

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:** 1/31/2025

Check all that apply:

Bill Number: SB 185Original Correction Amendment Substitute **Sponsor:** Sens. James G. Townsend,
Candy Spence Ezzell, Larry R.
Scott, and David M. Gallegos**Agency Name
and Code**Office of the State Engineer
550**Number:****Person Writing****Analysis:**Nat Chakeres**Short
Title:** Unlawful Use of Underground
Water**Email** Nathaniel.chakeres@o**Phone:** 505-231-4459 : se.nm.gov**SECTION II: FISCAL IMPACT****APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
None	None	None	None

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
None	None	None	None	None

(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		\$150,000	\$200,000	\$350,000	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

This bill would create the crime of unlawful use of underground water for any person selling, trading, bartering or otherwise using or appropriating underground water requiring a permit pursuant to Chapter 72, Article 12 NMSA 178, for any use other than a use permitted by the state engineer or without a permit.

The bill would make the crime a fourth-degree felony with a fine of one thousand dollars (\$1,000) per barrel or per forty-two gallons of water that is sold, traded, bartered or otherwise used or appropriated, and sentence would be according to the provisions of Section 31-18-15 NMSA 1978.

The bill would empower the attorney general and district attorney to bring an action in the name of the state to enforce the law.

FISCAL IMPLICATIONS

This bill would permit district attorneys and the attorney general to commence felony prosecutions under the changed law. Due to the difficulty of obtaining criminal convictions vis a vis the significant procedural and evidentiary protections provided to criminal defendants, state prosecutors would need OSE agency experts to help prove up their cases. This could necessitate an additional OSE FTE to coordinate this process and possibly additional money to account for staff time spent assisting prosecutions. The OSE estimates that the new FTE, with indirect costs and benefits, would cost the agency \$150,000 per year.

This analysis assumes that all fines collected as a result of successful prosecutions under this law will be applied to the state's general fund.

In addition, if OSE staff need to cooperate in the prosecution of these crimes, the OSE could be considered a law enforcement agency for the purposes of the Tort Claims Act, and the OSE could be subject to more civil rights and tort claims suits than it currently faces. While it is impossible to quantify the fiscal implications, we estimate an additional cost to the agency of \$50,000 in litigation and risk management costs beginning in FY27.

SIGNIFICANT ISSUES

Currently, OSE does not function as a law enforcement agency. If this were to change as a result of the passage of this bill, OSE would be exposed to liability under the Tort Claims Act. In addition, the relationship between OSE watermasters and water users would be changed if the users come to view OSE staff as law enforcement agents. It might be more difficult for OSE water

masters to obtain information about water use from water users if the water users were worried that the information could be used against them in a criminal prosecution.

This is not to say, however, that water theft is not a pressing issue in New Mexico. The OSE has received increased reports of illegal water use, particularly for oil & gas and cannabis operations. OSE diligently investigates and pursues these reports, but existing remedies are often inadequate. The OSE can require the double repayment of overdiverted water, but that is only effective to deter water use by users with valid water rights – it is an ineffective remedy for those who steal water and have no water rights at all. The OSE can also levy civil penalties, but those are limited to \$100 per day, and they do not begin to run until the conclusion of an administrative hearing process. Therefore, while the OSE has significant concerns, outlined above, about the use of felony prosecutions to deter water theft, it agrees that existing law has gaps in this area. Senate Bill 210 would increase the maximum penalties for illegal water use. The OSE believes that increasing maximum penalties is a more appropriate method of addressing the problem of illegal water use.

PERFORMANCE IMPLICATIONS

None

ADMINISTRATIVE IMPLICATIONS

None

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 210 also addresses the problem of illegal water use by increasing the maximum penalties for illegal water use.

TECHNICAL ISSUES

Section 72-8-4 already provides that the “unauthorized use of water to which another person is entitled, or the willful waste of surface or underground water to the detriment of another or the public, [is] a misdemeanor.” This misdemeanor provision dates to 1907 and is rarely utilized today. However, if this bill were enacted, there would be difficult interpretive questions involving whether someone’s illegal water use were to fall under this misdemeanor provision or the new felony provision.

OTHER SUBSTANTIVE ISSUES

None

ALTERNATIVES

Senate Bill 210 would increase the maximum civil penalties for water law violations. It would increase the deterrent effect of

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

OSE will continue to deal with overdiversions and illegal diversions of water under existing laws.

AMENDMENTS

None offered