State of South Dakota

NINETY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2018

933Z0045

HOUSE BILL NO. _____

Introduced by: _____

FOR AN ACT ENTITLED, An Act to provide for public recreational use of certain waters overlying public and private property and to declare an emergency.

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

Findings.

Section 1. That the code be amended by adding a NEW SECTION to read:

The Legislature finds:

(1) The South Dakota Supreme Court, in *Parks v. Cooper*, 2004 SD 27 and *Duerre v. Hepler*, 2017 SD 8, held that the Legislature has the obligation to determine the extent of public use of water overlying private property for recreational purposes; and

(2) The Legislature must balance the interests of recreational users and the rights of private property owners to provide a constitutionally sound and manageable basis for establishing public recreational use of water overlying private property in accordance with this Act.

Definitions.

Section 2. That the code be amended by adding a NEW SECTION to read:

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Insertions into existing statutes are indicated by underscores.
Deletions from existing statutes are indicated by ~~overstrikes~~.

Terms used in this Act mean:

(1) "Commission," the Game, Fish and Parks Commission;

(2) "Department," the Department of Game, Fish and Parks;

(3) "Meandered lake," any natural water body, except a river or stream, for which a meander line survey was included as part of the official survey conducted by the United States surveyor general for the land on which the lake is situated and the meander lines are shown on plats made by the United States General Land Office;

(4) "Nonmeandered lake," any natural lake that is not a meandered lake;

(5) "Recreational use," use for one or more of the following activities, except as otherwise limited by law: hunting, fishing, swimming, floating, boating, trapping, off-road driving, water sports, or snowmobiling.

Meandered Lakes.

Section 3. That the code be amended by adding a NEW SECTION to read:

The bed of each meandered lake within the lake's ordinary high water mark and the water of each meandered lake is open to recreational use.

Agreement.

Section 4. That the code be amended by adding a NEW SECTION to read:

The department, on behalf of and in the name of the state, may negotiate with each landowner to acquire, by gift, grant, devise, purchase, lease, or license, recreational use of all or any portion of any nonmeandered lake overlying private property. Any agreement reached pursuant to this section, or any failure to reach an agreement, does not constitute appealable final action of the department.

Permission.

Section 5. That the code be amended by adding a NEW SECTION to read:

Any person is entitled to recreational use of the portion of a nonmeandered lake that overlies private property if that person has permission from the owner of the private property.

Default Rule; Marking.

Section 6. That the code be amended by adding a NEW SECTION to read:

Any nonmeandered lake overlying private property is open to recreational use without permission of any owner of the private property underlying the nonmeandered lake unless the owner of the private property installs conspicuous markers, which may consist of signs or buoys, to identify the area of the nonmeandered lake that is not open to public recreational use without permission or agreement as provided under this Act.

Lakes.

Section 7. That the code be amended by adding a NEW SECTION to read:

Notwithstanding the provisions of this Act, any nonmeandered lake listed in section 8 of this Act is declared open for recreational use, based on the following conditions occurring prior to January 1, 2017:

(1) The open, obvious, and continuous recreational use by the public for a significant period; and

(2) The expenditure of public funds for the construction of one or more boat ramps.

Lakes.

Section 8. That the code be amended by adding a NEW SECTION to read:

The following nonmeandered lakes are declared open for recreational use pursuant to section 7 of this Act:

(1) Highway 81 East in Brookings County;

(2) Casey's Slough, Cottonwood GPA, Dry #1, Dry #2, Round, and Swan in Clark County;

(3) Deep and Goose in Codington County;

(4) East Krause, Lynn, Middle Lynn, and Reetz in Day County;

(5) North Scatterwood in Edmunds County;

(6) Three Buck in Hamlin County;

(7) Highway 81 West in Kingsbury County;

(8) Bullhead, Cattail-Kettle, and Opitz in Marshall County;

(9) Island South in McCook County;

(10) Keisz in McPherson County;

(11) Grass, Loss, Scott, and Twin in Minnehaha County;

(12) Twin in Sanborn County;

(13) Cottonwood and Mud in Spink County;

(14) Cottonwood in Sully County; and

(15) Dog Ear in Tripp County, South Dakota.

Marking Standards.

Section 9. That the code be amended by adding a NEW SECTION to read:

The commission shall promulgate rules, pursuant to chapter 1-26, to establish a process whereby an owner of private property underlying any nonmeandered lake listed in section 8 of this Act may petition the commission to allow the owner of private property to restrict

recreational use of the water overlying the owner's private property. The commission shall determine whether to grant, deny, or modify the petition. The commission shall consider the privacy, safety, and substantially affected financial interests of the owner of the private property underlying the water, as well as history of use, water quality, water quantity, and the public's interest in recreational use of the water.

Lease Renewal.

Section 10. That the code be amended by adding a NEW SECTION to read:

No lease or license entered into pursuant to section 4 of this Act may be for a term exceeding ten years.

Landowner Liability.

Section 11. That the code be amended by adding a NEW SECTION to read:

The liability of any owner of private property underlying a meandered or nonmeandered lake is limited as provided in §§ 20-9-12 to 20-9-18, inclusive.

Marker Standards.

Section 12. That the code be amended by adding a NEW SECTION to read:

The commission shall promulgate rules, pursuant to chapter 1-26, to specify standards for the markers described in section 6 of this Act after weighing the cost and burden of compliance by the owner of private property against the visibility of the markers to the public.

Technology; Public Notification.

Section 13. That the code be amended by adding a NEW SECTION to read:

The owner of private property shall notify the department, within a reasonable time frame, of any area of a nonmeandered lake marked by the owner of private property pursuant to section 6 of this Act. The department shall, within a reasonable time frame, identify the marked area and applicable restrictions in any map, guide, mobile application, or website maintained by the state to assist the public in identifying each public hunting or fishing area.

Means of Access.

Section 14. That the code be amended by adding a NEW SECTION to read:

Access to any nonmeandered lake for recreational use may only be by public roadway, public right-of-way, or other lawful means. Nothing in this Act creates a right of ingress or egress on private property to access a nonmeandered lake.

Bed and Frozen Surface Usage.

Section 15. That the code be amended by adding a NEW SECTION to read:

No person may walk, wade, stand, or operate a motor vehicle on the bed of a nonmeandered lake, or trap or hunt on the frozen surface above private land, without permission from the landowner or any other person legally in possession of the privately owned property underlying the waters of that portion of the nonmeandered lake.

Transportation Lane.

Section 16. That the code be amended by adding a NEW SECTION to read:

The commission shall promulgate rules, pursuant to chapter 1-26, to establish a process whereby a person may petition the commission to open a portion of the waters or ice of a nonmeandered lake marked pursuant to section 6 of this Act for the limited purpose of

transportation to a portion of the nonmeandered lake that is open for recreational use under the following conditions:

(1) The marked portion of the nonmeandered lake is directly between a point of legal public access and a portion of the nonmeandered lake open for recreational use; and

(2) There is no alternative legal public access or improved legal public access to the portion of the nonmeandered lake open for recreational use.

Transportation Lane Standards.

Section 17. That the code be amended by adding a NEW SECTION to read:

The commission shall set the size and location of the area of the marked portion of a nonmeandered lake opened for transportation pursuant to section 16 of this Act and set reasonable speed, wake, and other limitations to protect the privacy, safety, and substantially affected financial interests of the owner of private property underlying the marked portion of the nonmeandered lake.

Penalties.

Section 18. That the code be amended by adding a NEW SECTION to read:

Any person who enters or remains upon private property or waters overlying private property in violation of this Act is guilty of a criminal trespass in accordance with the applicable provisions of chapters 41-9 and 22-35, except for unarmed retrieval of lawfully taken small game as authorized in § 41-9-8 and subject to the affirmative defenses set forth in § 22-35-7.

Game, Fish and Parks Regulatory Authority.

Section 19. That § 41-2-18 be amended to read:

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

(1) The conservation, protection, importation, and propagation of wild animals and fish except for any nondomestic animal ~~which~~ that is regulated pursuant to § 40-3-26;

(2) The hunting, taking, killing, possession, sale, and transportation of all wild birds, wild animals, and wild fish except for any nondomestic animal which is regulated pursuant to § 40-3-26;

(3) The management of nongame, endangered, or threatened wildlife to ensure their perpetuation as viable components of the ecosystem;

(4) The management, control of traffic, improvement and public use of all lands and water owned, leased, or controlled by the state and Department of Game, Fish and Parks designated as public shooting areas, game production areas, wildlife refuges, lake and fishing access use areas and controlled hunting areas;

(5) The management, use, and improvement of all meandered and nonmeandered lakes, sloughs, marshes, and streams extending to and over dry or partially dry meandered lakes, sloughs, marshes, and streams, including all lands to which the state has acquired any right, title or interest for the purpose of water conservation or recreation;

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

(7) The management and improvement of all islands or accumulations of land formed in the bed of a navigable stream or meandered lake on the Missouri River below the

Fort Randall Power Plant and Lake Francis Case;

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

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

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

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

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

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

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

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

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

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

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

(19) The number of persons who may cooperate as a group in the pursuit, hunting, taking,

or killing of game birds or game animals;

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

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

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

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

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

(25) The operation of controlled hunting areas.

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

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

Section 20. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.