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## FISCAL IMPACT REPORT

SPONSOR: Thompson DATE TYPED: 01/25/01 HB 18  
 SHORT TITLE: Forfeiture Act SB \_\_\_\_\_  
 ANALYST: Rael

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
See Narrative				Recurring	GF/OSF

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB 314

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY01	FY02			
See Narrative			Recurring	General Fund
See Narrative			Recurring	Game Protection Fund
		\$ 8,000.0	Recurring	Federal Funds

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

Public Defender (PD)  
 Administrative Office of the Courts (AOC)  
 Department of Public Safety (DPS)  
 Department of Game and Fish (DGF)  
 Attorney General (AG)  
 Administrative Office of DAs (DA)  
 Crime Victims Reparation Commission  
State v. Nunez, 2000-NMSC-13

No Response Received

Taxation and Revenue Department (TRD)  
Department of Finance and Administration (DFA)

**SUMMARY**

Synopsis of Bill

Sec. 1. and 2. This bill provides uniform standards and procedures for the seizure and forfeiture of property used in the commission of a crime.

Sec. 3. The definition section contains definition of conviction, crime, law enforcement officer, owner and property. A "crime" is defined as an offense punishable by imprisonment for one year or more or a violation of laws or regulations regarding hunting, fishing or gambling.

Sec. 4. A judgment for forfeiture may be entered only upon conviction of the property's owner and clear and convincing evidence that the property was used or intended for use in the crime. A forfeiture proceeding may begin prior to the conclusion of the criminal prosecution. The value of the property forfeited shall not unreasonably exceed the pecuniary gain derived by the crime, the pecuniary loss caused by the crime or the value of the convicted owners's interest in the property.

Sec. 5. Property may be seized upon an order issued by the district court having jurisdiction after finding there is a substantial probability the state will prevail on the issue of forfeiture and a concern the property will be removed if not seized and seizing the property outweighs the hardship to the party of interest. Seizure without a court order can take place if it is incident to an arrest, the property was subject to a prior judgment, there is probable cause to believe the property could be dangerous, and there is probable cause to believe the property is forfeitable. The seizure of a residence or business shall occur only after a pre-seizure hearing. The owner shall be given a receipt.

Sec. 6. All forfeiture proceedings shall be brought in the name of the state and in the county in which the property was seized or, in the case of a pre-seizure hearing on seizure of a residence or business, in the county where the residence or primary office of the business is located.

A forfeiture notice is sent within 20 days of the seizure of assets. The notice is personally served to the person from whom the property was seized and each owner and secured interest holder. If personal service is not possible, notice is by publication. Any claimant has 60 days to respond. Within 20 days of receipt by a law enforcement agency of any claim to seize property, a complaint seeking forfeiture shall be filed in district court. If the value of seized property exceeds \$10,000, the claimant is entitled to a jury trial. The judge has discretion to appoint an attorney for indigent owners of seized property. Compensation for appointed counsel shall be paid by the state. Reasonable attorneys fees and costs shall be awarded to the prevailing claimant. The attorneys fees and costs shall be paid by the state. A decision is issued within 60 days of the last claimant's answer unless the time is extended by a consent of the parties or by the district court for good cause shown. When a related criminal proceeding becomes final, a judgment in the forfeiture action shall be entered. If no claims are filed in a timely manner the property is forfeited. Monies forfeited or monies from sale of forfeiture assets go first for restitution, then into the general fund, or to the game protection fund.

Sec. 7. This section provides that the court determine the owner of the property and order it returned if the ownership of the property cannot be proven by clear and convincing evidence.

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Sec. 8. This section requires the seizing agency to perform a title search on the property and to notify all persons whom the agency knows or should know to have an interest in the property. When the seizing agency determines that the seized property does not belong to a person charged with a crime related to the seizure, the agency shall return the property to the owner of the property.

Sec. 9. Forfeiture proceedings cannot be brought more than one year from the date of conviction. The prosecution must prove that the property is subject to forfeiture by clear and convincing evidence.

Sec. 10. The interests of any owner or lienholder who is not convicted is not subject to forfeiture. However, if the property is transferred to circumvent the Forfeiture Act, it is subject to forfeiture.

Sec. 11. Seized currency must be placed in an interest-bearing trust account. Other property not required to be destroyed may be placed in designated places for safekeeping.

Sec. 12. Currency or proceeds from sale conducted by a court are for restitution first with the remainder to the general fund. If the property has multiple owners, they may purchase the state's share at the current market value.

Sec. 13. Amendments are made to already existing forfeiture sections, deleting current procedures and referencing the new bill.

### Significant Issues

This bill will affect agency budgets and General Fund Revenues.

The **Office of the District Attorney** reports that this bill may actually decrease forfeiture proceedings due to the provision allowing attorney's fees for a successful claimant. The risk of having to pay attorney's fees out of an agency budget may be a disincentive to prosecuting forfeiture cases.

### **The Administrative Office of the Courts reports the following:**

Forfeitures are now done by law enforcement agencies who keep the proceeds. With this bill, proceeds would go to victim restitution first, then to the game protection fund if required to recover prosecution costs, then to the general fund.

Section 5 creates a hearing mechanism similar to a temporary restraining order hearing that could increase the number of hearings in courts.

This bill authorizes jury trials if the value of the property seized exceeds \$10,000. Because a forfeiture is an *in rem* proceeding, parties are currently not entitled to a jury. Under the recent New Mexico Supreme Court case of State v. Nunez, the forfeiture and criminal case should be handled in a bifurcated proceeding to avoid double jeopardy issues. This would potentially create trials with double juries.

This bill will introduce significant procedural complexities for the courts in forfeiture actions.

### **FISCAL IMPLICATIONS**

The general fund will see an increase from forfeiture proceeds that would ordinarily go directly to local government. However, this amount would be decreased somewhat by the new provision allowing for restitution to victims.

While the title of the bill refers to an appropriation, there is no appropriate section in the bill.

The **Office of the District Attorney** reports that this bill may actually decrease forfeiture proceedings due to the provision allowing attorney's fees for a successful claimant. The risk of having to pay attorney's fees out of an agency budget may be a disincentive to prosecuting forfeiture cases.

The **Department of Public Safety** reports that they would lose approximately \$250.0 annually in proceeds from seized assets if the proceeds are funneled directly into the general fund. These revenues are budgeted as other state funds. In FY00, DPS collected \$377.8 in total forfeitures and has received \$148.8 so far this current fiscal year. In its budget submission, DPS is not including these funds for the budget year due to the current uncertainty over their treatment. Additionally, there may be an adverse budget impact on DPS and other law enforcement agencies due to the cost of storage.

The **Department of Game and Fish** reports the following:

If this law is enacted, the Department will lose approximately \$8,000.0 in federal funds, which will cut approximately half of the Department's budget. The Department believes that if the proceeds from a Game and Fish forfeiture are not deposited in the state game protection fund, it will be a violation of N.M. Statutes 17-1-28 and 17-1-29 and the federal laws and regulations that allow New Mexico to receive the federal funds. Hunters currently forfeit vehicles used to spotlight big game. The Department currently receives approximately \$50.0 per year from forfeited vehicles, firearms and bows.

DGF is also concerned about the provisions regarding the value of the forfeited property. Because the vehicles forfeited by DGF are generally worth more than a deer or an elk, the Department would no longer be able to forfeit vehicles. See "Amendments" below.

Forfeiture proceeds (after subtracting any cost of prosecution) that would ordinarily go to the Department of Game and Fish will go directly into the general fund. However, if DGF is not able to prosecute forfeitures of vehicles, as they predict under the current language of the bill, this amount may be diminished considerable.

## **ADMINISTRATIVE IMPLICATIONS**

**The AOC reports the following:**

1. There will be a fiscal impact on the state to pay for representation by indigents or to reimburse a successful claimant attorney fees and costs are unknown.
2. The fiscal impact to the courts is uncertain. There will be a fiscal report as the result of increase demands for jury trials and the potential increase number of jury trials. Jurors are paid minimum wage, mileage and parking. Additionally, court interpreters are used both to empanel the jury and for jurors during trial if they are needed. A twelve person jury with two alternates can cost \$700 a day. The costs or what fund will pay for these costs. New hearings also have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.
3. It will cost the judicial information system \$400 for analysis, statewide update, distribution, and documentation of this new proceeding.

4. The AOC reports that there may be an administrative impact to the courts as a result of a new hearings such as the hearing in Section 5, paragraph B.

**The Public Defender Department** reports that fiscal implications to the department are potentially enormous. See “Substantive Issues” below.

## **TECHNICAL ISSUES**

The bill’s title states that it is making an appropriation. However, no appropriation is made or mentioned in the text of the bill.

## **AMENDMENTS**

The Department of Game and Fish proposes that the bill be amended to delete Section 4, paragraph B or by adding language that states that the value of wildlife is greater than the value of a motor vehicle. The Department also proposes that Section 6, paragraph L be amended to provide that proceeds from forfeitures by the Department of Game and Fish shall be deposited into the game protection fund.

## **OTHER SUBSTANTIVE ISSUES**

The main substantive issue is whether the procedure described by the bill is a separate proceeding or a “single bifurcated proceeding” as required by the recent New Mexico Supreme Court case of State v. Nunez. In that case, the New Mexico Supreme Court found that separate forfeiture and criminal proceedings created a double jeopardy problem in violation of the New Mexico Constitution. The Section 6 of the bill provides that the Rules of Civil Procedure (as opposed to the Rule of Criminal Procedure) will apply. In their opinion, the New Mexico Supreme Court cited a 1996 forfeiture act which was vetoed by the Governor. The 1996 bill contained an amendment which stated in relevant part that “any forfeiture proceeding shall be brought in the same proceeding as the criminal matter; however, the two issues shall be bifurcated and presented to the same jury.” Inserting this language may avoid the Double Jeopardy problem.

### **The AOC raised the following issues:**

An alternative may be to allow the attorney fee costs for indigent defense and successful claimants, jury and interpreter costs come out of a fund that receives the proceeds of the forfeitures, the balance of which goes to the general fund. Part of the costs of the forfeitures would then be paid out of the proceeds. It may also be useful to amend the bill to provide that public defender's indigency standard should apply to appointed counsel.

**The Public Defender Department reports** the bill may potentially conflict with the Public Defender Act. The language of the bill leaves courts with a problem of who to appoint to represent the Defendant during this "single bifurcated proceeding." House Bill 18 does not articulate who will represent the indigent, nor indicate a source agency from which counsel fees shall be paid. The natural choice for counsel representation seems to be the attorney already assigned the indigent on the related criminal matters. However, the Public Defender Act only provides for representation in criminal proceedings. Forfeiture sanctions are entirely civil. Assuming a Judge ignores this legal conflict and appoints a criminal defense attorney, most Public Defenders are not readily conversant with the Rules of Civil Procedure, or trained in Civil Proceedings. In the event of malpractice, the Public Defender and its attorneys are not insured against civil claims. Further, as previously noted, if a Judge decides to appoint co-counsel for the Public Defender or the Public Defender's contract counsel, the bill is silent on which agency will fund the compensation the Judge is required to award. Presently, the Public Defender is required to ‘mind’ its own budget. Legislation that might be

construed to allow a Judge discretion to both appoint contract counsel and, subsequently, to award compensation to said counsel, would, in the case of the Public Defender, usurp that autonomy reserved by the agency and make it impossible to plan for budgetary needs.

The **Attorney General** believes that the only effective way to create a constitutionally sound forfeiture law is to amend N.M. Const. art. II, §4 to say that the double jeopardy provisions do not apply to civil forfeiture actions.

### **POSSIBLE QUESTIONS**

1. Section 3. The definition of conviction does not include a conditional discharge. Also if a deferred sentence is successfully completed, the charges should be dismissed. How does this definition treat a deferred sentence?
2. The definition of owner includes a substantial equitable ownership interest. What is substantial? What is an interest in the definition of property. Is it different from owner?
3. Section 4. How will the evidence of the referenced profit or loss be shown. Will it be for the one act or a series of criminal acts?
4. Section 5. Does the law enforcement agency notify the person from whom the property was seized or the owner?
5. Section 6. Who is the prosecuting attorney? Is it the district attorney or the city attorney? Who is the trustee? Should the notice under paragraph E go to the courts and the law enforcement agency? How does a parties' agreement to forfeit under paragraph K impact the double jeopardy issues in the recent New Mexico Supreme Court case of State v. Nunez? How does the default judgement in paragraph I impact the double jeopardy issues in Nunez.
6. Section 6 allows reasonable attorney fees and costs awarded to a claimant who prevails in the forfeiture proceeding. Which state agency pays for the attorney fees and costs? What indigency standards apply to the appoint of counsel under Section 6, paragraph J?
7. Section 9. Does not the burden of proof also include a conviction?
8. What kinds of things are covered by victim restitution? Can a victim recover an amount that is greater than the amount recovered by the related forfeiture proceeding?
9. Does the bill sufficiently address the restitution process?

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