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FISCAL IMPACT REPORT

SPONSOR Cook ORIGINAL DATE 03/03/15
 LAST UPDATED 03/20/15 HB 560/ aHFL#1

SHORT TITLE Forfeiture Procedures & Reporting SB _____

ANALYST Cerny

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
	(Indeterminate but Substantial)	(Indeterminate but Substantial)	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate but Substantial	Indeterminate but Substantial		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (AGO)
 Public Defender Department (PDD)
 Administrative Office of the Courts (AOC)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of House Floor Amendment:

The House floor amends Section 9 of HB 560 to clarify the references to pertinent statute in Subsection D, and Subsection G.

Synopsis of Bill

House Bill 560 rewrites and adds new sections to the New Mexico Forfeiture Act (the Act),

Sections 31-27-1-8 NMSA 1978. HB 560 amends and revises the forfeiture procedures when the State seeks to administer pecuniary punishment on a person convicted of a crime in instances where the State can also prove that property was used in or acquired from criminal activity.

HB 560 revises many subsections for clarity and additionally:

- Provides greater details as to the Act’s purpose, including protection against the wrongful seizure of property;
- Creates definitions, as used in the Act, for “abandoned property,” “actual knowledge,” “contraband,” “conveyance,” and “instrumentality,” and amends the definition of “property subject to forfeiture.”
- Provides language to clarify when property becomes subject to forfeiture;
- Provides for replevin hearings (hearings to recover property);
- Adds requirement that forfeiture hearings are to take place post-conviction (though property may be subject to seizure—but not forfeiture—prior to conviction where procedures in Act are followed);
- Provides factors of consideration for courts when determining whether extent of forfeiture is constitutional;
- Sets forth a specific procedure for innocent owners to pursue retrieval of property but places burden on the alleged innocent owner;
- Provides that proceeds from the sale of forfeited property received by the state from another jurisdiction shall be deposited in to the general fund;
- Provides that a law enforcement agency shall not retain forfeited or abandoned property;
- Provides circumstances under which a law enforcement agency shall and shall not transfer seized property to the federal government;
- Provides a procedure and requirement for law enforcement to record property seized;
- Provides for penalties of second and third degree felonies for any racketeering activity related to forfeited property, as well as forfeiture of the property;

HB 560 also makes conforming amendments related to the law governing permitting requirements for excavation of archaeological sites and for unmarked burials (Section 18-6-11-14 -15 NMSA 1978).

Further, it makes conforming amendments to the criminal statutes governing unauthorized recordings (Section 30-16B-8-16 NMSA 1978), controlled substances (Section 30-31-34, 17-18 NMSA 1978), imitation controlled substances (Section 30-31A-9-19 NMSA 1978) and

racketeering (Section 30-42-4-20 NMSA 1978).

FISCAL IMPLICATIONS

HB 560 carries no appropriation.

DPS analysis makes a strong case that the revenue loss due to HB 560 would be substantial for law enforcement agencies around the state:

There will be an undetermined but highly significant fiscal impact not only to DPS but law enforcement statewide. In order to maintain the current level of law enforcement services, as it pertains to narcotics/criminal investigations being conducted statewide, the state general fund would be impacted. The bill would completely eliminate asset forfeiture revenue that is critical to funding the DPS law enforcement investigations and operations.

In addition it would impose unfunded expenses relating to the sale of statewide assets for all law enforcement agencies and the development and maintenance of a website application.

Creation of the web based application and secure website would require one (1) DPS ITD developer and one (1) DPS web developer 90 days to create the application and website. Cost for required server, storage and database software would be approximately \$10K for annual maintenance.

PDD analysis concludes there would be no fiscal implications for PDD immediately but may in the longer term, taken with other proposed criminal legislation:

However, while it is likely that the PDD would be able to absorb any additional workload under the proposed law, any increase in the number of prosecutions/forfeiture proceedings brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

AOC analysis states:

The increased protections and procedures offered to those whose property been seized, whether a petition to determine forfeiture constitutionality, proceedings to determine when a person is an innocent owner, the issuance of ex parte preliminary orders to seize property subject to forfeiture, or motions to the court to issue writs of replevin will necessitate additional judicial resources to handle these court proceedings.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

AGO analysis similarly states that HB 560 may have fiscal implications for the AGO which investigates and prosecutes crimes implicating the Forfeiture Act.

SIGNIFICANT ISSUES

Law dictionaries define forfeiture as "loss of some right or property as a penalty for some illegal act," and its role as a tool in the war on drugs is clear: to hit drug dealers where it hurts most in the wallet. The forfeiture laws allow the government to seize property from people it believes to be involved in drug-related activity, and then to use that revenue to bolster the efforts of law enforcement. The concept is simple. If you use your car, plane or boat to transport drugs, you will lose your car, plane or boat. If your cash was acquired through illegal drug sale, you will lose that cash and anything bought with it.

This bill, as proposed, will result in several significant changes for law enforcement. DPS analysis contends that these could ultimately affect the ability of law enforcement to conduct investigations, as well as the timeliness and quality of said investigations:

The practice of asset sharing and converting the proceeds of forfeited property to law enforcement use has been a long standing, nationally accepted practice, and permitted by federal law, for decades. Despite the recent national controversy, between the years of 1984 and 2009, over \$4.5 billion in forfeited assets has been shared across the nation with over 8,000 law enforcement agencies. This is a significant amount of funding.

This bill challenges this long standing basic principle of asset sharing and forfeiture by/with law enforcement. Without the ability to utilize these funds for law enforcement purposes, the amount of funding out of the NM general fund, required to adequately fund public safety agencies, to include DPS, throughout NM will need to be greatly increased. This would have a negative fiscal impact to the state's general fund as well as the operating budgets of each NM county and municipality.

DPS will no longer be permitted to deposit abandoned currency or the proceeds from the sale of abandoned property into the DPS budget [Section 10]. This will have a significant effect on DPS's ability to purchase ancillary equipment/resources throughout the year. Many times, investigations escalate quickly, become complex, or are otherwise unique in nature which require the immediate purchase of additional equipment/resources. These funds allow for DPS to respond quickly in acquiring the needed resources to allow for a continued and uninterrupted investigation which in turn has a direct impact on the public safety of NM citizens.

This bill would prevent DPS from converting forfeited and abandoned property, by court order, to its use for law enforcement practices. Eliminating the ability for DPS to convert certain property, via court order, to use by law enforcement personnel would have a direct impact on the ability to conduct certain investigations as well as the quality of those investigations.

As it pertains to covert investigations, the criminal element is not restricted by any limitations on the type of property, equipment or resources they can use to facilitate their crimes. Often some of this property/equipment/ or resources are custom made, ordered, or even acquired through illegal means. In order to further covert criminal investigations, it is sometimes beneficial for law enforcement to obtain/acquire and utilize property during the course of these investigations. Prohibiting law enforcement from continuing

this practice could possibly limit the scope/nature of criminal investigations thereby having a negative impact on public safety.

Additionally, this bill would no longer allow for the proceeds from the public sale of forfeited property to be retained by DPS. This will have a significant fiscal impact on DPS, as well as law enforcement agencies across the state. Currently, DPS converts these funds to the departmental budget as asset/forfeiture funds. These funds are then used to purchase equipment/training and additional resources throughout the year. DPS also utilizes these funds to purchase evidence and intelligence through the use of confidential funds.

If this financial resource is removed, DPS will have to request additional funding through the legislative body for equipment, resources and training. DPS has not done so in the past, despite having the need for these additional resources annually, because of the availability and use of these funds. The removal of these fiscal resources for DPS will undoubtedly result in less training, less resources, less equipment and a reduction in criminal investigations all which will have a direct and immediate impact on public safety.

DPS analysis also advises that narcotics investigations, as well as local government budgets, may be severely impacted if HB 560 is enacted:

DPS is currently an active initiative member of the New Mexico High Intensity Drug Trafficking Area (HIDTA). The HIDTA program is a federally funded anti-drug program through the Office of National Drug Control Policy. This program allows initiative members to request funding for the purposes of conducting/supporting investigations into both street level narcotics traffickers and drug trafficking organizations. The NM HIDTA initiatives, to include DPS, have a base line HIDTA budget. One of the terms used in HIDTA is program income. Program income is funded through asset/forfeiture funds. These funds are factored into the budgeting decision.

With the lack of program income, the initiatives (which make up state/local and federal drug task forces across these 16 NM counties) would be required to make significant changes to their current budget requests and line items to make up for these potential losses. Furthermore, because NM HIDTA policy allows narcotics operations to cross into non-HIDTA designated counties, provided a nexus exists, current narcotics operations being conducted in non-HIDTA designated counties will also be impacted. This will result in a negative impact to all of New Mexico's 33 counties, whether they are designated as a HIDTA county or not.

From a drug task force perspective, one of the greatest incentives for smaller, rural and local agencies to provide participation to the task force is the ability to participate in asset sharing. The federal asset forfeiture program was conceived on the fundamental belief and idea that equitable sharing would enhance the law enforcement objective by encouraging cooperation and the sharing of intelligence amongst federal, state and local law enforcement.

This bill directly jeopardizes the most basic and fundamental key to successful narcotics investigations which is the need for interagency cooperation and intelligence sharing.

Because NM is a rural state, many local agencies lack the financial ability to support narcotics and complex investigations for their own as well as neighboring communities. The ability to participate and enter into asset sharing agreements with other agencies not only provides an incentive, it provides the fiscal ability for this interagency cooperation to occur. The enactment of this bill would remove this incentive and fiscal resource for many of NM's rural communities to participate in investigations and intelligence sharing. This in turn will have an immediate and direct impact to public safety across the entire state of NM.

AGO analysis of the bill states the following are significant issues:

The bill does not contemplate the various ways in which criminal actions may be initiated, i.e., by complaint, indictment or information (See proposed Section 31-27-5(A).

The bill does not appear to deal with forfeiture actions arising out of misdemeanor offenses because all provisions relate to actions being brought in district court.

The bill also does not anticipate that criminal charges can be resolved in ways that do not result in a conviction, e.g., conditional discharge.

By providing that forfeiture proceedings will follow trial, the bill does not contemplate resolution of cases other than by trial; it is unclear how persons other than the criminal defendant will have notice regarding the forfeiture action where the forfeiture action follows immediately after trial.

The bill is not clear whether all forfeiture proceedings are subject to the rules of criminal procedure or the rules of civil procedure.

The consequences of removing the provision regarding seizures incident to "an inspection conducted pursuant to an administrative inspection warrant" is unclear. (See proposed language of Section 31-27-4E-1.)

PERFORMANCE IMPLICATIONS

DPS would need to create a web-based seizure and forfeiture website application and database hosted on a secure DPS website. Access would be provided to each law enforcement agency in order for them to enter detailed seizure and forfeiture data. The application would compile an aggregate annual report and publish it on the same DPS seizure and forfeiture website.

AGO analysis states that continuation of criminal proceedings so that the jury can consider forfeiture issues will complicate and lengthen trial procedures and may require additional evidentiary proceedings apart from resolution of criminal action.

The bill does not amend the role of the public defender, which would remain the same with respect to forfeiture, as defined in subsection 31-27-6-C3: "if the criminal defendant in the related criminal matter is represented by the public defender department, the chief public defender or the district public defender *may* authorize department representation of the defendant in the forfeiture proceeding." PDD analysis states: "While possible that PDD will elect to send attorneys to represent affected persons in hearings that would now follow convictions, PDD

would retain discretion as to its representation and, as a result would likely be able to absorb any additional workload.”

TECHNICAL ISSUES

It appears that subsection 31-27-7(B) has neglected to include the language “deposited in the general fund” at the end of the final sentence in that subsection (as proposed for amendment), thereby leaving the sentence incomplete.

Page 25, line 2: uses the term “*nolle prosequi*” rather than the correct term “*nolle prosequi*.”

The bill allows for publication on “the sunshine portal” but that term is not defined. Similarly, the bill does not define “forfeiture” or “seizure” (See *State v. Benally*, No. 31, 972, NM Ct. App. Jan. 29, 2015).

ALTERNATIVES

Current practice could remain the same. DPS could develop internal policies to address forfeiture procedures.

The bill could be amended to allow for a percentage of proceeds obtained through the sale of forfeited property to be retained by the seizing law enforcement agency, to be utilized for law enforcement purposes.

AMENDMENTS

DPS feels that the significant new language in Section 13A added to the Forfeiture Act that limits transfer of seized property to a federal law enforcement authority or other agency is problematic for them with regard to narcotics investigations, which are regularly conducted in cooperation with federal agencies and turned over to them. Many factors aside from forfeiture considerations figure into a decision to turn over an investigation to a federal partner, who may substantially more in the way of resources than the state.

By limiting consideration to only those situations in which the value of the seized property must exceed \$50.0 thousand in value (excluding contraband) *AND* the law enforcement agency must determine that the criminal conduct that gave rise to the seizure is *interstate* in nature and sufficiently complex to justify transfer of the property, many cases that require federal assistance will be hampered. Also, the value of seized property is not immediately apparent and may increase as a federal investigation moves forward, resulting in more forfeiture dollars returning to the state. Therefore, DPS recommends deletion of these requirements or insertion of the word “or” instead of “and” between subsections 1 and 2 and deletion of the word “interstate.”

The thirty-day timetable contained in amended Section 31-27-5 may be unworkable, as seizure of property and filing of a related criminal indictment rarely occur at the same time, especially where cases are particularly complicated and may require clarification. (AGO analysis points to *State v. Norman Benally*, No. 31, 972, N.M. Ct. App. Jan. 29, 2015). Therefore it is suggested that, on p. 10, line 21, the words “whichever is later,” be inserted after the word “indictment” and before “the.”

AGO suggests that consideration should be given to including a provision for a reporting requirement to the AGO, e.g., a new section to be contained in section 11 of the bill.

CAC/aml/je