



Division of Secretariat
Office of Legal Counsel
700 East Broadway Avenue
Pierre, South Dakota 57501
O: 605.773.3262 | F: 605.773.4442
dot.sd.gov

MEMORANDUM

TO: Transportation Commission

FROM: Karla L. Engle

DATE: June 16, 2021

RE: June 23, 2021, 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 Wednesday, June 23, 2021:

1. Application by Railroad for Authority to Exercise Eminent Domain;
2. Notice of Hearing;
3. Position Statement for Rapid City, Pierre & Eastern Railroad, Inc.;
4. Position Statement for Dena Kinsella;
5. South Dakota Codified Laws 49-16A-75 through 49-16A-75.4;
6. Administrative Rules of South Dakota Chapter 70:08:01.

Thank you.

KLE
Enclosure

Date Received by DOT Legal 5/4/2021
Reviewed By Karla Engle
Title Chief Legal Counsel
Date 5/4/2021

APPLICATION BY RAILROAD FOR AUTHORITY TO EXERCISE EMINENT DOMAIN

Pursuant to South Dakota Codified Law ("SDCL") 49-16A-75, *et seq.*, the applicant requests authority to exercise eminent based on a determination that the railroad's exercise of the right of eminent domain would be for a public use consistent with public necessity.

Applicant Name: Rapid City, Pierre & Eastern Railroad, Inc. (RCPE)

State of Incorporation: Delaware

Principal Place of Business: 1855 W Baseline Road, Mesa, Arizona 85202

Mailing Address: 200 Meridian Centre Blvd., Suite 300, Rochester, NY 14618

E-mail Address: brad.ovitt@gwrr.com

FAX Number: 503-365-7787 Telephone Number: 503-480-7779

Names of Corporate Officers and Directors:

President: John B. Ovitt, 1855 W. Baseline Road, Mesa, Arizona 85202

Secretary: Alfred Q. Ricotta, 20 West Ave, Darien, CT 06820

Assistant Secretary: Catherine Pushchak, 20 West Ave, Darien, CT 06820

Treasurer: Mark Blyth, 20 West Ave., Darien, CT, 06820

Assistant Treasurer: Christopher S. Nagle, 1855 W Baseline Road, Mesa, Arizona 85202

Vice Presidents: Mark Blyth, 20 West Ave., Darien, CT, 06820

Sara A. Greene, 13901 Sutton Park Drive South- Ste 270, Jacksonville, FL 32254

Ann P. Servatius, 200 Meridian Centre, Suite 300, Rochester, NY 14618

Tony Long, 13901 Sutton Park Drive South- Ste 270, Jacksonville, FL 32254

Jerry Vest, 3601 Concord Rd # 2, York, PA 17402

Directors: Mark Blyth, 20 West Ave., Darien, CT, 06820

Sara A. Greene, 13901 Sutton Park Drive South, Ste 270, Jacksonville, FL 32254

Alfred Q. Ricotta, 20 West Ave., Darien, CT 06820

Name and Address of Registered Agent for Service of Process in South Dakota:

CT Corporation System, 319 South Coteau Street, Pierre, South Dakota 57501-3187

Date Received by DOT Legal _____
Reviewed By _____
Title _____
Date _____

Name, Mailing Address, E-mail Address, and Phone Number of Applicant's Legal Counsel:

Steve Williams & Chad Knight

Knight Nicastro MacKay, LLC

27 Shiloh Rd., Ste. 10

Billings, MT 59106

Email: williams@knightnicastro.com; knight@knightnicastro.com

Phone: (540) 784-5957

Describe the proposed project and its purpose in accordance with the provisions of SDCL 49-16A-75.3, and attach project plans if available:

RCPE is seeking to obtain an access road that it previously built across the landowner's property to its track and bridge, as well as a small laydown area adjacent to the bridge. The location of this property is at coordinates 44.337981, -100.378717. A map of the area, showing the bridge and the .3-mile access road is attached.

Under 49 C.F.R. § 213, et seq., railroads are required to inspect and maintain their rail lines. SDCL § 49-16A-78 additionally gives the railroad the ability to obtain property, through condemnation, "sufficient to enable the railroad to construct and repair its road". The access road and laydown area are necessary to allow the railroad to transport machinery to this section of the track for maintenance and repair of the track and bridge. The ability to transport machinery to this area is additionally necessary to aid in flood prevention efforts. The railroad needs to have the ability to access this area quickly. To this point in 2019, there was significant flooding of the Bad River that required the railroad to access the bridge and surrounding track to mitigate and prevent flooding. The initial refusals and delays in obtaining access to this property, caused by the landowner, resulted in significant increased damages from the flooding and a disruption to federal common carrier obligations.

Date Received by DOT Legal _____
Reviewed By _____
Title _____
Date _____

For each landowner with respect to whom Applicant seeks authority to exercise the right of eminent domain, provide the following: (Attach additional pages as necessary)

Landowner Name: Dena Kinsella Landowner Phone: 605-223-2380

Landowner Mailing Address: 21101 Cedar Hill Rd, Fort Pierre, SD 57532

Describe the real property needed from the landowner for the proposed project:

In 2019, RCPE built an access road that crossed Ms. Kinsella's property following significant flooding of the Bad River near Fort Pierre, South Dakota. The railroad's track and bridge are located at coordinates 44.337981, -100.378717.

RCPE is seeking to obtain this access road, which measures approximately 1,900 feet long and 20 feet across. Additionally, the railroad is seeking to obtain a laydown area adjacent to the bridge of approximately 50 feet by 100 feet. The total area for the access road and the laydown area is approximately 1 acre. A map of the property, including the access road is attached.

Describe your efforts to acquire sufficient property for the project without exercising eminent domain:

RCPE has been largely unsuccessful in negotiating access to this portion of its track and bridge with the landowner. In 2019, the railroad attempted to work with the landowner regarding access to the bridge across her property during the lead up to flooding of the Bad River. Landowner initially refused to permit access. This refusal caused significant delays, which in return resulted in greatly increased flood damage, and created the need for significant amounts of construction that would have been unnecessary if access were more promptly allowed. The railroad was eventually able to contract with the landowner for temporary access to the bridge to conduct repairs. The railroad is currently engaged in arbitration with the landowner regarding this 2019 contract.

RCPE has recently conducted good faith negotiations with the landowner to privately acquire the property without using eminent domain. On April 7, 2021, the railroad offered the landowner \$15,000 to obtain the access road and laydown area - approximately 1 acre of property. This offer was made entirely

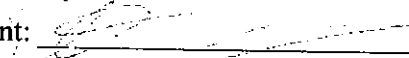
DOT-1026
(03/2021)

Date Received by DOT Legal _____
Reviewed By _____
Title _____
Date _____

separate from the landowner's arbitration claims and was rejected. Prior to making the offer, the railroad's real estate department conducted an evaluation of similar land for sale in the area. It was determined that the mean per acre value of land in the vicinity was approximately \$12,000, making RCPE's offer above market value.

Describe your consideration of any proposed alternative routes or potential land acquisitions:

The access road leads to an RCPE bridge over the Bad River. This road presents the only method of transporting heavy machinery to this area as heavy machinery cannot be transported across the bridge. This heavy machinery is necessary to fulfill the railroad's legal duty to maintain its track, as well as to conduct projects to reduce or mitigate flooding.

Authorized Signature of Applicant:  Date: 5/04/2021

By: Steve Williams (Print Name) Title: Legal Representative

Submit this Application to:

**S.D. DEPARTMENT OF TRANSPORTATION
OFFICE OF LEGAL COUNSEL
700 EAST BROADWAY AVENUE
PIERRE, SOUTH DAKOTA 57501-2586
TELEPHONE (605) 773-3262**



VERIFICATION

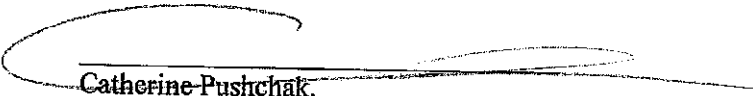
COUNTY OF Fairfield)

:ss

STATE OF CT)

I, Catherine Pushchak, being first duly sworn upon oath, do depose and state that I am duly authorized to verify the truth and veracity of Rapid City, Pierre & Eastern Railroad Inc.'s application to exercise eminent domain pursuant to S.D. Admin. R. 70:08:01:02. I have read the above-referenced application and the same are true and correct to the best of my information and belief.

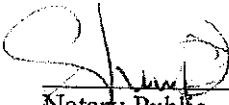
Rapid City, Pierre, and Eastern Railroad, Inc.


Catherine Pushchak,
Assistant Secretary
Rapid City, Pierre & Eastern Railroad, Inc.

Subscribed and sworn to me before this 4th day of May, 2021, by Catherine Pushchak.

My commission expires: _____

{Seal} Shirley A. Reinos
NOTARY PUBLIC
State of Connecticut
My Commission Expires
June 30, 2025



Notary Public

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

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 contested case hearing in the above-entitled matter will be held before the South Dakota Transportation Commission (the "Commission") on Wednesday, June 23, 2021, at 1:00 p.m. Central Time in the Commission Room of the Becker-Hansen Building, 700 E. Broadway Avenue, Pierre, South Dakota, 57501, or as soon thereafter as the parties can be heard.

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 decide if the Commission should grant authority to Rapid City, Pierre & Eastern Railroad, Inc. ("RCP&E") to exercise the right of eminent domain based upon a determination that RCP&E's exercise of this right would be for a public use consistent with public necessity.

The issues for hearing are:

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

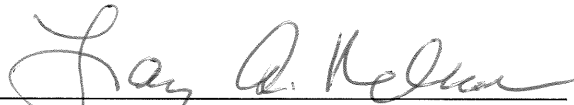
Should RCP&E be granted authority to exercise the right of eminent domain based upon a determination that RCPE's exercise of this right would be for a public use consistent with public necessity?

This hearing is a contested case as that term is defined in SDCL 1-26-1(2) and is an adversary proceeding to be conducted in accordance with the provisions of SDCL chapter 1-26. As such, each party has the right to be present at the hearing and to be represented by a lawyer, to introduce evidence and compel its production, to call witnesses to testify and to compel the attendance thereof, to inspect all documentary evidence, and to cross-examine all witnesses present. These and other due process rights will be forfeited if not exercised at the hearing. If you do not appear at the scheduled time of the hearing, the matter may be dismissed, or it may be decided based on evidence presented by the other party at the hearing. Following the hearing, the Commission will issue a decision granting or denying RCP&E the right to exercise eminent domain, based on the Commission's determination of whether RCP&E's exercise of this right would be for a public use consistent with public necessity. The decision of the Commission may be appealed to the circuit court and the State Supreme Court as provided by law.

If the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may request the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL Section 1-26-17.

The Honorable David Gienapp has been engaged as a hearing examiner to preside over the hearing and make recommendations to the Commission.

Dated this 13th day of May, 2021, at Canton, South Dakota.



Larry A. Nelson, Chair
South Dakota Transportation Commission

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of May, 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 Transportation Commission:

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

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 13th day of May, 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:

Steven Williams
williams@knightnicastro.com

Chad Knight
knight@knightnicastro.com

Patrick Burns
Patrick@burns-law.mn

Hon. David Gienapp
dgienapp@sio.midco.net

/s/ Dustin W. DeBoer

Dustin DeBoer
Special Assistant Attorney General
S.D. Dept. of Transportation
5316 West 60th St. N.
Sioux Falls SD 57107-6464
(605)367-4970 Ext. 180-2014



Steven T. Williams
Senior Attorney
27 Shiloh Road, Ste 10
Billings, MT 59106
williams@knightnicastro.com
T: 406-545-2031
F: 816-396-6233

June 15, 2021

Judge David Gienapp
Hearing Officer
P.O. Box 14
Madison, SD 57042
dgienapp@siomidco.net
VIA E-MAIL

Re: **IN THE MATTER OF THE APPLICATION FOR AUTHORITY TO EXERCISE
EMINENT DOMAIN BY RCP&E RAILROAD, INC.**
Court: Transportation Commission – Hearing Officer David Gienapp
Landowner’s Attorney: Patrick Burns, Burns Law Firm, Minneapolis, MN
Hearing Date: June 23, 2021

Dear Judge Gienapp:

Please accept this letter as the pretrial statement in this matter.

PRETRIAL STATEMENT

I. BACKGROUND

In April of 2019 there was significant flooding of the Bad River near Pierre, South Dakota. This flooding required flood mitigation actions by RCP&E to protect its bridge and surrounding track. The only way for RCP&E to access this area with heavy equipment is to cross property that belongs to Dena Kinsella.

RCP&E made several attempts to negotiate with Ms. Kinsella in 2019 to gain access to its property and take actions to prevent flooding. There were initial difficulties, however, as Ms. Kinsella first refused to communicate with RCP&E regarding access, and then later refused to permit access across her property. After extended delays, RCP&E was able to contract with Ms. Kinsella and obtain access across her property. Unfortunately, due to these delays and increased flooding, what had originated as an inexpensive project to install flood prevention measures turned into a bridge repair project that cost 3.5 million dollars.

Once RCP&E contracted with Ms. Kinsella in 2019, it built an access road and conducted work under the contract. Even after the contract was in place, RCP&E had difficulties completing the project as Ms. Kinsella refused access at times, or otherwise impaired the contractor's ability to work.

Following the completion of the work, a dispute arose regarding the contract and Ms. Kinsella has separately filed for arbitration regarding the work done under the 2019 contract. This arbitration claim is entirely separate from the issue of eminent domain and applies only to the terms of the 2019 contract that granted temporary access across Ms. Kinsella's property. Ms. Kinsella's claims include allegations that the access road was not properly built as well as claims that she was not paid for certain amounts of dirt. RCP&E has denied these claims and raised counterclaims regarding Ms. Kinsella's interference with its ability to complete work under the contract. These issues, and negotiations involving the settlement of arbitration, are entirely distinct from the issues involved with RCP&E's eminent domain application.

Ms. Kinsella's property continues to present the only available access to RCP&E's track and bridge. This need continues to be present due to the shifting trajectory of the river. As such, RCP&E reached out to Ms. Kinsella again in the spring of 2021 to negotiate a purchase of the road that had been built to access to its rail line across her property as well as a 50 foot by 100 foot area next to the bridge to permit the railroad to place equipment or materials when conducting repairs. When this offer was made, it was specified that it was made entirely independent from Ms. Kinsella's arbitration claim. Despite RCP&E's good faith offer, Ms. Kinsella has refused to negotiate or provide a counteroffer.

II. ISSUES FOR THE JUNE 23, 2021 HEARING

South Dakota law allows railroads to seek eminent domain under S.D.C.L. § 49-16A-75, *et seq.* Under § 49-16A-75.2, “[t]he 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.” The concept of a public use consistent with a public necessity is further defined by, § 49-16A-75.3, which holds that “[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.” Thus, the issues for the June 23rd hearing are:

1. Whether RCP&E's eminent domain is a public use consistent with public necessity; and
2. Whether RCP&E has negotiated in good faith with the landowner.

i. RCP&E's Exercise of Eminent Domain is Public Use Consistent with Public Necessity

Pursuant to S.D.C.L. § 49-16A-75.2, RCP&E must show a “public use consistent with public necessity.” In discussing this requirement, the South Dakota Supreme Court has given the public use consistent with public necessity a broad interpretation. For example, the Supreme Court has held that projects such as building a spur track – a track that comes off the main railroad track and provides rail service to a specific private industry – is a public use and granted eminent domain over land for such tracks. *Great N. Ry. v. Chicago, St. P., M. & O. Ry.*, 78 S.D. 168, 175-176, 99 N.W.2d 439, 443, 1959 S.D. LEXIS 14, *12-13 (citing to *Chicago Great Western Ry. Co. v. Jesse*, 249 Minn. 324, 82 N.W.2d 227, 231; *State ex rel. Oregon-Washington R. & Nav. Co. v. Superior*

Court, 155 Wash. 651, 286 P. 33). Similarly, South Dakota has an established law that expressly permits railroads to use eminent domain or condemnation of land to gain access to its track through adjacent land. *See* S.D.C.L. § 49-16A-78 (“[The railroad] 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 property by purchase or condemnation in the manner provided by law.**”) (emphasis added).

RCP&E is seeking to obtain an access road that it previously built across the landowner’s property to its track and bridge, as well as a small area adjacent to the bridge to stage necessary equipment and materials when conducting repairs. The location of this property is at coordinates 44.337981, -100.378717. The access over Ms. Kinsella’s adjacent land is necessary as, under 49 C.F.R. § 213, *et seq.*, railroads have a legally mandated duty to inspect and maintain their rail lines. As evidenced by the flooding of the Bad River in 2019, this will sometimes require heavy equipment to make repairs and this access road presents the only method of transporting heavy machinery to RCP&E’s bridge and surrounding track. The need for access to this bridge is compounded by the fact that the trajectory of this river is continuing to change over time, making future maintenance and flood prevention measures a necessity.

Not only does RCP&E need access to its bridge and surrounding track, it needs to have the ability to access this area quickly. To this point in 2019, the initial refusals and delays in obtaining access, caused by the landowner, resulted in an exponential increase in damage and a disruption to federal common carrier obligations. Because of this need for rapid access, there is no lesser available solution available to RCP&E other than obtaining ownership of the property. Delays of days and weeks can cause disruptions of service that impact RCP&E’s ability to engage in interstate commerce and disrupt the transportation of goods. The shutdown of the bridge at issue in 2019 caused the track to be fully closed for three weeks. This track transports approximately 100 loaded railcars per day, carrying a daily cargo worth two hundred thousand dollars. Extended delays and associated shutdowns have an enormous impact on RCP&E’s ability to transport freight, as well as impacting the industries that use RCP&E to transport their goods. Such disruptions can similarly result in millions of dollars in repair costs as occurred in 2019.

The granting of an easement rather than ownership of the property itself, would not be an appropriate solution in this matter. This is evidenced by the fact that even when RCP&E was operating under a contract with Ms. Kinsella in 2019, it still suffered significant interference with its ability to complete the necessary and required work on its track. Ms. Kinsella obstructed and interfered with RCP&E’s ability to work, and at times refused access despite a contract being in place. An easement would not be an effective resolution in this matter as RCP&E believes that there would still be delays and refusals to allow access to Ms. Kinsella’s property that would have a direct impact on RCPE’s ability to transport freight.

ii. RCP&E has Privately Negotiated in Good Faith to Acquire the Property without the use of Eminent Domain.

RCP&E has negotiated in good faith with the landowner regarding accessing her property both in 2019, and 2021. The negotiations in 2019, were difficult and resulted in significant delay and expense. The 2019 contract is additionally the subject of arbitration. RCP&E requires continued access to its bridge and surrounding track to fulfill its legal duties and sought to negotiate

such access in 2021. Ms. Kinsella has refused to discuss the sale of this property. As such, RCP&E has negotiated in good faith, but is unable to reach an agreement with Ms. Kinsella regarding the land subject to this hearing.

a. 2019 Negotiations

As described above, in 2019 there was significant flooding, that threatened RCP&E's property, including one of its bridges. RCP&E initially sought access to the property to install gravel, which would protect its property from any additional flooding. This project was anticipated to cost one hundred and fifty thousand dollars. Due to the continued rising waters, gaining access to the property to install this gravel was time sensitive. RCP&E, however, had considerable difficulties in gaining access to the property from Ms. Kinsella. Ms. Kinsella initially refused to answer her phone or door, and she refused to allow RCP&E access across her property. She additionally initially demanded \$25,000 to permit access. Finally, after substantial delay, Ms. Kinsella agreed to sign a contract permitting RCP&E access across her property. Unfortunately, due to the delays and additional flooding, the project went from costing one hundred and fifty thousand dollars to costing 3.5 million dollars.

Even after the contract was signed, there continued to be issues with access to the property to complete work under the contract. Ms. Kinsella, at times, refused to permit contractors to access their equipment or her property, causing additional delays and expenses and otherwise interfered with the work of the contractor. RCP&E will put forth evidence that it conducted good faith negotiations throughout this period in 2019. RCP&E agreed to pay significantly higher than the market rate for dirt obtained from Ms. Kinsella's property, and conducted several extra services for Ms. Kinsella, such as installing a culvert on her driveway, and hauling gravel for her personal use, free of charge.

Despite these efforts, the relationship and negotiations are untenable. The delays and continued interference caused by Ms. Kinsella cost RCP&E millions of dollars and continued even when there was a contract in place. There is every reason to believe that if there is future flooding or similar issues, that there will be similar delays in gaining access. Such delays impact RCP&E's ability to move freight as a common carrier, impact RCP&E's legal duties, and create significant additional expense.

b. 2021 Negotiations

Although the 2019 contract between the parties is currently in arbitration, RCP&E still needs to be able to rapidly obtain access to its property in order to comply with federal regulations and ensure that its track is properly maintained.

RCP&E is seeking to obtain this access road, which measures approximately 1,900 feet long and 20 feet across. Additionally, RCP&E is seeking to obtain a laydown area adjacent to the bridge of approximately 50 feet by 100 feet to stage equipment and materials. The total area for the access road and the laydown area is slightly less than 1 acre. On April 7, 2021 RCP&E made an offer to Ms. Kinsella of \$15,000 to obtain the access road and the staging area. *See Exhibit A.* This offer was entirely separate and independent from Ms. Kinsella's arbitration claim.

Prior to making this offer in 2021, RCP&E conducted a property analysis, and used property listings from the surrounding area to determine the market value of property in the surrounding area. This analysis found that the market value for one acre of land in the vicinity was approximately \$12,000. RCP&E offered Ms. Kinsella \$15,000 – 25% above this calculated market

value for the property. RCP&E specified in its offer that the offer was unrelated to Ms. Kinsella's arbitration claims. *See Exhibit A.* This offer was rejected by Ms. Kinsella. Ms. Kinsella additionally indicated that she is unwilling to negotiate or discuss the sale of her land. *See Exhibit B: April 7, 2021 Email.* As a result, RCP&E had no choice, but to file this eminent domain claim.

c. Negotiations Relating to Arbitration

As discussed above, Ms. Kinsella has filed an arbitration proceeding regarding the terms of the 2019 contract. Ms. Kinsella specifically alleges that the access road was improperly built, that she was not paid for all the dirt that was used, and that other remediation is necessary for her property. She is seeking monetary damages. RCP&E disagrees with Ms. Kinsella's claim and is defending itself in the arbitration proceeding. RCP&E has not offered Ms. Kinsella any money related to her claim for damages in arbitration. RCP&E has, however, offered Ms. Kinsella \$15,000 to purchase the above-described property. RCP&E anticipates that Ms. Kinsella will assert that RCP&E has not negotiated in good faith because it did not offer Ms. Kinsella money to settle her claim for damages. This assertion misses the mark. RCP&E is not obligated to settle Ms. Kinsella's claim in arbitration, which RCP&E believes lacks merit, in order to negotiate the purchase of the property.

III. CONCLUSION

Based on the foregoing, RCP&E has a legal need to obtain the access road and laydown area that is consistent with the requirements of South Dakota Law. RCP&E has negotiated in good faith, both in 2019 and 2021, to obtain access to this property, but negotiations have failed. Pursuant to S.D.C.L. § 49-16A-75, *et seq.* and S.D.C.L. § 49-16A-78, RCP&E's application for eminent domain should be granted.

Sincerely,

KNIGHT NICASTRO MACKAY, LLC



Steven T. Williams
Chad M. Knight

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.
Jeffrey D. Collins

EXHIBIT A

From: [Steven T. Williams](#)
To: [Patrick R. Burns](#)
Cc: [Chad M. Knight](#); [Jenifer L. Rosario](#)
Subject: Kinsella - Access Road/Laydown Area
Attachments: [image002.png](#)
[2021.04.07 Ltr to Burns re Land Purchase.pdf](#)

Patrick,

RCPE would like to make Ms. Kinsella an offer to purchase the access road to its bridge and a laydown area next to its bridge so that it is able to conduct necessary maintenance and repair in the future. Attached is a letter outlining RCPE's offer. This offer is separate from the ongoing arbitration.

Could you please convey the offer to Ms. Kinsella and let us know her response?

Thank you,
Steve

	Steven T. Williams, Senior Attorney 27 Shiloh Rd., Ste. 10, Billings, MT 59106 williams@knightnicastro.com P: 540-784-5957 F: 816-396-6233
	

EXHIBIT A



Steven T. Williams
Senior Attorney
27 Shiloh Road, Ste 10
Billings, MT 59106
williams@knightnicastro.com
T: 540-784-5957
F: 816-396-6233

April 7, 2021

Patrick Burns
Burns Law Firm, PLLC
1624 Harmon Place, Suite 300
Minneapolis, MN 55403
Patrick@burns-law.mn
Sent via Email Only

Patrick,

RCPE is interested in purchasing a portion of Ms. Kinsella's property to allow access to its railroad bridge for future maintenance and repair.

Specifically, the railroad would like to purchase the land that contains the access road leading to the railroad's bridge and a laydown area adjacent to the bridge of approximately fifty (50) by one hundred (100) feet. The access road is approximately nineteen hundred (1900) feet long, and approximately twenty (20) feet across. The total area for the access road and lay down area would be approximately one acre.

An evaluation of similarly situated land for sale in the vicinity of Ms. Kinsella's property indicates that a mean per acre value is approximately \$12,000. RCPE is offering Ms. Kinsella \$15,000 for the specified property.

Could you please convey this offer to Ms. Kinsella and let us know what her response is? This offer is separate from the current arbitration proceedings between the railroad and Ms. Kinsella.

Best regards,

A handwritten signature in blue ink, appearing to read 'Steve Williams', is written over a light blue horizontal line.

Steve Williams

EXHIBIT B

From: [Patrick R. Burns](#)
To: [Steven T. Williams](#)
Cc: [Chad M. Knight](#); [Jenifer L. Rosario](#)
Subject: RE: Kinsella - Access Road/Laydown Area
Date: Wednesday, April 7, 2021 3:56:09 PM
Attachments: [image005.png](#)

Patrick,

In response to the offer of RCPE to purchase the access road, I submit the following:

My dealings with RCPE were done in good faith. RCPE has not honored their signed contract or other verbal commitments made to me. I have no desire to enter into any agreement with RCPE until they honor their previous commitments:

- 1. Payment of the second half of the dirt at the same rate as the initial dirt.*
- 2. Access road brought up to grade, with proper drainage, fabric trimmed according to specifications, with adequate gravel covering.*
- 3. Reseeding of all affected areas since no grass has grown to date.*

We are eager for, and welcome an inspection, which should have been done upon completion of the project as specified.

Thank you.

Dena Kinsella

Patrick

Patrick R. Burns
Burns Law Firm PLLC
612.877.6400

www.burns-law.mn

“LIVE” Calendar: www.nadn.org/patrick-burns



Patrick R. Burns
Lawyer, Arbitrator, Mediator

Licensed in Minnesota, Wisconsin
North Dakota and South Dakota

June 15, 2021

South Dakota Transportation Commission
700 East Broadway Avenue
Pierre, SD 57501

Honorable David Gienapp
P.O. Box 14
Madison, SD 57042

SENT VIA EMAIL TRANSMISSION ONLY

**Re: In The Matter of The Application for Authority to Exercise Eminent Domain by
RCP&E Railroad, Inc.**

Dear Honorable Hearing Officer Gienapp and Honorable Commissioners:

I represent Ms. Dena Kinsella of Fort Pierre in this matter. Thank you for your time and attention to this important matter. It is a simple case and should not be complicated or belabored by counsel for either party during the scheduled proceeding on June 23, 2021.

On behalf of my client, I am hereby renewing her May 12, 2021 objections to the application of the railroad even being considered at this juncture by the Commission; and include the objections presented via email on May 12, 2021 to opposing counsel, Judge Gienapp, Karla Engle and Dustin DeBoer:

From: Patrick R. Burns <Patrick@burns-law.mn>
Sent: Wednesday, May 12, 2021 1:24 PM
To: David Gienapp <dgienapp@sio.midco.net>
Cc: Jenifer L. Rosario <rosario@knightnicastro.com>; DeBoer, Dustin <Dustin.DeBoer@state.sd.us>; Engle, Karla <Karla.Engle@state.sd.us>; Steven T. Williams <williams@knightnicastro.com>; Chad M. Knight <knight@knightnicastro.com>

Subject: RE: [EXT] Application by RCPE for Authority to Exercise Eminent Domain --
Hearing Date

My client formally objects to a hearing being set in this matter at tomorrow's Commission meeting. The matter and application are not properly presented for consideration by the State of South Dakota at this time.

1. The Railroad does not have South Dakota licensed counsel appearing on the record in this administrative action. I would leave it to the Judge or The State Bar of South Dakota to determine if filing and/or participating in an arbitration or administrative action in South Dakota amounts to the practice of law in South Dakota. I believe it does.
2. There is also not a single address on the Railroad's application that lists a South Dakota address for the Railroad, besides an agent for service of process and my client's property.
3. Furthermore, there is a pending AAA arbitration between the parties on the same subject matter and property of Ms. Kinsella set for two days of hearing in Fort Pierre in October. The Railroad and their counsel were unavailable in that case and could not schedule hearing dates until the fall of 2021 in that case, but then present this administrative filing and availability for a June hearing. This attempt "railroad" my client in this manner while that companion case is pending a final hearing is objectionable on equitable grounds, if not on other grounds set forth herein.
4. Additionally, there was no genuine attempt by the Railroad to negotiate or work with Ms. Kinsella on this request before their application to exercise eminent domain. Such good faith efforts are required by SDCL 49-16A-75.3 and ARSD Article 70:08:01:03 (5) (b) and (c). One emailed offer and one rejection was all that was exchanged. Not a single meeting or phone call between the parties or counsel took place in that regard.

South Dakota law requires more good faith efforts by the Railroad in a case like this one - - before a foreign business applies to the State of South Dakota for such drastic relief at great cost to taxpayers. Also, the requirements that such an application and proceeding burdens the DOT and its staff and commissioners with is not small - - and should not be improperly sought or easily granted under such circumstances.

If Your Honor wishes to have a preliminary hearing on this objection in order to hear from the parties and counsel, Ms. Kinsella and I will participate.

Patrick

Patrick R. Burns
Burns Law Firm PLLC
612.877.6400
www.burns-law.mn

Montana counsel for the railroad has subsequently been conditionally admitted to practice law in South Dakota for the limited purpose of appearing at this hearing with sponsorship of Rapid

City attorney Jeffery D. Collins. That issue is resolved, assuming Mr. Collins will be present for the hearing with the railroad's Montana lawyers on June 23. The remaining issues raised in Ms. Kinsella's objections have not been resolved or ruled on; and I ask that the Commissioners rule on the objections at the outset of the day on June 23 for the record.

The remaining preliminary issues presented by Ms. Kinsella for consideration of the Commission are 1) "standing" of the railroad to bring this action; 2) "equitable estoppel;" 3) "ripeness;" and 4) the clear failure of the foreign-corporation applicant to show evidence of complying in good faith with the pertinent South Dakota DOT rules and South Dakota statutes before being granted a full hearing in this matter -- a determination that would permanently take land and significantly intrude on important and legally-protected real property rights of a South Dakota citizen. State of South Dakota laws and the Rules of this venerable Department and its Commission exist for a reason; and need to be followed in order that a precedent for future applications by this railroad or other applicants not be unwittingly created.

If the Commission and Judge Gieneapp decide to ultimately proceed to a hearing on the merits of the application, I present the following evidence summary and timeline for consideration of the Commission in advance of the hearing, as directed by Judge Gienapp in his May 18, 2021 correspondence to counsel.

As the Commission will see by the evidence, the railroad is gaming the State of South Dakota and DOT system, and putting the onus on each of you - - at great expense to South Dakota tax-payers and all involved persons - - to decide a matter that has been prematurely presented for your consideration by improper means and with near-zero effort on the railroad's part.

Hiring lawyers is not the litmus test here. Actual good-faith negotiation is the litmus test; and the burden of proof is on the applicant to show it did so BEFORE presenting the application to the Commission. The Commissioners should take particular notice of how few times the Commission has been called to hear or rule on an application for eminent domain in the past 10-years. I submit that is because other applicants actually respect and follow South Dakota law and the Administrative Rules of the Department of Transportation before doing so.

THE PARTIES AGREEMENT FOR THE RAILROAD'S WORK AND ACCESS

- On **May 10, 2019** the parties to this case entered into a written agreement for access, use of raw materials and other work that would be done on Ms. Kinsella's land in order for the railroad to access the trestle bridge that goes over the Bar River - - on and near Ms. Kinsella's home and grazing land near Fort Pierre. The railroad drafted the agreement and proposed most of its terms, including a dispute resolution clause that called for binding arbitration of any future disputes as an alternative to court action. SEE ATTACHMENT.

RAILROAD FAILS TO PERFORM UNDER THE CONTRACT TERMS

- The railroad's work that was the subject of the parties' contract proceeded and was ultimately completed successfully for the railroad, despite significant delays and breaches caused by the railroad, its contractors and agents. The railroad frequently revised the contract - - including requesting additional dirt from Ms. Kinsella (double the amount agreed upon in the contract), and other significant alterations to the parties' agreement.
- The railroad ultimately did not complete the road over her property per the terms of parties' agreement, and it did not pay Ms. Kinsell for the additional dirt it took from her after she agreed to that request, among other contract breaches. SEE ATTACHMENT.
- Notably, the application before the Commission is for an involuntary taking of land from Ms. Kinsella by eminent domain which the railroad never previously requested from her and that was not part of the parties' contract.

KINSELLA TRIES TO NEGOTIATE IN GOOD-FAITH FOR ANOTHER ENTIRE YEAR IN AN ATTEMPT TO AVOID COSTLY LEGAL BATTLE AT ARBITRATION

- By **February of 2020**, it became clear to Ms. Kinsella that the railroad had no intention of making good on the parties' agreement and she was forced to seek legal counsel. SEE ATTACHMENT.
- **From March - November of 2020** counsel for Ms. Kinsella (the undersigned) attempted to negotiate a resolution to the contractual dispute subject to arbitration (NOT THE SUBJECT MATTER OF THE PRESENT APPLICATION) in good faith with prior counsel for the railroad, Mr. Brian Donohoe of Sioux Falls. Not once did the railroad or Mr. Donohoe propose or agree to any resolution of the other dispute in the other case.
- On **September 19, 2020**, through counsel, the railroad requested an October 23, 2020 meeting of lawyers and the parties at Ms. Kinsella's property to look at the situation and meet to discuss resolution. Ms. Kinsella and her lawyer (the undersigned) agreed to that meeting. Then, on **October 22, 2020**, one day before the meeting date that the railroad proposed, Mr. Donohoe emailed to cancel with no explanation. Mr. Donahoe realized that he and/or his client had acted in bad faith by its many delays, and by the last-minute cancellation of the meeting they requested, and he offered to pay for my travel expenses incurred by my client in having me make the trip.
- On **December 20, 2020** new counsel appeared for the railroad – Chad Knight and Steven Williams of the Billings, Montana law firm Knight Nicastro MacKay.
- **From December 20, 2020 and February 10, 2021**, counsel for Ms. Kinsella attempted to negotiate and resolve the other dispute between the parties. Multiple offers to meet in Fort Pierre and/or otherwise attempt mediation were all rejected out of hand by the

railroad. Stonewalling behind counsel was the continuing behavior of the railroad in that case and continues until today. Never during this nearly two-year period was the issue of permanent access now being requested by the railroad in its application to the Commission brought up by the railroad.

- On **January 29, 2021** counsel for the railroad wrote a letter to the undersigned stating “We are in receipt of your January 26, 2021 demand for the Kinsella matter. After discussing the matter at length, RCPE is adamant that it is unwilling to make any settlement offer to Ms. Kinsella and that this position will not change at a later date if arbitration is filed.” [emphasis added.]

KINSELLA FILES ARBITRATION AS REQUIRED BY THE CONTRACT

- On **February 10, 2021**, Ms. Kinsella filed a demand for arbitration with the American Arbitration Association (AAA) against the railroad to resolve the parties’ contractual dispute. No claim or defenses or counterclaims were brought by either party to that case for the access road now being sought by the applicant railroad in this DOT eminent domain matter.
- On **April 6, 2020** an arbitrator from Minneapolis was selected by the parties and appointed by the AAA to hear the contractual dispute in the other matter.
- On **April 21, 2021** the parties and the AAA arbitrator had a preliminary hearing and scheduling teleconference in the other contractual matter, and a date for the final hearing was set for October 5 – 6, 2021 in Fort Pierre. Counsel for the railroad was adamant on that conference call that they simply could not do the arbitration until that time - six months out - due to other commitments and scheduling conflicts.

THE SET-UP | THE RAILROAD ACTS IN BAD-FAITH AGAIN

- Out of the blue on **April 7, 2021**, and after zero communication between the parties since the January 29, 2021 letter from the railroad’s counsel, the undersigned received an email from counsel for the railroad about an access road it proposed to purchase from her. In that letter, counsel for the railroad stated: “RCPE would like to make Ms. Kinsella an offer to purchase the access road to its bridge and a laydown area next to its bridge so that it is able to conduct necessary maintenance and repair in the future. Attached is a letter outlining RCPE’s offer. This offer is separate from the ongoing arbitration.” Again, no mention of this request or impending eminent domain application was ever raised by the railroad prior to this email.
- **That same day**, the undersigned replied “To be clear, the railroad wants to make this offer - - and regardless of her acceptance or rejection - - keep arbitrating? Why did they

not make this offer previously or as part of the project? Should we lawyers attempt to resolve everything for these clients through negotiation or mediation instead of the costs and logistics and time-consuming nature of arbitrating? That could be by zoom or in Fort Pierre in the coming months.” Counsel for the railroad rejected that proposal outright and essentially said it was a take-it-or leave-it proposal.

- **Later that same day**, the undersigned relayed by email the response of Ms. Kinsella that she was not interested in the offer from the railroad, but would consider it as part of a global settlement. She also welcomed an inspection by the railroad in furtherance of settlement negotiations.

From: Patrick R. Burns
Sent: Wednesday, April 7, 2021 3:56 PM
To: Steven T. Williams <williams@knightnicastro.com>
Cc: Chad M. Knight <knight@knightnicastro.com>; Jenifer L. Rosario <rosario@knightnicastro.com>
Subject: RE: Kinsella - Access Road/Laydown Area

Patrick,

In response to the offer of RCPE to purchase the access road, I submit the following:

My dealings with RCPE were done in good faith. RCPE has not honored their signed contract or other verbal commitments made to me. I have no desire to enter into any agreement with RCPE until they honor their previous commitments:

- 1. Payment of the second half of the dirt at the same rate as the initial dirt.*
- 2. Access road brought up to grade, with proper drainage, fabric trimmed according to specifications, with adequate gravel covering.*
- 3. Reseeding of all affected areas since no grass has grown to date.*

We are eager for, and welcome an inspection, which should have been done upon completion of the project as specified.

Thank you.

Dena Kinsella

- Not one phone call, meeting nor any other negotiations took place between the parties related to any disputed subject matter in either case - - until yesterday June 14, 2021 - - presumably because the railroad needs some helpful evidence for the hearing next week.

In an email, counsel for the railroad stated: “Patrick – I’d like to touch base briefly about settlement negotiations, as we are coming up on the eminent domain hearing.” And then in a follow-up email stated: “We also are intending on having a surveyor come out to the property this week to get a legal description of the property at issue. I just wanted to verify that the surveyor would be permitted access.”

CONCLUSION

As the Commission can see, this foreign for-profit railroad is attempting to circumvent the parties' agreed upon arbitration process for the resolution of all disputes, and is dealing with my client in ways that are tantamount to both stonewalling and bullying, while hiding behind multiple lawyers to avoid its contractual obligations and carry out its other efforts in a sloppy manner in South Dakota. Equity, real property rights of citizens of the State of South Dakota, and due process in eminent domain proceedings demand more.

In conclusion, even if the railroad can allege or present some compelling public necessity, the application of the railroad should be denied at this juncture due to bad-faith and failure of the railroad to satisfy the good faith negotiation element of SDCL 49-16A-75.3 and ARSD Article 70:08:01:03 (5) (b) and (c) - - BEFORE (and since) moving to take property by eminent domain and avail itself to this Commission's time and approval.

Such a lacking and a heavy-handed attempt by a for-profit foreign railroad to take any land legally-owned by any resident of the State of South Dakota should be summarily rejected. The DOT and its Commissioners should require parties to follow the basic laws and rules promulgated by South Dakota. It should also hold applicants strictly to their burden of proof and not grant eminent domain takings lightly.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. Burns', with a long horizontal flourish extending to the right.

Patrick R. Burns

Enclosures

Cc: Karla Engle
Dustin DeBoer
Dena Kinsella

**LICENSE AGREEMENT FOR
BRIDGE REPAIR & MAINTENANCE**

This Agreement (the "Agreement") is made this 10th day of May 2019 ("Effective Date") by and between RAPID CITY, PIERRE & EASTERN RAILROAD, INC. (hereinafter "LICENSEE"), whose address is 246 Founders Park Drive, Suite 202, Rapid City, SD 57701 and Dena ~~Smith~~ ^{St. Kinsella} (hereinafter "LICENSOR"), whose address is 21101 Cedar Hill Road, Fort Pierre, SD 57532.

WHEREAS, for valuable consideration as outlined herein, the receipt of which is hereby acknowledged, LICENSOR desires to grant to LICENSEE a license for access across LICENSOR's property to reach LICENSEE's bridge for the purpose of maintenance and repair; and

WHEREAS, the parties have reached accord concerning the terms and conditions for LICENSEE's access and desire to reduce them to writing.

NOW, therefore, for and in consideration of the premises and mutual covenants and agreements contained herein, the parties agree as follows:

1. TERM / ACCESS TO LICENSEE FACILITIES

The term of the license granted by this Agreement shall run for a period of forty-five (45) days, commencing on the day LICENSEE begins repairing the Bridge (the "Term").

LICENSOR grants LICENSEE access across LICENSOR's property to LICENSEE's bridge (the "Bridge"), as generally depicted in Exhibit A, attached hereto and incorporated herein by reference, for the purpose of repair and maintenance of LICENSEE's rail facilities, including, without limitation, the Bridge for the duration of the Term. The license granted hereunder shall extend to contractors of LICENSEE.

LICENSEE and LICENSOR shall mutually agree upon the actual route over LICENSOR's property to the Bridge.

LICENSEE may enter upon LICENSOR's property, with LICENSEE's equipment reasonably necessary to make repairs to and ensure the structural integrity of the Bridge, at any time during the Term.

LICENSEE shall be responsible for returning LICENSOR's property to its prior condition following any access to the Bridge for maintenance or repair at LICENSEE's expense.

LICENSEE shall promptly clear all construction debris generated by LICENSEE from LICENSOR's property.

LICENSEE shall correct any leakage that occurs from LICENSEE's equipment immediately.

LICENSEE shall provide LICENSOR with ten (10) large bales of hay to cover 2019 lost grass production.

LICENSEE shall instruct LICENSEE's contractor(s) to close livestock gate after each use.

LICENSEE shall maintain all private roads used for access at passable condition throughout the Term.

LICENSEE, through its primary point of contact, Shawn Engel, shall promptly meet with LICENSOR to discuss and remedy any issues that arise with regard to the subject matter of this Agreement.

2. GENERAL

This Agreement is intended for the sole benefit of the parties hereto. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation, or other entity, other than the parties hereto and their respective officers, agents, employees, parent corporation, subsidiaries, affiliates, successors, and permitted assigns, any right or benefit pursuant to any provision or term of this Agreement, and all provisions and terms of this Agreement are and will be for the sole and exclusive benefit of the parties to this Agreement.

Private Grade Crossing License No. [AGREEMENT NUMBER]

The terms of this Agreement have been arrived at after mutual negotiation and, therefore, it is the intention of the parties that its terms not be construed against any of the parties by reason of the fact that it was prepared by one of the parties.

Neither party shall be liable to the other party for indirect, special, punitive or consequential damages.

This Agreement will be construed in accordance with the laws of the state of South Dakota.

Any dispute arising between the parties hereto with respect to any of the provisions hereof which cannot be settled by the parties themselves within thirty (30) calendar days of either party giving the other notice of the dispute shall be settled under the Commercial Arbitration Rules of the American Arbitration Association. The arbitration will be held in Stanley County, South Dakota. There shall be a single arbitrator experienced in railroad matters and transportation law. The arbitrator shall apply South Dakota law to resolve legal matters in dispute. The decision of the arbitrator shall be final and conclusive upon the parties hereto and shall be enforceable in a court of competent jurisdiction.

The parties shall not disclose the terms of this Agreement to a third party (a) other than as required by law so long as such party required to disclose the terms of this Agreement under applicable law provides the other party with prior written notice of such requirement, or (b) as otherwise agreed in writing between the parties. Notwithstanding the foregoing, the parties may disclose the terms and conditions of the Agreement to (1) a parent, subsidiary or affiliated company; or (2) to their lawyers and consultants, including but not limited to its auditors, provided that all such parties agree to maintain the confidentiality of such information in accordance with the terms of this provision. If any party violates this paragraph, any adversely affected party may cancel this Agreement without penalty and exercise any available remedies under applicable law.

This Agreement may be executed in any number of counterparts, each of which may be deemed an original for any purpose.

This Agreement contains the entire understanding among the parties and supersedes any prior understandings and/or written or oral agreements among them respecting the within subject matter. There are no representations, agreements, arrangements, or understandings, oral or written, between or among the parties hereto relating to the subject matter hereof that are not fully expressed herein.

(The Remainder of this Page Left Blank Intentionally.)

Private Grade Crossing License No. [AGREEMENT NUMBER]

THIS AGREEMENT IS hereby declared to be binding upon the parties hereto.

IN WITNESS WHEREOF, the undersigned have hereunto agreed to the terms above this 10th day of May 2019.

LICENSOR

RAPID CITY, PIERRE & EASTERN
RAILROAD, INC.

by: _____

its: _____

Signed: _____

*Delivered by Shawn A. Engcl
for RCPE
[Signature] 5-10-19*

LICENSEE

KINSELLA
DENA ~~GESILLA~~ *DK*

Signed: *Sera P. Kinsella*

20/11/19
5/11/19
20/11/19

A PR manager will meet
weekly with land owner
during negotiation to discuss
accessibility and damage issues
that may arise during
construction

Shawn Engel
5/11/19 4:52

AA shall be responsible to return land owner property to its prior condition following Access to Bridge

land owner will grant the inland access to the property to repair the bridge work with a vicar system to stabilize the river bank. The water will be set both parties

AA shall provide the land owner to have road work done by 11/1/19 or before last grass reduction in 2019

AA shall install the new marker that will go to the land owner property by or shut after each use

AA and the engineer will be responsible to ~~at~~ mark all private and used of the road level during the project.

Patrick R. Burns

From: cowchickdrk@aol.com
Sent: Wednesday, March 18, 2020 10:12 AM
To: Patrick R. Burns
Subject: Fwd: railroad and AGE Corp

-----Original Message-----

From: cowchickdrk <cowchickdrk@aol.com>
To: rob <rob@extremejustice.com>
Sent: Thu, Feb 20, 2020 12:28 pm
Subject: railroad and AGE Corp

Rob,
Please send a letter to: Andy Johnson, AGE Corp, PO Box 697, Fort Pierre, SD 57532
Blake C Jones, Vice President of Transportation, Midwest Region, 246 Founders Park Drive,
Suite 202, Rapid City SD 57701

regarding the following:

1. Breach of Contract: License Agreement for Bridge Repair and Maintenance, signed May 20, 2019 by Shawn Engel; term of agreement was for 45 days commencing May 20, 2019. AGE, contractor finished installing fence and removed the last of their equipment on November 27, 2019.
2. The railroad and AGE Corp needed fill dirt for the project, and said they would provide load tickets for all dirt removed from our hill. We were paid \$40,000 on July 17, 2019 for the dirt removed for the bridge repair up to that date; no load tickets were received and they said they had enough dirt.
3. About three weeks later they approached us and said they needed more dirt. Chad from the Railroad and Andy Johnson were a part of this conversation at the track. Tom Kinsella later talked to Andy and agreed they could take more dirt from the hill, provided we were paid for it as before. We also requested load tickets for the second part of the dirt. No load tickets were provided and we were never received payment for the second portion of the dirt. This agreement was made before the dirt was removed.
4. A road was built through my property for access to the bridge trestle repair site. A fabric was installed on the road, but the fabric was never covered with adequate dirt (6"-8"). Fabric is protruding through the top of the road and on the sides. The fabric was never "trimmed" to fit the road. Large pieces of fabric are scattered throughout my property. Proper covering of the road was not done, and there was no clean up provided. Drainage culverts on the road were not finished.
5. To correct and prevent more erosion for the benefit of the Railroad and the landowner both Andy Johnson, AGE, and representatives for the railroad assured us a weir would be constructed. Andy Johnson provided me with a diagram of the weir on our first meeting regarding access through my property. Shawn Engel included affirmation that the weir would be installed on his hand written agreement

representing the Railroad

6. A large excavation was made off the Railroad Right of Way for access for installation of new trestle uprights. We were assured that the area would be brought up to the prior elevation; that was not done. The agreement signed by the Railroad states that all property will be restored to its prior condition.
7. A second crossing was installed; the agreement with Chad representing the Railroad was that the crossing would be designated as an official crossing and paperwork properly filed. This agreement was made prior to the completion of the crossing. No notice of designation or filing has been received.
8. Representatives of the Railroad and Andy Johnson, AGE were contacted regarding all of the above issues. They refuse to discuss these issues. We were assured, and an agreement signed by Shawn Engel, that a representative of the Railroad would be on hand to discuss any issues. Railroad authority was passed down the line to different representatives, but when questioned on matters, we were told "they had no authority". When I called the Rapid City Office and requested someone contact me regarding resolution of they issues, they had Chad (Brookings) call me. I told him the issues, and have never heard back from him or anyone else with the railroad or Andy Johnson, AGE.

If you have questions, please call me. Hopefully we can get this sent soon. I will send time line later today.


Thank you!



Complete this form to start arbitration under an arbitration agreement in a contract.

1. Which party is sending in the filing documents? (check one) <input checked="" type="checkbox"/> Consumer <input type="checkbox"/> Business		
2. Briefly explain the dispute: Railroad (licensee) needed to cross private property (licensor) and entered into a contract to build a road across the property to access and repair an old bridge and trestle. Railroad utilized subcontractors. Railroad needed more than double the dirt than it initially planned on needing, agreed to take it from the property, caused additional problems for the property owner and now refuses to pay for the dirt or road repairs.		
3. Specify the amount of money in dispute, if any: \$ 100,000		
4. State any other relief you are seeking: <input checked="" type="checkbox"/> Attorney Fees <input checked="" type="checkbox"/> Interest <input checked="" type="checkbox"/> Arbitration Costs <input checked="" type="checkbox"/> Other; explain: injunctive relief		
5. Identify the requested city and state for the hearing if an in-person hearing is held: City: Fort Pierre State: South Dakota <input type="checkbox"/>		
6. Please provide contact information for both the Consumer and the Business. Attach additional sheets or forms as needed.		
Consumer:		
Name: Dena Kinsella		
Address: 21101 Cedar Hill Road		
City: Fort Pierre	State: South Dakota <input type="checkbox"/>	Zip Code: 57532
Telephone:	Fax:	
Email Address:		
Consumer's Representative (if known):		
Name: Patrick R. Burns		
Firm: Burns Law Firm PLLC		
Address: 1624 Harmon Place; Suite 300		
City: Minneapolis	State: Minnesota <input type="checkbox"/>	Zip Code: 55403
Telephone: 612.877.0400	Fax:	
Email Address: patrick@burns-law.mn		
Business:		
Name: Rapid City, Pierre & Eastern Railroad, Inc (RCPE)		
Address: 246 Founders Park Drive; Suite 202		
City: Rapid City	State: South Dakota <input type="checkbox"/>	Zip Code: 57701
Telephone:	Fax:	
Email Address:		



Business' Representative (if known):		
Name: Steven T. Williams, Chad M. Knight, Jenifer L. Rosario		
Firm: Knight Nicaastro & MacKay		
Address: 27 Shiloh Rd., Ste. 10		
City: Billings	State: Montana 	Zip Code: 59106
Telephone: 540-784-5957	Fax: 816 396 6233	
Email Address: williams@knightnicastro.com; rosario@knightnicastro.com; knight@knightnicastro.com		
Date: February 10, 2021		

7. Send a copy of this completed form to the AAA together with:

- A clear, legible copy of the contract containing the parties' agreement to arbitrate disputes;
- The proper filing fee (filing fee information can be found in the Costs of Arbitration section of the Consumer Arbitration Rules); and
- A copy of the court order, if arbitration is court-ordered.

8. Send a copy of the completed form and any attachments to all parties and retain a copy of the form for your records.

To file by mail, send the initial filing documents and the filing fee to: AAA Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043.

To file online, visit www.adr.org and click on **File** or **Access Your Case** and follow directions. To avoid the creation of duplicate filings, the AAA requests that the filing documents and payment be submitted together. When filing electronically, no hard copies are required.

Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit a completed Affidavit for Waiver of Fees, available on our website.

Pursuant to New Jersey Statutes § 2A:23B-1 et seq, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the New Jersey Arbitration Act, and to all consumer arbitrations conducted in New Jersey. If you believe that you meet these requirements, you must submit a completed Affidavit for Waiver of Fees, available on our website.

Patrick R. Burns

From: Steven T. Williams <williams@knightnicastro.com>
Sent: Wednesday, April 7, 2021 10:50 AM
To: Patrick R. Burns
Cc: Chad M. Knight; Jenifer L. Rosario
Subject: Kinsella - Access Road/Laydown Area
Attachments: 2021.04.07 Ltr to Burns re Land Purchase.pdf

Patrick,

RCPE would like to make Ms. Kinsella an offer to purchase the access road to its bridge and a laydown area next to its bridge so that it is able to conduct necessary maintenance and repair in the future. Attached is a letter outlining RCPE's offer. This offer is separate from the ongoing arbitration.

Could you please convey the offer to Ms. Kinsella and let us know her response?

Thank you,
Steve



Steven T. Williams, Senior Attorney
27 Shiloh Rd., Ste. 10, Billings, MT 59106
williams@knightnicastro.com
P: 540-784-5957 F: 816-396-6233

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Knight Nicastro MacKay

Steven T. Williams
Senior Attorney
27 Shiloh Road, Ste 10
Billings, MT 59106
williams@knightnicastro.com
T: 540-784-5957
F: 816-396-6233

April 7, 2021

Patrick Burns
Burns Law Firm, PLLC
1624 Harmon Place, Suite 300
Minneapolis, MN 55403
Patrick@burns-law.mn
Sent via Email Only

Patrick,

RCPE is interested in purchasing a portion of Ms. Kinsella's property to allow access to its railroad bridge for future maintenance and repair.

Specifically, the railroad would like to purchase the land that contains the access road leading to the railroad's bridge and a laydown area adjacent to the bridge of approximately fifty (50) by one hundred (100) feet. The access road is approximately nineteen hundred (1900) feet long, and approximately twenty (20) feet across. The total area for the access road and lay down area would be approximately one acre.

An evaluation of similarly situated land for sale in the vicinity of Ms. Kinsella's property indicates that a mean per acre value is approximately \$12,000. RCPE is offering Ms. Kinsella \$15,000 for the specified property.

Could you please convey this offer to Ms. Kinsella and let us know what her response is? This offer is separate from the current arbitration proceedings between the railroad and Ms. Kinsella.

Best regards,



Steve Williams

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.

**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](#).