

# State of South Dakota

EIGHTY-SIXTH SESSION  
LEGISLATIVE ASSEMBLY, 2011

626S0349

## HOUSE BILL NO. 1177

Introduced by: Representatives Verchio, Brunner, Hunhoff (Bernie), Jensen, Kirkeby, Kopp, Olson (Betty), Schaefer, and Schrempp and Senators Rampelberg, Frerichs, Lederman, Maher, Rhoden, and Sutton

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the use of eminent  
2 domain.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

5 (1) "Condemn," to take property under the power of eminent domain;

6 (2) "Condemnee," a person who has or claims an interest in property that is the subject  
7 of a prospective or pending condemnation action;

8 (3) "Condemnor," a private for profit corporation or utility empowered to condemn.

9 Section 2. The attorney general, with the cooperation of appropriate state agencies, shall  
10 prepare pamphlets in readable format describing the eminent domain laws of this state. The  
11 pamphlets shall include the reasons for condemnation, the procedures followed by condemnors,  
12 how citizens may influence the condemnation process, and the rights of property owners and  
13 citizens affected by condemnation. The attorney general shall make copies of the pamphlets  
14 available to all condemnors who shall be charged a price for the pamphlets sufficient to recover



1 the costs of production. A condemnor shall present a copy of the pamphlet to a property owner  
2 prior to making an offer to purchase and initiating a condemnation action.

3 Section 3. A condemnor shall make reasonable and diligent efforts to acquire property by  
4 good faith negotiation.

5 Section 4. In attempting to acquire the property by purchase under this Act, the condemnor  
6 shall negotiate in good faith and may contract with respect to:

7 (1) Any element of valuation or damages recognized by law as relevant to the amount  
8 of just compensation payable for the property;

9 (2) The extent, term, or nature of the property interest or other right to be acquired;

10 (3) The quantity, location, or boundary of the property;

11 (4) The acquisition, removal, relocation, or disposition of improvements upon the  
12 property and of personal property not sought to be taken;

13 (5) The date of proposed entry and physical dispossession;

14 (6) The time and method of payment of agreed compensation or other amounts  
15 authorized by law; and

16 (7) Any other terms or conditions deemed appropriate by either of the parties.

17 Section 5. Good faith negotiation shall include:

18 (1) Prior to making an initial offer, a preliminary written notice to the landowner shall  
19 include:

20 (a) The proposed project, the land proposed to be condemned, plan of work,  
21 operations and facilities in a manner sufficient to enable the condemnor to  
22 evaluate the effect of the proposed project, plan of work, operations and  
23 facilities on the condemned's use of the land, to the extent reasonably known  
24 at the time;

- 1 (b) A description of the general location and extent of the property sought, with  
2 sufficient detail for reasonable identification;
  - 3 (c) A statement that, at the condemnee's request, a representative of the  
4 condemnor will tour the property sought with the condemnee or the  
5 condemnee's representative at a mutually agreeable time prior to the  
6 condemnor's initial written offer to discuss issues related to properties sought;
  - 7 (d) An estimate of the fair market value of the property sought and the general  
8 basis for such estimate; and
  - 9 (e) A discussion of the reclamation planned by the condemnor for the property  
10 disturbed by the condemnor's project; and
- 11 (2) A bona fide initial offer to acquire the property sought sent by certified mail. This  
12 offer shall be accompanied by written notice that the condemnee is under no  
13 obligation to accept this initial written offer, but if the condemnee fails to respond to  
14 the initial written offer, the right to object to the good faith of the condemnor may be  
15 waived, and that the condemnee has a right to seek advice from an attorney, real  
16 estate appraiser, or any other person of the condemnee's choice during the  
17 negotiations and any subsequent legal proceedings.

18 Section 6. The condemnee may make a counteroffer in writing within sixty-five days of the  
19 initial offer specified in section 5 of this Act specifying areas of disagreement.

20 Section 7. The condemnor shall make a final offer including a response to any areas of  
21 disagreement indicated by the condemnee. The final offer shall be sent by certified mail, return  
22 receipt requested, at least thirty days prior to commencing a condemnation action.

23 Section 8. A condemnee may request one appraisal to be done by an appraiser chosen by the  
24 condemnee. The condemnor shall pay for such appraisal.

1 Section 9. No action to condemn property may be maintained over timely objection by the  
2 condemnee unless the condemnor made a good faith effort to acquire the property by purchase  
3 before commencing the action. No condemnee may object to the good faith of the condemnor  
4 if the condemnee has failed to respond to an initial written offer as provided in section 5 of this  
5 Act and the condemnor has met the requirements of section 5 of this Act.

6 Section 10. The condemnor shall, prior to filing any petition pursuant to § 21-35-1, file with  
7 the governmental entity having jurisdiction over the proposed project, a petition that names the  
8 person, group, or corporation desiring to take or damage private property as plaintiff, and all  
9 persons having interest in or liens upon the property affected by the proceeding as defendants,  
10 so far as they shall be known at the time of the filing. The petition shall contain a description  
11 of the property to be taken or damaged and a statement that the plaintiff has negotiated in good  
12 faith to acquire all property needed without the use of eminent domain and that all state and  
13 federal permits have been granted. A copy of each permit shall be attached to the petition. If the  
14 right is granted to the condemnor, the condemnor shall exercise that right by filing  
15 condemnation proceedings in circuit court within ninety days or the right is revoked. The  
16 purpose for which the property is to be taken or damaged shall be clearly set forth in the  
17 petition. It is not necessary to specify the interests or claims of the several defendants in the land  
18 or property affected by the proceeding.

19 Section 11. That § 21-35-10.1 be amended to read as follows:

20 21-35-10.1. Within thirty days from the date the summons described in § 21-35-9 is served,  
21 the defendant may demand a hearing in circuit court on the petitioner's right to take. At this  
22 hearing, the condemnor shall prove the following:

23 (1) The condemnor used good faith negotiations;

24 (2) The condemnor successfully negotiated purchase or easement agreements with at

1           least seventy percent of the affected landowners, if more than ten landowners are  
2           involved;

3           (3)   That the project is planned for the greatest public good with the least private injury;

4           (4)   That the project is a public use consistent with public necessity; and

5           (5)   That the condemnee's property is necessary for the project.

6           Failure to make such demand or to consent in writing to the taking, within the thirty-day  
7           period, shall constitute a waiver of the right to question the necessity of the taking. The finding  
8           of necessity by the plaintiff, unless based upon fraud, bad faith, or an abuse of discretion, shall  
9           be binding on all persons.

10          Section 12. That chapter 21-35 be amended by adding thereto a NEW SECTION to read as  
11          follows:

12          For the purposes of this chapter, the fair market value as determined by a jury may include:

13          (1)   The price paid for easements of comparable type, size, and location on the same or  
14              similar property; and

15          (2)   The value determined by using generally accepted appraisal techniques and may  
16              include:

17              (a)   The value determined by appraisal of the property by a certified appraiser;

18              (b)   The price paid for other comparable easements or leases of comparable type,  
19                  size, and location on the same or similar property; and

20              (c)   Values paid for transactions of comparable type, size, and location by other  
21                  companies in arms-length transactions for comparable transactions on the  
22                  same or similar property.

23          Section 13. Upon abandonment, nonuse for a period of five years, or transfer or attempted  
24          transfer to a use where the transferee could not have condemned for the new use, or where the

1 new use is not identical to the original use and new damages to the landowner whose property  
2 was condemned for the original use will occur, any easement or ownership authorized under this  
3 Act terminates. The property shall be restored as much as possible by the condemnor to the  
4 condition before condemnation or the condemnor shall pay the condemnee for any cost to  
5 restore the property to the property's condition before condemnation.

6 Section 14. That § 49-16A-75 be repealed.

7 ~~—49-16A-75. A railroad may exercise the right of eminent domain in acquiring right-of-way  
8 as provided by statute, but only upon obtaining authority from the Governor or if directed by the  
9 Governor, or the commission, based upon a determination by the Governor or the commission  
10 that the railroad's exercise of the right of eminent domain would be for a public use consistent  
11 with public necessity. The Governor or the commission shall consider the requirements of  
12 §§ 49-16A-75.1 to 49-16A-75.3, inclusive, when granting or denying an application for  
13 authority to use eminent domain. The decision to grant or deny an application shall be made  
14 after reasonable notice and opportunity to be heard, pursuant to chapter 1-26. However, an  
15 impartial hearing examiner may be appointed by the Governor or the commission to administer  
16 the proceedings or make recommendations. Any parties who are united in interest or  
17 representation shall unite in the filing of an affidavit for change of hearing examiner under the  
18 provisions of § 1-26D-10. The filing of such affidavit by one party is deemed to be filed by all  
19 of the parties. No more than one change of hearing examiner may be granted on request or  
20 affidavit made by or on behalf of the same party or parties united in interest under the provisions  
21 of § 1-26D-10. However, the filing of an affidavit and the first change of hearing examiner does  
22 not prevent any other party to the action or any party's attorney from obtaining a change in  
23 hearing examiner upon a showing of an unacceptable risk of actual bias or prejudice concerning  
24 a party. The Governor or the chair of the commission shall replace the hearing examiner within~~

1 ~~five business days upon any recusal. A hearing shall be held and a decision rendered on any~~  
2 ~~application within ninety days following the receipt of a new application and upon any~~  
3 ~~application pending before the Governor or the commission on July 1, 2008.~~

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

7 Section 15. That § 49-16A-75.1 be repealed.

8 ~~— 49-16A-75.1. The commission shall in accordance with chapter 1-26, promulgate rules:~~

9 ~~— (1) — Establishing a form upon which a railroad may apply for authority to exercise the~~  
10 ~~right of eminent domain;~~

11 ~~— (2) — Specifying the information to be submitted by an applicant; and~~

12 ~~— (3) — Administering applications for authority to exercise the right of eminent domain.~~

13 Section 16. That § 49-16A-75.2 be repealed.

14 ~~— 49-16A-75.2. The applicant has the burden of proving by a preponderance of the evidence~~  
15 ~~that the exercise of the right of eminent domain is a public use consistent with public necessity.~~

16 Section 17. That § 49-16A-75.3 be repealed.

17 ~~— 49-16A-75.3. A railroad's exercise of the right of eminent domain is a public use consistent~~  
18 ~~with public necessity only if the use of eminent domain is proposed by an applicant who has~~  
19 ~~negotiated in good faith to privately acquire sufficient property without the use of eminent~~  
20 ~~domain. No determination of public use or necessity or any other issue properly decided by the~~  
21 ~~Governor or the commission may be addressed by the circuit court in an action for~~  
22 ~~condemnation. Such a determination may only be challenged upon direct appeal of that~~  
23 ~~determination. Notwithstanding appeal of such determination, the railroad may proceed at any~~  
24 ~~time by action in circuit court for possession and determination of compensation for any real~~

1 ~~property taken or damaged:~~

2 Section 18. That § 49-16A-75.4 be repealed.

3 ~~—49-16A-75.4. Upon a failure to reach agreement on compensation following a determination~~  
4 ~~pursuant to § 49-16A-75.3, either party may bring a proceeding in state court to establish~~  
5 ~~compensation to be paid for the property taken or damaged. The court shall expedite the~~  
6 ~~proceedings. A railroad is not entitled to physical possession of the property to be taken~~  
7 ~~pursuant to the exercise of eminent domain except upon the earlier to occur of either:~~

8 ~~—(1)— Execution of a written agreement between the parties as to fair market value of~~  
9 ~~compensation;~~

10 ~~—(2)— Entry of a judgment of condemnation in the circuit court; or~~

11 ~~—(3)— Upon posting by the railroad of a bond to be established by the court as soon as~~  
12 ~~possible but no later than one hundred twenty days following petition by the railroad~~  
13 ~~for possession. The bond shall be in an amount the court determines to be a~~  
14 ~~preliminary estimate of compensation based on the best information available, but~~  
15 ~~is not determinative of final compensation or admissible as evidence thereon.~~