

State of South Dakota

SEVENTY-SEVENTH SESSION
LEGISLATIVE ASSEMBLY, 2002

169H0652

HOUSE BILL NO. 1279

Introduced by: Representatives Peterson (Bill), Broderick, Jaspers, Madsen, Michels, Olson (Mel), Richter, and Smidt and Senators Everist, Brown (Arnold), Daugaard, Hutmacher, McCracken, Olson (Ed), and Sutton (Dan)

1 FOR AN ACT ENTITLED, An Act to revise and supplement certain powers of the Board of
2 Water and Natural Resources and the South Dakota Conservancy District, to provide for the
3 establishment of a corporation by the South Dakota Conservancy District for the purpose of
4 acquiring, owning, leasing, subleasing and disposing of certain land, improvements and
5 capital equipment comprising all or a portion of a system or part of a system of waterworks,
6 sewage or waste disposal, and to establish or confirm the powers of municipalities and other
7 public entities in connection therewith.

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

9 Section 1. Terms used in this Act, unless the context otherwise clearly requires, mean:

- 10 (1) "Board," the Board of Water and Natural Resources, created by § 1-40-5;
- 11 (2) "Corporation," the special purpose body corporate and politic established by the
12 board by resolution as provided in section 3 of this Act;
- 13 (3) "District," the South Dakota Conservancy District, a governmental agency, body
14 politic and corporate organized and existing pursuant to chapter 46A-2;



- 1 (4) "Lease," when used with respect to utility property, any lease, sublease, lease-
2 purchase agreement, installment agreement, lease-back agreement or other contract,
3 agreement, instrument or arrangement pursuant to which any rights or property with
4 respect to utility property are transferred to or from one party to another party;
- 5 (5) "Permitted investments," any investment authorized by §§ 4-5-23 and 4-5-26 together
6 with (a) noncollateralized direct obligations or any other payment undertaking or
7 agreement of any bank or savings institution, insurance company or bank or insurance
8 holding company, whether organized under the laws of the United States of America,
9 any state or territory thereof, or the laws of any foreign nation, if such institution or
10 holding company is rated in the highest four classifications by at least one standard
11 domestic rating service and (b) any bonds, notes or other obligations of any state or
12 any agency, authority or other instrumentality of any state or political subdivision
13 thereof provided that such bond, notes or other obligations are rated in the four
14 highest classifications established by at least one standard domestic rating service;
- 15 (6) "Person," has the meaning given thereto in § 46A-2-4 and, for the purposes of this
16 Act, also expressly includes any grantor trust, business trust or other form of trust or
17 association;
- 18 (7) "Public entity," has the meaning given thereto in § 46A-2-4 and expressly includes the
19 district, the corporation and the state for purposes of this Act;
- 20 (8) "State," the State of South Dakota acting by and through the Department of
21 Environment and Natural Resources;
- 22 (9) "Support and operating agreement," any contract, agreement or other arrangement
23 pursuant to which a party agrees with another party to make certain utility property,
24 or rights with respect thereto or in connection therewith, available to such other party;

1 (10) "Utility," any system or part of a system of waterworks, or sewage and waste disposal
2 described in § 9-40-1; and

3 (11) "Utility property," any land, improvements or capital equipment comprising a utility,
4 including any extensions, additions, improvements or appurtenances to any such utility
5 or combination of systems and any interest in any of the foregoing.

6 Section 2. The state may acquire from any public entity or other person by purchase, lease
7 or any other form of contract, agreement, instrument or conveyance all or any portion of utility
8 property and may own, operate, use or otherwise contract with any public entity or other person
9 to own, operate, use or contract for use or operation of utility property, and the state may
10 dispose of all or any portion of utility property by sale, lease or any other form of contract,
11 instrument or conveyance to any public entity or other person, subject only to any applicable
12 terms and conditions set forth in section 2 to 7, inclusive, of this Act.

13 Any sale, acquisition, disposition, lease or other form, contract, instrument or conveyance
14 by the state authorized by this section shall be evidenced by an instrument or agreement in
15 writing signed on behalf of the state by the secretary of the Department of Environment and
16 Natural Resources. The secretary of the Department of Environment and Natural Resources shall
17 file a certified copy of any such instrument or agreement with the Legislature promptly upon
18 execution and delivery thereof. Upon the filing of a certified copy of any such instrument or
19 agreement by the secretary of the Department of Environment and Natural Resources, such sale,
20 acquisition, disposition or other contract shall, for all purposes, be valid, binding and enforceable
21 in accordance with the terms thereof and all deeds, bills of sale, leases and other instruments,
22 contracts and agreements related thereto, including any pledge, grant of security interest or other
23 encumbrance made by the state, the board, the corporation, the district or any public entity are
24 not subject to disavowal, disaffirmance, cancellation or avoidance by reason of insolvency of any

1 party, lack of consideration or any other fact, occurrence or rule of law.

2 Section 3. That chapter 46A-2 be amended by adding thereto a NEW SECTION to read as
3 follows:

4 The district shall have the power and authority to establish by resolution of the board a
5 special purpose corporation which shall be body corporate and politic and instrumentality of, but
6 separate and apart from, the State of South Dakota, the district and the board. Such corporation
7 shall be established for the express limited public purposes set forth in this Act and no part of the
8 net earnings of any such corporation shall inure to any private individual.

9 The corporation shall be governed by a board of trustees consisting of the members of the
10 board and two additional persons appointed by the Governor, which two additional members
11 shall be independent from the state. The resolution establishing the corporation shall serve as the
12 charter of the corporation and may be amended from time to time by resolution of the board, but
13 such resolution shall at all times provide that the power and the authority of the corporation shall
14 be subject to the terms, conditions and limitations of this Act and any applicable covenants or
15 agreements of the corporation in any lease, indenture or other instrument, contract or agreement
16 then in effect. The district and corporation shall each possess the power to enter into contracts
17 regarding any matter connected with any corporate purpose within the objects and purposes of
18 this Act.

19 The district and corporation may delegate by resolution to one or more officers or employees
20 of the Department of Environment and Natural Resources, the district or the corporation such
21 powers and duties as the district or corporation may deem proper.

22 The corporation shall have the power and authority to enter into leases of utility property,
23 support and operating agreements, and any and all contracts, agreements or other instruments
24 which the board of trustees of the corporation determines to be related or ancillary thereto, and

1 to secure payment or performance of obligations in connection therewith with any property,
2 funds or rights of the corporation.

3 The corporation may pledge as security for any arrangement entered into with respect to
4 utility property (i) any rights under any lease, support and operating agreement or other contract,
5 agreement or instrument involving or relating to utility property, (ii) any rights with respect to
6 investment of moneys, including contracts related or ancillary thereto, (iii) moneys or other funds
7 deposited with, payable to or held by or on behalf of the corporation and (iv) the proceeds of the
8 foregoing. Any such pledge made by the corporation shall be valid and binding from the time
9 such pledge is made. The property, revenues, moneys, other funds and rights so pledged and
10 thereafter held or received by or on behalf of the corporation shall immediately be subject to the
11 lien of such pledge without any physical delivery thereof or further act; and, subject only to the
12 provisions of prior pledges or agreements of the corporation, the lien of such pledge shall be
13 valid and binding as against the state and all parties having claims of any kind in tort, contract
14 or otherwise against the corporation irrespective of whether such parties have notice thereof. No
15 ordinance, resolution, trust agreement or other instrument by which such pledge is created need
16 be filed or recorded except in the records of the corporation.

17 In connection with any lease or other contract or arrangement relating to utility property, the
18 corporation may enter into one or more support and operating agreements or other arrangements
19 to provide additional security or liquidity. Such arrangements may include, without limitation,
20 bond insurance, letters of credit and lines of credit. The corporation may enter into contracts and
21 may agree to pay fees to persons providing such arrangements.

22 In connection with any sale, lease or other contract, agreement, instrument or arrangement
23 relating to utility property or the investment of funds of the corporation in connection therewith,
24 the corporation may enter into contracts that it determines necessary or appropriate to permit

1 it to manage payment or interest rate risk. These contracts may include, but are not limited to,
2 interest rate exchange agreements; contracts providing for payment or receipt of funds based on
3 levels of or changes in interest rates; contracts to exchange cash flows or series of payments; and
4 contracts incorporating interest rate caps, collars, floors, or locks.

5 The corporation shall not have the authority to file a voluntary petition under or be or
6 become a debtor or bankrupt under the federal bankruptcy code or any other federal or state
7 bankruptcy, insolvency or moratorium law or statute as may, from time to time, be in effect and
8 neither any public officer nor any organization, entity or other person shall authorize the
9 corporation to be or become a debtor or bankrupt under the federal bankruptcy code or any
10 other federal or state bankruptcy, insolvency or moratorium law or statute, as may, from time
11 to time be in effect.

12 The corporation shall not have the authority to guarantee the debts of another.

13 The corporation shall not be required to file any reports with the state other than those
14 required to be filed with the Legislature by authorities which issue bonds.

15 Except for debts incurred directly by the corporation, no lease or other contract, agreement,
16 instrument or obligation, issued, incurred or created by the State of South Dakota or any state
17 agency or instrumentality may be or become a lien, charge or liability against the corporation or
18 the property or funds of the corporation.

19 Section 4. That chapter 46A-2 be amended by adding thereto a NEW SECTION to read as
20 follows:

21 The purposes of the corporation established by the board pursuant to this Act are:

- 22 (1) To purchase, acquire, own, operate, contract with other parties to operate, pledge,
23 lease, sublease, encumber, sell, mortgage or otherwise transfer all right, title and
24 interest in and to utility property;

- 1 (2) To raise funds through the sale, lease, transfer, pledge, encumbrance, mortgage or
2 other conveyance of the rights or contract described above in clause (1) of this
3 section;
- 4 (3) To serve the Legislature by making reports concerning the foregoing;
- 5 (4) To sue and be sued and to prosecute and defend, at law or in equity, in any court
6 having jurisdiction of the subject matter and of the parties;
- 7 (5) To have and to use a corporate seal and to alter the same at pleasure;
- 8 (6) To maintain an office at such place or places as the board of trustees of the
9 corporation by resolution may designate;
- 10 (7) To receive and invest funds transferred to it by the district, the board, the state, any
11 public entity or other person;
- 12 (8) To invest any of its funds in permitted investments; and
- 13 (9) To do all things necessary and convenient to carry out the purposes of this chapter.

14 The corporation shall also be vested with the same power and authority, and shall be subject
15 to the same limitations and conditions, as are applicable to the district pursuant to the district and
16 the board pursuant to §§ 46A-2-6, 46A-2-7, 46A-2-8, 46A-2-9, 46A-2-10, 46A-2-12, 46A-2-13
17 and 46A-2-15, except (a) such power and authority shall be exercised with respect to and shall
18 be limited to the purposes of the corporation set forth in section 4 of this Act, (b) no lease or any
19 other contract or agreement created hereunder shall have a term in excess of one hundred years,
20 (c) the corporation shall not be authorized to engage in any unrelated activities, (d) such power
21 and authority shall be deemed to extend to all utility property as defined in this Act and (e) the
22 other limitations and conditions on the power and authority of the district and the board as
23 contained in chapter 46A-2, or incorporated therein or referred thereby, shall not be applicable
24 to the corporation.

1 Section 5. That chapter 46A-2 be amended by adding thereto a NEW SECTION to read as
2 follows:

3 No lease, support and operating agreement or other contract or agreement of the corporation
4 created under this Act may be or become a lien, charge or liability against the State of South
5 Dakota, the board or the district, nor against the property or funds of the State of South Dakota,
6 the board or the district within the meaning of the Constitution or statutes of South Dakota.

7 Section 6. That chapter 46A-2 be amended by adding thereto a NEW SECTION to read as
8 follows:

9 The State of South Dakota pledges to and agrees with any party to any sale, lease, or other
10 contract, agreement, instrument or other arrangement created under this Act that the state will
11 not limit or alter the rights and powers vested in the corporation, board, the district or other
12 public entity by this Act so as to impair the terms of any such contract made by the corporation,
13 board, the district or other public entity with such party or in any way impair the rights and
14 remedies of such party until such contract is satisfied. The corporation, board, district and any
15 public entity is each authorized to include their pledges and agreements of the state in any such
16 contract created under this Act.

17 Neither the State of South Dakota nor the district nor the board shall be liable on any
18 instrument of conveyance, lease or other contract or other agreement relating to utility property
19 created under this Act. None of such contracts shall be a debt of the state, the district or the
20 board, and this Act shall not be construed as a guarantee by the state, the district or the board
21 of the obligations of the corporation.

22 Section 7. That chapter 46A-2 be amended by adding thereto a NEW SECTION to read as
23 follows:

24 The corporation is hereby declared to be performing a public function on behalf of the state

1 and to be a public instrumentality of the state. The income of the district and the corporation, and
2 all utility property and any other property at any time owned by the district or the corporation,
3 shall be exempt from all taxation in the State of South Dakota. In addition, the corporation shall
4 be exempt from all filing, reporting and similar requirements otherwise applicable to nonprofit
5 and other corporations.

6 Section 8. That chapter 46A-2 be amended by adding thereto a NEW SECTION to read as
7 follows:

8 The corporation shall have the power, together with all powers incidental thereto or
9 necessary for the performance thereof, to employ attorneys, accountants, consultants and
10 financial experts, managers and such other employees and agents as may be necessary in its
11 judgment and to fix their compensation.

12 Section 9. That chapter 9-40 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 The power and authority conferred by the provisions of §§ 9-40-37, 9-40-38, 9-40-39 and
15 9-40-40 are hereby expressly extended to and made applicable to any acquisition, sale or lease
16 by any public entity with respect to any utility property to, from or with the state, the district,
17 the corporation or any other person except, for the purposes of this section, (1) any sale price
18 shall not be required to exceed the fair market value of the utility property being sold or
19 otherwise transferred, (2) only the net proceeds remaining with the public entity after any
20 deposit, payment or prepayment required pursuant to any lease, contract, agreement or other
21 arrangement entered into contemporaneously therewith and relating to or concerning such utility
22 property shall be subject to § 6-13-8, (3) all such utility property so sold, transferred and/or
23 subject to one or more leases, support and operating agreements, or other contract, agreement
24 or arrangement shall be deemed described in and to benefit by the provisions of § 9-40-39, (4)

1 no lease or other contract or agreement entered into by a public entity as provided herein shall
2 have a term in excess of one hundred years, and (5) to the extent that a public entity sells,
3 transfers or otherwise conveys utility property to the state, district or the corporation as provided
4 hereunder and enters into a lease, support and operating agreement or other contract, agreement
5 or other arrangement as described in § 9-40-38, as modified hereby, such public entity and such
6 sale, transfer, conveyance, lease, contract, agreement and other arrangement shall not be subject
7 to any restriction, condition or limitation or procedural requirement prescribed by any other law
8 or charter applicable to such public entity.

9 Section 10. The powers conferred by this Act are in addition to all other powers conferred
10 upon the board, the district, the corporation and any other public entity, and their exercise shall
11 be subject only to such restrictions as may be provided by the South Dakota Constitution and
12 are not subject to any restriction or procedural requirements prescribed by any other law or
13 charter.

14 Section 11. If any clause or other portion of this Act shall be held invalid, that decision shall
15 not affect the validity of the remaining portions of this Act. It is hereby declared that all such
16 remaining portions of this Act are severable, and that the Legislature would have enacted such
17 remaining portions if the portions that may be so held to be invalid had not been included in this
18 chapter.