LFC Requester:	Jonas Armstrong

AGENCY BILL ANALYSIS
2015 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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 X **Amendment** ____
Correction ___ **Substitute** ____

Date January 30, 2015
Bill No: HB 235

Sponsor: Rep. Paul 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)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

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:

House Bill 235 (HB 235) would amend NMSA 1978, Section 17-4-7 (1967). That statute, *in its current form*, simply limits the tort liability to which a private landowner (including lessees and controllers of land) is exposed when that landowner has granted free public access to the landowner's privately held lands for the limited purposes of "hunting, fishing, trapping, camping, hiking, sightseeing, or any other recreational activity."

HB 235 substantially amends and augments Section 17-4-7 by (1) altering landowner liability regarding the public; (2) providing landowners with a new civil cause of action for injunctive relief, including attorney's costs and fees; (3) establishing that no implied public easement exists in the beds of public waters on private lands of the state; (4) granting the State Game Commission (SGC) new powers and authority to oversee the water of the state, including determining whether a body of water is "navigable" and allowing for administrative proceedings; and (5) establishing a presumption that water on private land is non-navigable.

FISCAL IMPLICATIONS

There are no fiscal implications for this office.

SIGNIFICANT ISSUES

HB 235 potentially eliminates any duty of care due to trespassers on any private land in New Mexico.

Currently, New Mexico rules governing the duty of care owed to a trespasser by a landowner can be found at Rules 13-1305 to -1307, NMRA (2014) (Uniform Jury Instructions). While the duty of care owed to a trespasser is minimal, Section (A),

p. 2, ln. 3-4, of HB 235 appears to eliminate even this minimal duty of care. Further, HB 235 could be read to authorize, or condone, landowners resorting to self-help to repel or punish trespassers (e.g. constructing booby traps and/or erecting other dangerous deterrents) on any private property throughout the state.

HB 235 may subject landowners to a greater duty of care and a higher level of liability.

Subsection (A), p. 2, ln. 19-21, of HB 235 strikes subsection (A)(4) from the currently codified Section 17-4-7; it also appears to alter the current duty of care a landowner owes, or the exposure to liability, or both. Under current law, the landowner owes a person on private land who has permission to engage in the listed activities no *greater* duty of care "than if permission had not be granted and the person or group were trespassers." By eliminating this subsection, HB 235 may impose on landowners a higher duty of care and greater potential liability with respect to licensees/invitees.

HB 235 vests the SGC with new authorities and power but does not amend 17-1-1 to -29, which governs the SGC.

Subsection (C), p. 3, ln. 14 to p. 4, ln. 7, augments the powers of the SGC. HB 235 provides that (1) the SGC shall be granted new authority to determine whether a body of water within the state is "navigable;" (2) the SGC may "adopt rules, regulations and procedures" to implement this new grant of power; and (3) the SGC will be required to establish a procedure for this determination, including (a) sua sponte determinations (b) petitions and hearing determinations, (c) and appeals to the SGC of any final determination.

There does not appear to be a clear purpose for HB 235's conferral of this authority to determine navigability on the SGC. As written, HB 235 makes no explicit differentiation between navigable and non-navigable waters when it establishes that only express easements would allow the public to access the waters of the state that exist on private lands—i.e. no implied public easement exists in the beds of the public waters of the state which are on private land. It appears that HB 235 would continue to allow access to waters that are navigable, but not to those that are non-navigable, but that distinction is not clearly delineated within the text of HB 235.

Section 17-1-1 to -29 NMSA 1978 could be read as an exclusive grant of power to the SGC, in which case HB 235 could be ineffective in its grant of power and authority to the SGC since the bill does not amend that statute. It is also worth noting that the Office of the State Engineer (OSE) is the state agency that is tasked with overseeing the waters of the state including appropriations for water rights, and the OSE might already possess much of the information that the SGC would need to make the determinations that HB 235 would require. It is unclear what impact this grant of power to the SGC would have on the operations of the OSE and its administration of water rights in the state.

HB 235 does not clearly define any right of appeal to the courts of New Mexico following the administrative appeal allowed from the SGC to the SGC regarding the determination of navigable waters.

> HB 235 provides for an appeal from the initial determination of navigability by the SGC to the SGC, which appears to essentially be a request to reconsider the judgment. HB 235 does not, however, provide for an appeal from the SGC to a judicial body of the state, which appears to implicate both due process rights and separation of powers issues. Section 39-3-1.1 NMSA 1978, appears to remedy this lack of explicit grant of right, providing an appeal to the district court from the final decision of an agency appeal. However, including language to that effect within HB 235 could reduce potential satellite litigation.

PERFORMANCE IMPLICATIONS

There are no performance implications for this office.

ADMINISTRATIVE IMPLICATIONS

There are no administrative implications for this office.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 235 duplicates Senate Bill 226 introduced this session.

TECHNICAL ISSUES

On p. 3, ln. 5-6, Subsection (C) states, "Notwithstanding the provisions of Sections 72-4-15 and 72-4-17 NMSA 1978 or any other provision of law…." It is unclear why the bill cites to Section 72-4-17, which deals with invoices being properly attached to shipments of game; suggest that this reference be clarified or in the alternative suggest citing to Sections 72-4-11 (providing for licensing of private lakes and parks) and/or 72-4-12 (providing the process for application of the license), which appears to cover the issue implicated in this section.

On p. 5, ln. 7-8, Subsection (G)(1), suggest that sponsors/Legislature consider deleting this subsection regarding the definition for "department" because the term is not used in the bill as drafted. Note this change would also require the renumbering of Subsection (G).

On p. 5, ln. 9-14, Subsection (G)(2), for clarity suggest changing "and" on ln. 10 to "or" which would provide for classification either by historical fact or present condition. As written the definition appears to require both historical fact and present condition, which could preclude classifying any body of water as navigable for which there is no historical record, including diversions or canals or waterways that were created after statehood.

On p. 5, ln. 15-23, Subsection (G)(3), suggest breaking subsection (G)(3)(c) into two parts and creating a new subsection, (d), to begin after "or" on ln. 21 so the bill would read: "(c) fenced or enclosed…; or (d) from which…." to more clearly delineate that (G)(3) allows for two possible ways that a property could meet the definition of a "private property to which access is restricted."

OTHER SUBSTANTIVE ISSUES

HB 235 presumes all public water on private land is non-navigable.

It is unclear how this presumption will affect access of state waters currently in use. It appears that the SGC would have to officially determine those waters to be navigable, and therefore, any use of those waters would violate the law unless and until SGC makes such a determination, regardless of whether they were currently or have been historically used. This could potentially disrupt the activities of individuals, businesses and public agencies in the state and create, at least an initially, a backlog of determination cases, which the SGC then would be required to process.

HB 235 creates a redundant cause of action.

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 Section 17-4-7(D) simultaneously, and thereby imposes multiple liabilities for the same underlying 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, all for the same acts.

The utility of HB 235 Subsection (F) is unclear.

Subsection (F) 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

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

None.