

FISCAL IMPLICATIONS

No fiscal impact. DGF analysis states the agency would be able to carry out the administrative actions needed to comply with this section of law including the development of prospective rules, regulations and procedures for Commission consideration in implementing the provisions of this bill.

SIGNIFICANT ISSUES

Although statute and DGF rules prohibit fishing *on private property* without the landowner's written permission when the land is properly posted with signs, a 2014 attorney general opinion stated that existing laws and regulations do not directly address the question of the public's right to fish *in* streams crossing private land.

The opinion relied on the fact that New Mexico law declares that unappropriated water in natural streams belongs to the public and a New Supreme Court ruling that owners of land bordering public waters have no right to exclude the public from recreating therein. *State ex rel. State Game Commission v. Red River Valley Company*. That ruling was in regards to fishing from a boat on Conchas Lake whereas the attorney general opinion specifically addressed stream fishing where it is "likely that a person fishing in the stream would walk in the stream rather than float on it." However, the opinion reasoned that the depth of the water was not material to the court's ruling to protect a person's right to use public waters that flow on private land for fishing and other recreational purposes. According to the attorney general opinion, this is in line with rulings by the state supreme courts in Utah and Wyoming.

While sportsmen supported the opinion allowing individuals to wade through and fish in water flowing through private land, livestock and hunting and fishing outfitter organizations and some landowners claimed it limited private property owners' right to benefit from investments made to improve riparian habitat and fishing opportunities.

This bill attempts to clarify this issue by prohibiting public access to private property by walking or wading through certain waters without landowner consent. Current statute provides that it is a misdemeanor for any person to enter private property where a landowner has posted notice to not hunt or fish. It is unclear if the language in this bill extends the existing prohibition or simply restates it. By providing that a person may not "walk or wade *onto* private property" the bill does not seem to address public access to water flowing through private property by wading through the water itself.

Moreover, the bill's language is vague and will likely lead to litigation over which waters are non-navigable. Navigability is a legal issue used in defining both public access to waters and the jurisdictional extent of federal agencies, including the Army Corps of Engineers and the Environmental Protection Agency, which has been extensively litigated. The landmark *Daniel Ball* ruling by the United States Supreme Court provided that a river is navigable in law if it is navigable in fact and that courts should consider a river's capability of being used for trade and travel. Under this test, and criteria stemming from it in later decisions, federal courts have held that bodies of water much smaller than lakes and rivers, including shallow streams only traversable by canoe, can be "navigable" for purposes of federal regulatory authority.

While the test of navigability is the same for assessing questions of title of water beds, the U.S.

Supreme Court has noted that it is not applied in the same way in these cases and those regarding federal regulatory jurisdiction. In title cases, courts are to consider rivers on a segment-by-segment basis to assess navigability as portages may defeat navigability for title purposes. Still, some nonnavigable segments may be so minimal that they merit treatment as part of a navigable segment for title purposes.

State laws determine ownership of waters that are not navigable under federal law and what rights the public has to use those waters for recreational purposes. These laws differ among the states with some allowing riparian landowners exclusive rights to use such waters and others extending public access to small streams regardless of who owns the streambed.

DUPLICATION

The Senate Judiciary Committee Substitute for Senate Bill 226 duplicates HB 235/HAWCS/HJCS/HFIS, but does not include the House floor amendment.

JA/aml