an application submitted pursuant to § 70:08:01:02, a hearing on the application shall be scheduled and conducted in accordance with SDCL chapter [1-26](#) to determine whether the railroad's exercise of the right of eminent domain would be for a public use consistent with public necessity as provided by SDCL chapter 49-16A. The hearing officer may hold such pre-hearing conferences with the parties or their attorneys as the hearing officer deems necessary or desirable to consider such matters as may aid in the disposition of the hearing. If it is determined by the Governor, or the commission, that the railroad's exercise of eminent domain would be for a public use consistent with public necessity, the application for authority shall be granted. If it is determined the exercise of eminent domain is not for a public use consistent with public necessity, the application for authority shall be denied.

Source: 26 SDR 44, effective October 4, 1999; 34 SDR 88, effective September 10, 2007.

General Authority: SDCL [49-16A-75.1](#).

Law Implemented: SDCL [49-16A-75](#), [49-16A-75.1](#), [49-16A-75.3](#).