

LFC Requester:

Scott Sanchez

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO AgencyAnalysis.nmlegis.gov and email to billanalysis@dfa.nm.gov
(Analysis must be uploaded as a PDF)**

SECTION I: GENERAL INFORMATION

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

Date Prepared: January 30, 2025 *Check all that apply:*
Bill Number: SB 185 Original Correction
Amendment Substitute

Sponsor: James G. Townsend and Candy Spence Ezzell and Larry R. Scott and David M. Gallegos **Agency Name and Code Number:** Administrative Office of the District Attorneys - #264
Short Title: Unlawful Use of Underground water **Person Writing:** M. Anne Kelly
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	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

BILL SUMMARY

Synopsis:

This bill is new material entitled “Unlawful Use of Underground Water – Penalty”

Section 1(A) provides that

unlawful use of underground water consists of a person selling, trading, bartering or otherwise using or appropriating underground water requiring a permit pursuant to Chapter 72, Article 12 NMSA 1978;

- (1) for any use other than a use permitted by the state engineer; or
- (2) without a permit.

Subsection (B) provides that the crime is a fourth degree felony and that whoever commits the crime “shall” be assessed a \$1000 fine “per barrel or per forty-two gallons of water that is sold, traded, bartered or otherwise used or appropriated and shall be sentenced according to the provisions of Section 31-18-15 NMSA 1978.”

Subsection (C) provides that “the attorney general or a district attorney may bring an action in the name of the state to enforce this section.”

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

As a new crime, more resources for the prosecutor’s offices may be required. Training would also likely be necessary given the unique subject matter of the proposed crime.

SIGNIFICANT ISSUES

The crime is designated as a felony but contains no mens rea. That is, there is no requirement that the person know that they are using the water for a use other than that permitted by the state engineer or that they know it is done without a permit. As such, it appears to be a strict liability crime. Strict liability crimes are crimes “for which liability is imposed irrespective of the defendant’s knowledge or intentions, that is, crimes without a mens rea requirement.” Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401, 417 (1993); see also *State v. Harrison*, 1992-NMCA-139, ¶ 18 (“A strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent.”). “Strict liability crimes generally arise from the legislative exercise of police powers to achieve

some societal good, with relatively slight penalties.” *State v. Rael*, 2024-NMSC-010, ¶ 43, 548 P.3d 66. In *Rael*, the Supreme Court presumed a mens rea for the manufacturing portion of the sexual exploitation of children statute and construed the statute to supply the mens rea. *Id.* ¶¶ 44-45.

This crime is designated as a fourth degree felony which carries a potential prison sentence of 18 months and contains a specific provision for a compulsory fine. It is possible that the courts will similarly decline to read the statute as one of strict liability, and construe the crime to require an intent element. *See e.g. State v. Ramos*, 2013-NMSC-031, ¶ 21 (holding that although not expressly stated in the statute, the crime of violating a protection order requires proof that the defendant knew of the order and of the protected person’s presence within the protected zone); *State v. Nozie*, 2009-NMSC-018, ¶ 30 (knowledge that the victim is a police officer is an essential element of aggravated battery on an officer, although not expressly stated in the statute). *State v. Valino*, 2012-NMCA-105, ¶¶ 15, 17 (same for battery on a health care worker).

The penalties section provides that an offender “shall” be assessed a specific fine, directly related to the amount of water that is appropriated and then provides that the offender “shall be sentenced according to the provisions of Section 31-18-15.” As Section 31-18-15 does not provide for this specific fine structure and instead provides for a fine not to exceed \$5000 (*see* Section 31-18-15(E)(11)), it might be preferable to delete the reference to Section 31-18-15 or specify that the offender shall “otherwise” be sentenced under that statute.

PERFORMANCE IMPLICATIONS

n/a

ADMINISTRATIVE IMPLICATIONS

n/a

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

n/a

OTHER SUBSTANTIVE ISSUES

n/a

ALTERNATIVES

n/a

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

n/a