

State of South Dakota

EIGHTY-NINTH SESSION
LEGISLATIVE ASSEMBLY, 2014

165V0415

SENATE BILL NO. 169

Introduced by: Senators Brown, Bradford, Buhl O'Donnell, Ewing, Frerichs, Heineman (Phyllis), Holien, Jones (Chuck), Kirkeby, Krebs, Lucas, Maher, Omdahl, Otten (Ernie), Peters, Rampelberg, Rave, Rhoden, Sutton, Tidemann, Tieszen, Van Gerpen, Vehle, Welke, and White and Representatives Hawley, Anderson, Bartling, Cammack, Conzet, Cronin, Dryden, Duvall, Feickert, Gosch, Heinemann (Leslie), Hoffman, Hunhoff (Bernie), Killer, Kirschman, Kopp, May, Olson (Betty), Peterson, Rounds, Schaefer, Schrempp, Stalzer, Verchio, Werner, and Wink

1 FOR AN ACT ENTITLED, An Act to provide for access to and use of public waters on public
2 and private property and to protect private property rights for the citizens of South Dakota.

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

4 Section 1. Nothing in this Act limits or changes the authority granted in titles 1, 46, and 46A
5 to the Water Management Board or the Department of Environment and Natural Resources to
6 appropriate and regulate beneficial uses of water or to protect water quality as authorized in title
7 34A.

8 Section 2. Nothing in this Act limits or changes the private property provisions outlined in
9 Article VI, section 13 of the South Dakota Constitution.

10 Section 3. Nothing in this Act limits or changes the state's ownership of the beds of
11 navigable waters, whether meandered or nonmeandered, as provided by the Enabling Act of
12 February 22, 1889, chapter 180 therein, the South Dakota Constitution, or other laws. Nothing



1 in this Act conveys or transfers the state's property interest or the public trust interest in water
2 or any real property interest to any private party or waives or disclaims the state's ownership or
3 public trust interest in the waters of the state.

4 Section 4. Nothing in this Act limits or changes the authority granted in titles 41 and 42 to
5 the Game, Fish and Parks Commission or the Department of Game, Fish and Parks to regulate
6 fishing, hunting, trapping, boating, or other public use activities except as provided in section
7 21 of this Act.

8 Section 5. Terms used in this Act mean:

- 9 (1) "Commission," the Game, Fish and Parks Commission;
- 10 (2) "Department," the Department of Game, Fish and Parks;
- 11 (3) "Meandered lake," any natural water body for which a meander line survey was
12 included as part of the official survey conducted by the United States surveyor
13 general for the land on which the lake is situated;
- 14 (4) "Meander line," a survey line used by the United States surveyor general to define the
15 approximate margin of a natural body of water, primarily used for federal
16 government land sales and land grants. A meander line is not, in itself, a
17 topographical line or the boundary line for land ownership;
- 18 (5) "Nonmeandered lake," any natural water body which is not a meandered lake. The
19 term does not include a body of water created by a manmade impoundment
20 constructed on privately owned land.

21 Section 6. The waters of all meandered lakes and the bed of all meandered lakes within their
22 ordinary high water marks are dedicated to all lawful public recreational purposes subject to
23 sections 7 and 8 of this Act.

24 Section 7. That § 43-17-2 be amended to read as follows:

1 43-17-2. Unless the grant under which the land is held indicates a different intent, the owner
2 of the upland, if it borders upon a navigable lake or stream, takes to the edge of the lake or
3 stream at low water mark. All navigable rivers and all meandered lakes are public highways
4 within fifty feet landward from the water's nearest edge, provided that the outer boundary of
5 such public highway may not expand beyond the ordinary high water mark and may not contract
6 within the ordinary low water mark, and subject to §§ 43-17-29, 43-17-31, 43-17-32, and 43-17-
7 33. This section does not apply to nonmeandered lakes.

8 Section 8. That § 43-17-29 be amended to read as follows:

9 43-17-29. If any water level rises above the ordinary high water mark of a navigable
10 meandered lake, the right of the public to enjoyment of the waters of the entire lake may not be
11 limited, except that access to the lake shall be by public right-of-way or by permission of the
12 riparian landowner and is subject to §§ 43-17-2, 43-17-31, 43-17-32, and 43-17-33. This section
13 does not apply to nonmeandered lakes.

14 Section 9. If a nonmeandered lake has a surface area of forty acres or less, the waters may
15 be closed to public recreational use if marked in accordance with the provisions of section 11
16 of this Act.

17 Section 10. Except as otherwise provided in this Act, a person may use the waters of a
18 nonmeandered lake for any lawful recreational purpose if access to the waters can be obtained
19 by public roadway, public right-of-way, or other lawful means of access; and if recreational use
20 will not impair water rights as established in title 46; and if the nonmeandered lake:

- 21 (1) Is contiguous with and connected to a meandered body of water; or
- 22 (2) Either has a surface area larger than forty acres or includes surface area not marked
23 in accordance with section 11 of this Act.

24 Section 11. An owner or any other person legally in possession of privately owned real

1 property underlying the waters of a nonmeandered lake that may be lawfully closed to public
2 recreational use pursuant to section 9 or section 12 of this Act may close the property by
3 installing markers restricting the use of the waters of that portion of the lake overlying the
4 person's privately owned real property in accordance with rules promulgated pursuant to this
5 section. Any unauthorized recreational use of water overlying privately owned real property that
6 is properly marked pursuant to this section is a Class 2 misdemeanor. The commission shall
7 promulgate rules pursuant to chapter 1-26 to specify methods, criteria, and standards for
8 markings to restrict recreational use of water under this section and to establish procedures for
9 department review or removal of markers placed pursuant to this section.

10 Section 12. The commission shall promulgate rules pursuant to chapter 1-26 to establish a
11 process whereby a landowner may petition the commission to allow the landowner to post
12 certain portions of nonmeandered waters, or of meandered waters above the ordinary high water
13 mark, as closed or limited to public recreational access. The commission shall promulgate rules
14 pursuant to chapter 1-26 to establish a process whereby a South Dakota resident may petition
15 the commission to open certain closed portions of nonmeandered waters, or closed portions of
16 meandered waters above the ordinary high water mark. The commission shall consider criteria
17 related to the privacy, safety, and substantially affected financial interests of the owner of the
18 private land underlying public water, as well as the public trust in the water, including water
19 quality, water quantity, and the public's interest, including use of water for recreational
20 purposes, in determining whether access restriction is warranted. In considering criteria related
21 to safety and as the circumstances may warrant, the commission may in its discretion alter the
22 restriction established in § 41-9-1.4 on the discharge of firearms within six hundred sixty feet
23 of an occupied dwelling, church, schoolhouse, or livestock being held in a confined area
24 according to usual and customary animal husbandry practices.

1 Section 13. Any person who walks, wades, or stands on the bed of a nonmeandered lake, or
2 who traps or hunts, except for waterfowl, on the waters of a nonmeandered lake, without
3 permission from the landowner or any other person legally in possession of the privately owned
4 real property underlying the waters of the nonmeandered lake is guilty of a criminal trespass in
5 accordance with the applicable provisions of chapters 41-9 and 22-35, except for unarmed
6 retrieval of lawfully taken small game as authorized in § 41-9-8 and subject to the affirmative
7 defenses set forth in § 22-35-7.

8 However, incidental contact, including contact between the land and fishing tackle, or
9 similar contact associated with an otherwise lawful activity, is not a trespass. Contact with
10 private land in an area restricted pursuant to section 11 of this Act that results from shore fishing
11 activities conducted from a public roadway or right-of-way and that solely involves contact by
12 fishing tackle or similar items is not a trespass.

13 Section 14. No person may operate any motorized vehicle or any combustion engine on any
14 nonmeandered lake for or in connection with any recreational purpose within six hundred sixty
15 feet of an occupied dwelling, church, schoolhouse, or livestock being held in a confined area
16 according to usual and customary animal husbandry practices unless the person:

- 17 (1) Has obtained permission from the owner or any other person legally in possession of
18 the impacted property; or
- 19 (2) Is traveling directly to or from a ramp, dock, or other point of legal access to the
20 waters of the nonmeandered lake; or
- 21 (3) Is operating on the water of a nonmeandered lake adjacent to land that has been
22 subdivided and developed for lakeside dwellings.

23 A violation of this section is a Class 2 misdemeanor.

24 Section 15. Except as restricted in section 14 of this Act, transportation on the surface of any

1 meandered or nonmeandered lake related to the lawful use of the lake for recreational purposes
2 is authorized by this Act and is not a trespass.

3 Section 16. The liability of any landowner owning private land underlying a meandered or
4 nonmeandered lake is limited as provided for in §§ 20-9-12 to 20-9-18, inclusive. Any user of
5 a meandered or nonmeandered lake may be held liable for damage caused to private property
6 as provided for in title 21.

7 Section 17. No person may construct a fence or barrier for the purpose of restricting public
8 access to any lake that is open to public access. A violation of this section is a Class 2
9 misdemeanor.

10 Section 18. No person may cut, remove, or in any way tamper with any fence legally
11 constructed, located, and maintained on private land to gain access, unless the person has
12 obtained authorization from the owner of the fence to engage in the conduct described in this
13 section. A violation of this section is a Class 2 misdemeanor.

14 Section 19. That § 31-3-6.1 be amended to read as follows:

15 31-3-6.1. Notwithstanding any other provisions of this chapter, no county or township may
16 vacate a highway which provides access to public lands or waters open to the public for
17 recreational use.

18 Section 20. That § 31-18-3 be amended to read as follows:

19 31-18-3. The board of county commissioners may vacate or change the location of any
20 section-line highway under its jurisdiction and the board of supervisors of an organized
21 township may vacate or change the location of any section-line highway under its jurisdiction,
22 as provided in this title, but neither board may vacate or change any portion of the state trunk
23 highway system or any highway constructed by state or federal aid or any highway within the
24 limits of a municipal corporation. Also, a board of supervisors may not vacate or change any

1 portion of the county highway system, nor may a board of county commissioners vacate or
2 change any portion of the township road system. In addition, no board of county commissioners
3 or board of supervisors may vacate a section-line highway which provides access to public lands
4 or waters open to the public for recreational use. This section does not prohibit the closing or
5 abandonment of a section-line highway to vehicular traffic if the highway is unsafe for vehicular
6 traffic.

7 Section 21. That § 41-2-18 be amended to read as follows:

8 41-2-18. The Game, Fish and Parks Commission may ~~adopt~~ promulgate such rules as may
9 be necessary to implement the provisions of chapters 41-1 to 41-15, inclusive. The rules may
10 be ~~adopted~~ promulgated to regulate:

- 11 (1) The conservation, protection, importation, and propagation of wild animals and fish
12 except for any nondomestic animal which is regulated pursuant to § 40-3-26;
- 13 (2) The hunting, taking, killing, possession, sale, and transportation of all wild birds,
14 wild animals, and wild fish except for any nondomestic animal which is regulated
15 pursuant to § 40-3-26;
- 16 (3) The management of nongame, endangered, or threatened wildlife to ensure their
17 perpetuation as viable components of the ecosystem;
- 18 (4) The management, control of traffic, improvement and public use of all lands and
19 water owned, leased, or controlled by the state and Department of Game, Fish and
20 Parks designated as public shooting areas, game production areas, wildlife refuges,
21 lake and fishing access use areas and controlled hunting areas;
- 22 (5) The management, use, and improvement of all meandered lakes, sloughs, marshes,
23 and streams including such water bodies extending to and over dry or partially dry
24 meandered lakes, sloughs, marshes, and streams, including all lands to which the

1 state has acquired any right, title, or interest for the purpose of water conservation or
2 recreation as well as the waters of all nonmeandered lakes open to the public for
3 recreational use in accordance with this Act;

4 (6) The creation, modification, or vacation of state game refuges, state waterfowl
5 refuges, and state game bird refuges on all public land and on private land with the
6 written consent of the landowner;

7 (7) The management and improvement of all islands or accumulations of land formed
8 in the bed of a navigable stream or meandered lake on the Missouri River below the
9 Fort Randall Power Plant and Lake Francis Case;

10 (8) The appointment, management, bonding, and cancellation of licensing agents;

11 (9) The gathering, purchasing, distributing, and transferring of all wild animals and fish
12 for population management, stocking purposes, scientific study, and
13 intergovernmental trades;

14 (10) The form of and the manner and placement of any tags, coupons, or permits
15 necessary for the transportation of any wild animal or fish;

16 (11) The sale, breeding, raising, and transportation of any nondomestic animal which is
17 not regulated pursuant to § 40-3-26;

18 (12) The form, procedures for, and content of all license applications authorized under this
19 title;

20 (13) The form, procedures for, fee, and manner of validation, replacement, or cancellation
21 of all licenses authorized under this title that are not already established by statute;

22 (14) The devices, weapons, ammunition, traps, tackle, bait, lures, and equipment which
23 may be used to hunt, kill, capture, or locate any wild animal or fish if use of the
24 above items would adversely affect the health, safety, or welfare of people or wildlife

1 resources;

2 (15) The hunting, fishing, and trapping in the boundary waters of this state;

3 (16) The release, hunting, and taking of animals and birds on private shooting preserves;

4 (17) The establishment of, and the opening, closing, modifying, or curtailing of hunting,
5 fishing, and trapping seasons, if the seasons are not established by statute;

6 (18) The setting of fees for special licenses not covered by statute to manage specific and
7 limited wildlife populations;

8 (19) The number of persons who may cooperate as a group in the pursuit, hunting, taking,
9 or killing of game birds or game animals;

10 (20) The acquisition, possession, use, and disposition of raptors;

11 (21) The acquisition, possession, transportation, sale, and release of bait fish and frogs;

12 (22) The regulation of, and the acquisition, possession, transportation, sale, and release
13 of fish, from private fish hatcheries;

14 (23) The regulation of fish houses or other sheltering structures maintained upon the ice
15 of any public waters;

16 (24) The issuance and cancellation of taxidermist licenses and the acquisition, possession,
17 and disposition of specimens for taxidermy purposes;

18 (25) The operation of controlled hunting areas.

19 The rules shall be ~~adopted~~ promulgated pursuant to chapter 1-26 and shall be in accordance
20 with the provisions of this chapter.

21 A violation of the substantive provision of any rule authorized by this section is a Class 2
22 misdemeanor. If the same incident is a violation of statute and of the rules authorized by this
23 section only the penalty authorized for the violation of the statute may be imposed.

24 Section 22. If this Act, or any section hereof, is declared by an advisory opinion or

1 adjudication of the South Dakota Supreme Court to be a taking of private property requiring
2 compensation, that section is void and severed from this Act.

3 Section 23. The provisions of this Act are repealed on June 30, 2019.