

**Department of Transportation**  
**Office of Legal Counsel**  
700 East Broadway Avenue  
Pierre, South Dakota 57501-2586 605/773-3262  
FAX: 605/773-4442

MEMORANDUM

TO: Joel Jundt

FROM: Karla L. Engle

DATE: April 23, 2021

RE: April 29, 2021, Commission Meeting

The Department of Transportation requests that the Transportation Commission set a hearing date to consider an *Application by Railroad for Authority to Exercise Eminent Domain*, received from Rapid City, Pierre & Eastern Railroad, Inc. on April 19, 2021. Governor Noem has directed the Commission to consider and act upon the application.

The Department asks that the Commission appoint the Honorable Catherine Williamson, Chief Hearing Examiner of the Office of Hearing Examiners, to preside over the hearing and make recommended findings, conclusions, and an order. The Commission will be free to accept, reject or modify any recommended findings, conclusions, and order.

I enclose a copy of the following documents with this memo:

- *Application by Railroad for Authority to Exercise Eminent Domain*;
- *South Dakota Codified Laws 49-16A-75 through 49-16A-75.4*;
- *ARSD Ch. 70:08:01*.

At the meeting next week, I will be prepared to answer questions from the Commission on the procedural aspects of this matter. Thank you.

KLE  
Enclosure



DOT-1026  
(03/2021)

Date Received by DOT Legal 4/19/21  
Reviewed By Karla Engle  
Title Chief Legal Counsel  
Date 4/19/2021

**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: \_\_\_\_\_

FAX Number: \_\_\_\_\_ Telephone Number: \_\_\_\_\_

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

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

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

Sara A. Greene, 200 Meridian Centre, Suite 300, Rochester, NY 14618

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

Mark Blyth 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

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

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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.

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.

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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 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

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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: 4/15/2021

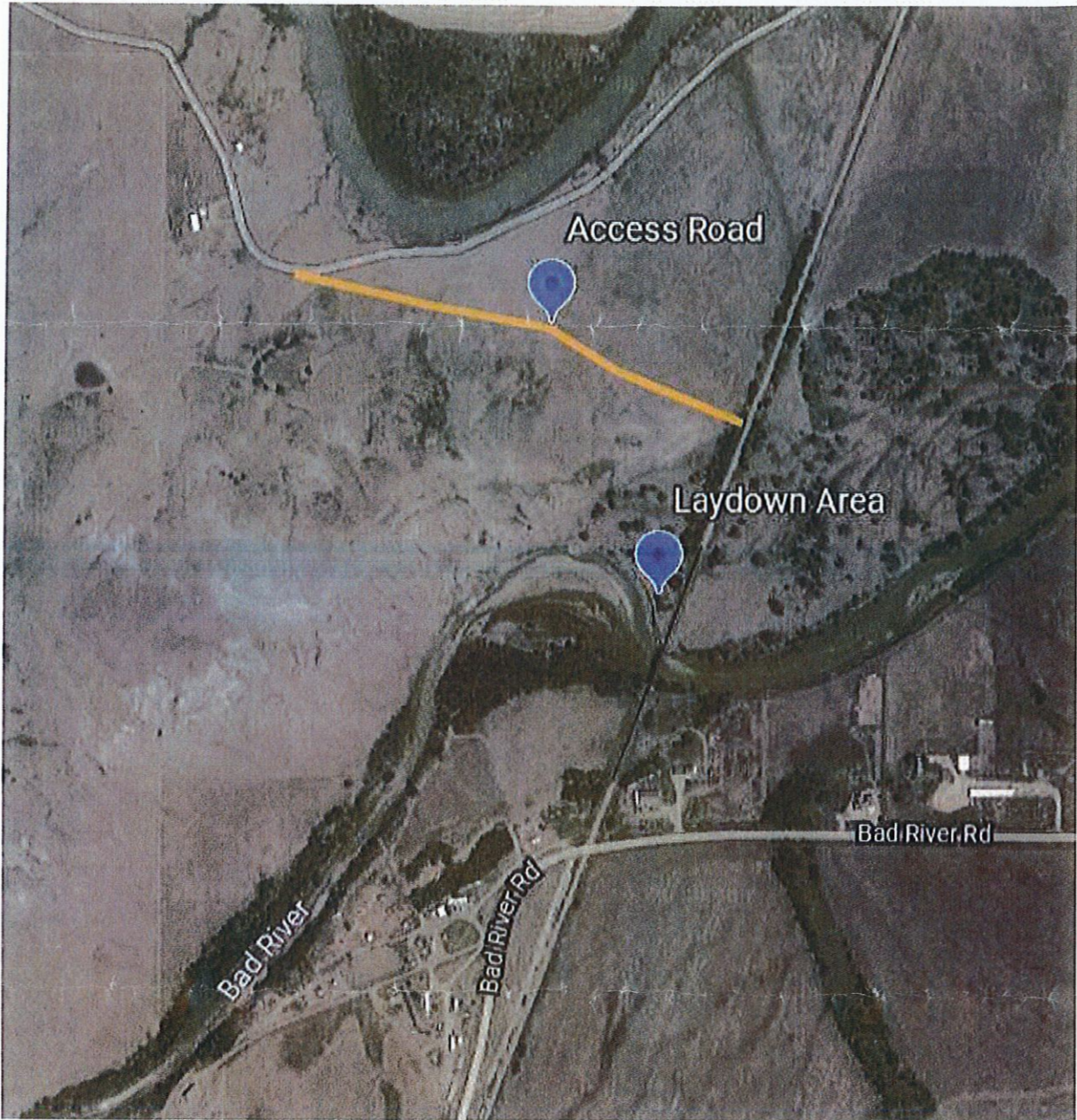
By: Steve Williams (Print Name) Title: Legal Representative

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**

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**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.

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**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.

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**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.

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**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.

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**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.

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**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.

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**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](#).

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**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](#).

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**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](#).

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**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](#).