

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**        **Amendment**      
**Correction**        **Substitute**   

**Date** February 17, 2015  
**Bill No:** HB 235s

**Sponsor:** Rep. Paul C. Bandy  
**Short Title:** Use of Public Water and Landowner Protection

**Agency Code:** Attorney General's Office - 305  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

**BILL SUMMARY**

Synopsis:

Substitute House Bill 235 (HB 235) amends NMSA 1978, Section 17-4-6, adding a new subsection C, which contains two additional caveats to the prohibition of Section 17-4-6(B), explicitly prohibiting walking or wading in a body of water on or crossing private property without written permission.

HB 235 also enacts a “new section of Chapter 17 NMSA 1978,” which (1) provides a new grant of authority to the State Game Commission (SGC), the power and duty to determine the navigability of bodies of water in New Mexico, which also determines who owns the streambed; (2) provides a new civil cause of action for injunctive relief, including attorney’s costs and fees; (3) establishes a presumption that water on private land is non-navigable; and (4) attempts to exempt the use of water by watercraft from the enactment.

**FISCAL IMPLICATIONS**

N/A

**SIGNIFICANT ISSUES**

Section 1(C), pg. 2, ln. 15-16: “Notwithstanding the provisions of Sections 72-4-15 and 72-4-17 or any other provisions of law...” The two specific sections mentioned govern the water rights, appropriations of water, and adjudications of those rights by the Office of the State Engineer (OSE). It is unclear exactly what effect this would have on the authority of the OSE at his time, but it appears that there could be some effect and this potentially undermines or erodes the grant of power provided to the OSE.

Section 2(A), pg. 3, ln. 6-8: “Determination of streambed ownership based on whether water on private property is navigable water...” The Desert Land Act of 1877, 43 U.S.C. §§ 321–339 (2014), severed the ownership of the water from ownership of the land over which it flowed before the creation of the state of New Mexico. As a result, a determination by the SGC of ownership of the streambed based on the navigability of the water would potentially effect a governmental taking, depending on the facts and circumstances. HB 235 does not provide for just compensation. The lack of just compensation for any taking that occurs as a result of such a determination could render the taking unconstitutional.

## **PERFORMANCE IMPLICATIONS**

N/A

## **ADMINISTRATIVE IMPLICATIONS**

N/A

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 235 relates to SB 225 introduced this session.

## **TECHNICAL ISSUES**

Section 2, pg. 2, ln. 25: “A new section of Chapter 17 NMSA 1978 is...,” suggest clarifying whether this is a new article to be included in Chapter 17 or a new section of Chapter 17, Article 1 (which deals with the creation and grant of authority to the SGC).

Section 2(F)(1), p. 5, ln. 5-6, suggest consider deleting this subsection regarding the definition for “department” because the term is not used in the bill as drafted. Note this would also require the renumbering of Subsection (F).

Section 2(F)(2), p. 5, ln. 13-15, suggest clarifying, as written it is unclear whether the bill intends that the request to leave by “the owner or a person authorized to act...” renders land “private property to which access is restricted” to all persons or solely to the person asked to leave the premises.

Section 2(F)(5), p. 5, ln. 23-24, suggest considering removing or clarifying the definition for “public water,” because this definition appears to refer only to unappropriated water. “Public water” can be a term of art used in water law generally, it unclear what impact this definition would have on the use of the term public water in reference to fully appropriated water basins.

## **OTHER SUBSTANTIVE ISSUES**

Section 2(A), pg. 3, ln. 20-22: It is unclear what the presumption (that water on private land is non-navigable) will do to access of state waters currently in use. It appears that the SGC would have to officially determine them to be navigable, and therefore, any current use of them would violate the law unless and until SGC makes such a determination, regardless of whether they are currently or have historically been used. This could potentially disrupt the activities of the state and create, at least an initially, a backlog of determination cases, which the SGC would be required to process.

Section 2(B), pg. 4, ln. 4-12: Causes of action and injunctions already exist for trespass. HB 235 allows for an additional and redundant measure, providing that a landowner could bring an action under both trespass and this new cause of action simultaneously, and thereby provides multiple punishments for unified conduct. As a result, any person in violation of this could be criminally liable for trespass, civilly liable for trespass, and civilly liable under Section 17-4-7, for the same activity. In addition, it does not appear to make enforcement no easier or more likely than those remedies currently available.

Section 2(E), pg. 5, ln. 1-3: This section admonishes the public to “remove any refuse or tangible personal property,” but provides no penalty, and appoints no agency or official to enforce the provision. As a result, it is unclear whether this provision allows for some type of penalty or whether it is superfluous.

#### **ALTERNATIVES**

N/A

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status Quo

#### **AMENDMENTS**

N/A