



## 2024 South Dakota Legislature

# House Bill 1246

Introduced by: **Representative** Overweg

1 **An Act to establish a pre-condemnation process and to require reclamation and**  
 2 **restoration of property damaged by condemnation.**

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

4 **Section 1. That a NEW SECTION be added to title 21:**

5 Terms used in this chapter mean:

6 (1) "Appraisal," the act or process of developing an opinion of the value of property  
 7 for another, conducted by an individual certified, licensed, or registered under  
 8 chapter 36-21B.

9 (2) "Condemn," to take property under the power of eminent domain;

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

12 (4) "Condemnor," a person empowered to condemn; and

13 (5) "Property," an interest in real or personal property under the laws of this state.

14 **Section 2. That a NEW SECTION be added to title 21:**

15 A condemnor shall make every reasonable and diligent effort to acquire the  
 16 property of a condemnee by good faith negotiation, as required by section 11 of this Act.

17 **Section 3. That a NEW SECTION be added to title 21:**

18 Before initiating good faith negotiations for the acquisition of a condemnee's  
 19 property, the condemnor shall have an appraisal of the property completed to determine  
 20 the amount that would constitute just compensation for its taking. The condemnee or the  
 21 condemnee's representative must be given a reasonable opportunity to accompany the  
 22 appraiser during the appraisal of the property.

1           For purposes of the good faith negotiations as described under section 13 of this  
2 Act, the condemnor may not offer the condemnee less than the appraised amount  
3 resulting from the appraisal required under this section.

4           Before entering good faith negotiations with the condemnee, the condemnor shall  
5 provide the condemnee with a copy of the appraisal required under this section.

6           In determining the amount of just compensation, the condemnor shall disregard  
7 any decrease or increase in the fair market value of the property caused by the project  
8 for which the property is to be acquired.

9   **Section 4. That a NEW SECTION be added to title 21:**

10           A condemnor, or the condemnor's agent, may enter a condemnee's private  
11 property to examine and survey the property for the purpose of appraisal and to determine  
12 if the property is suitable for the project, is within the power of the condemnor to  
13 condemn, and the potential location of the project on the property.

14           The entry must be:

15       (1) Preceded by prior notice to the condemnee, which must be provided by the  
16 condemnor at least thirty days before the planned entry, specifying:

17           (a) The proposed project being pursued;

18           (b) The activity to be undertaken on the property;

19           (c) The name, address, telephone number, and e-mail address of the  
20 condemnor or the condemnor's designee; and

21           (d) The proposed use and potential recipient of any property data collected;

22       (2) Scheduled with the condemnee so that the condemnee is able to be present during  
23 the planned entry;

24       (3) Undertaken at a reasonable time during daylight hours; and

25       (4) Accomplished peaceably and without inflicting substantial injury to land, crops,  
26 improvements, livestock, or business operations.

27           A condemnor shall locate a condemnation project in a manner this is compatible  
28 with the greatest public benefit and the least amount of private injury.

29   **Section 5. That a NEW SECTION be added to title 21:**

30           In addition to the pre-entry requirements under section 4 of this Act, if a  
31 condemnor is seeking to establish a project that requires a siting permit under chapter  
32 49-41B, the condemnor may enter the private property of a condemnee, if the condemnor:

- 1       (1) Files a siting permit application with the Public Utilities Commission pursuant to  
2           § 49-41B-11;  
3       (2) Provides a copy of the siting permit application to the condemnee at least thirty  
4           days before the planned entry to the condemnee's property; and  
5       (3) Makes a payment to the condemnee in the amount of five hundred dollars or  
6           provides sufficient security for the payment, for any actual damage done to the  
7           property by the entry.

8       **Section 6. That a NEW SECTION be added to title 21:**

9           If reasonable efforts to accomplish an entry to perform authorized activities on  
10          private property under section 4 or 5 of this Act have been obstructed or denied, the  
11          condemnor may petition the circuit court in the county where the property is located for  
12          an order permitting entry.

13          Unless the condemnee shows good cause to the contrary, the court shall make its  
14          order permitting and describing the purpose of the entry and setting forth the nature and  
15          scope of activities the court determines are reasonably necessary and authorized to be  
16          made on the property. In addition to requiring a deposit under section 7 of this Act, the  
17          court shall include in its order the terms and conditions for the time, place, and manner  
18          of the planned entry and any activities authorized on the property to facilitate the purpose  
19          of the entry and minimize damage, hardship, and burden to each party.

20       **Section 7. That a NEW SECTION be added to title 21:**

21          If a court orders entry as allowed by section 6 of this Act, the court must include  
22          in its order a determination of the amount of money needed, if any, to fairly compensate  
23          the condemnee or any other person in lawful possession or physical occupancy of the  
24          property for damages for physical injury to the property and for substantial interference  
25          with its possession or use, which the court finds is likely to be caused by the entry and  
26          activities authorized by the order. The court order must include a requirement that the  
27          condemnor deposit with the court the amount of money provided in the order before entry  
28          on the property.

29          Unless disbursed earlier by court order, the amount deposited must be retained on  
30          deposit for six months following termination of the entry. The court for good cause may  
31          extend the period of retention.

32       **Section 8. That a NEW SECTION be added to title 21:**

1 After notice and hearing, the court may modify an order made under section 6 of  
2 this Act.

3 If a deposit is required or the amount required to be deposited is increased by a  
4 modification to the court order, the court must specify the time within which the required  
5 amount must be deposited and may direct that any further entry, activity, or study under  
6 the order as modified be stayed until the required deposit has been made.

7 **Section 9. That a NEW SECTION be added to title 21:**

8 A condemnor is liable for physical injury to and for substantial interference with  
9 possession or use of property caused by the condemnor's entry and activity on the  
10 condemnee's property. This liability may be enforced in a civil action against the  
11 condemnor or by application to the court as provided by this section unless voluntarily  
12 paid by the condemnor.

13 If moneys are on deposit as required by section 7 of this Act, the condemnee or  
14 other person entitled to damages under this section may apply to the court for an award  
15 of the amount entitled to be recovered. The court shall determine the award amount and  
16 direct that its payment be made from the money on deposit. If the amount on deposit is  
17 insufficient to pay the full amount, the court must enter judgment against the condemnor  
18 for the unpaid portion.

19 **Section 10. That a NEW SECTION be added to title 21:**

20 In an action or other proceeding for recovery of damages under section 9 of this  
21 Act, the court may award the prevailing party attorney fees and costs incurred by or on  
22 behalf of the prevailing party.

23 **Section 11. That a NEW SECTION be added to title 21:**

24 Except as provided in section 15 of this Act, an action to condemn property under  
25 chapter 21-35 may not be maintained over timely objection by the condemnee unless the  
26 condemnor negotiated in good faith to acquire the property before commencing the action.  
27 A condemnee may not object to the good faith of the condemnor if the condemnee has  
28 failed to respond to an initial written offer as required by section 13 of this Act.

29 An offer to acquire property that is made in substantial compliance with sections  
30 2, 3, and 12 of this Act, accompanied or followed by reasonable negotiation efforts

1 consistent with section 13 of this Act, is prima facie evidence of good faith under this  
2 section.

3 **Section 12. That a NEW SECTION be added to title 21:**

4 In attempting to acquire property in good faith, the condemnor, acting within the  
5 scope of its powers and to the extent not otherwise forbidden by law, may contract with  
6 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 sought;  
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 conducive to acquisition of the property by  
17 agreement.

18 **Section 13. That a NEW SECTION be added to title 21:**

19 A good faith negotiation required by this chapter must, at a minimum, include  
20 written notice of the following:

- 21 (1) To the extent reasonably known at the time, the details and purpose of the  
22 proposed project, including a proposed work plan;  
23 (2) The name, address, telephone number, and e-mail address of the condemnor or  
24 the condemnor's designee;  
25 (3) An initial written settlement offer that must include:  
26 (a) A description of the general location and extent of the property sought, with  
27 sufficient detail for reasonable identification;  
28 (b) An offer that, at the condemnee's request, a representative of the  
29 condemnor agrees to tour the property sought with the condemnee or the  
30 condemnee's representative at a mutually agreeable time before the  
31 deadline for the condemnee's response to the initial written offer to discuss  
32 issues related to the property sought and the initial offer;

- 1           (c) An estimate of the fair market value of the property sought and the general
- 2                 basis for the estimate;
- 3           (d) An offer to acquire the property sought, allowing the condemnee up to sixty-
- 4                 five days from the date the initial written offer is sent by certified mail to
- 5                 respond or make a counteroffer in writing;
- 6           (e) A summary detailing the basis for the amount the condemnor established
- 7                 as just compensation for the property, separately stating the compensation
- 8                 amount for the property to be acquired and the amount for the damages to
- 9                 any remaining property resulting from the taking;
- 10          (f) An explanation of the reclamation and restoration planned by the
- 11                 condemnor for the property disturbed by the condemnor's project;
- 12          (g) A statement that the condemnee is under no obligation to accept the initial
- 13                 written offer, but if the condemnee fails to respond to the initial written
- 14                 offer, the right to object to the good faith of the condemnor may be waived
- 15                 under section 11 of this Act; that the condemnor and the condemnee are
- 16                 obligated to negotiate in good faith for the acquisition of the property
- 17                 sought; that formal legal proceedings may be initiated if negotiations fail;
- 18                 and that the condemnee has a right to seek advice from an attorney, real
- 19                 estate appraiser, and any other person of the condemnee's choice during
- 20                 the negotiations and any subsequent legal proceedings; and

21          (4) A written response from the condemnor to any counteroffer made in writing by the  
 22                 condemnee to the initial written offer made as required by subdivision (3).

23                 The written notice required under this section must be given to the condemnee of  
 24                 record as shown on the records in the county assessor's office, no less than ninety days  
 25                 before commencement of a condemnation action.

26                 The condemnor shall send to the condemnee, by certified mail, the written notice  
 27                 required by this section.

28                 The condemnor shall send to the condemnee, by certified mail, a written final offer  
 29                 at least fifteen days before commencing a condemnation action if the parties have not  
 30                 come to a settlement agreement by that time.

31                 A condemnee shall make reasonable and diligent efforts to negotiate in good faith  
 32                 with the condemnor, including a timely written response to the written offer identified in  
 33                 subdivision 3, specifying areas of disagreement.

34          **Section 14. That a NEW SECTION be added to title 21:**

1           If a court finds the condemnor failed to negotiate in good faith as required under  
2           sections 2 and 13 of this Act, or to comply with any requirements of this chapter, the court  
3           shall require the condemnor to reimburse the condemnee for all reasonable attorney fees,  
4           court costs, expenses, and fees.

5           **Section 15. That a NEW SECTION be added to title 21:**

6           A condemnor's failure or inability substantially to comply with section 11 to 13,  
7           inclusive, of this Act, does not bar the maintenance of a condemnation action if:

8           (1) Compliance is waived by written agreement between the condemnee and the  
9           condemnor;

10          (2) One or more of the owners of the property is unknown, cannot with reasonable  
11          diligence be contacted, is incapable of contracting and has no legal representative,  
12          or owns an interest that cannot be acquired by contract; or

13          (3) Due to an emergency affecting public health or safety, there is a compelling need  
14          to avoid the delay in beginning the action which compliance would require.

15          **Section 16. That chapter 21-35 be amended with a NEW SECTION:**

16          A condemnor who acquires a property right or interest of less than fee simple title  
17          in any property is responsible for reclamation and restoration of the property and any  
18          improvements on the property. The reclamation and restoration must return the property  
19          and improvements to the condition existing before the condemnation to the extent the  
20          reclamation and restoration is reasonably possible.

21          **Section 17. That chapter 21-35 be amended with a NEW SECTION:**

22          Reclamation and restoration required under section 16 of this Act must include  
23          grading to the natural contour, replacement of topsoil, the planting and establishment of  
24          appropriate plants and control of weeds resulting from condemnor's disturbance, and:

25          (1) In the case of a growing crop for which compensation has been paid, an  
26          establishment of ground cover, if requested by the condemnee; and

27          (2) In the case of grazing lands, the reseeding and establishment of native grasses  
28          and forbs previously growing on the disturbed land, unless the establishment of  
29          alternative beneficial plants are agreed to by the parties.

30          **Section 18. That chapter 21-35 be amended with a NEW SECTION:**

1           The responsibility of the condemnor to return the condemnee's property and  
2 improvements to the condition existing before condemnation as required by section 16 of  
3 this Act applies to:

- 4           (1) Damages caused by the condemnor, its successors or its agents during entry before  
5 condemnation as authorized by sections 4 and 5 of this Act;
- 6           (2) Damages caused by the condemnor, its successors or its agents during  
7 construction of the condemnation project;
- 8           (3) Damages caused by the condemnor, its successors or its agents after the  
9 construction and during the use of the property during the time of the condemnor's  
10 possession; and
- 11           (4) Damages caused by the condemnor, its successors or its agents in the removal of  
12 any facilities or improvements on the property at the termination of the authorized  
13 use.

14           The condemnor shall begin any required restoration and reclamation as soon as  
15 reasonably possible after completion of project construction, unless otherwise agreed to  
16 by the condemnor and the condemnee. Sections 16 and 17 of this Act and this section do  
17 not preclude the condemnor and the condemnee from agreeing to compensation in lieu of  
18 the reclamation and restoration requirements.

19   **Section 19. That chapter 21-35 be amended with a NEW SECTION:**

- 20           A condemnor shall complete its condemnation project within two years from:
- 21           (1) The date a voluntary agreement is finalized between the condemnor and the  
22 condemnee; or
- 23           (2) The date the court enters judgment under § 21-35-19.

24   **Section 20. That § 21-35-31 be REPEALED:**

25           ~~The provisions of this section only apply to a project which requires a siting permit~~  
26 ~~pursuant to chapter 49-41B. Each person vested with authority to take private property~~  
27 ~~for public use may cause an examination and survey to be made as necessary for its~~  
28 ~~proposed facilities. The person or the person's agents and officers may enter the private~~  
29 ~~property for the purpose of the examination and survey. Any person seeking to cause an~~  
30 ~~examination or survey, where permission for examination or survey has been denied,~~  
31 ~~shall:~~

- 32           ~~(1) Have filed a siting permit application with the Public Utilities Commission pursuant~~  
33 ~~to § 49-41B-11;~~

Underscores indicate new language.  
Overstrikes indicate deleted language.



1       ~~(2) — Give thirty days written notice, including the filing and expected dates of entry, to~~  
2           ~~the owner and any tenant in possession of the private property; and~~

3       ~~(3) — Make a payment to the owner, or provide sufficient security for the payment, for~~  
4           ~~any actual damage done to the property by the entry.~~

5           ~~This section does not apply to the state or its political subdivisions. This section is~~  
6       ~~in addition to and not in derogation of other existing law.~~