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FISCAL IMPACT REPORT

ORIGINAL DATE 2/03/07
 SPONSOR Garcia, M.P LAST UPDATED 2/21/07 HB 333/aHJC/aHF#1
 SHORT TITLE Roadside Memorial Desecration Penalties SB _____
 ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 478

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Corrections Department (CD)
 Second Judicial District Attorney
 Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of HFL#1 Amendment

House Floor Amendment 1 to House Bill 333 as amended removes from criminal liability owners of private property upon which a descanso is located. This amendment addresses the concerns expressed by the AGO in this regard as outlined below.

Synopsis of HJC Amendment

House Judiciary Committee amendment 1 to HB 333, broadens the bill to state that a person shall not knowingly or willfully deface or destroy, in whole or in part, a descanso, also known as a memorial, placed alongside a public road right of way to memorialize a death of one or more persons.

Synopsis of Original Bill

House Bill 333 prohibits a person from defacing or destroying a “descanso, also known as a memorial” placed alongside a public road right-of-way to memorialize a motor vehicle accident resulting in death. The bill provides criminal penalties ranging from a petty misdemeanor for a first offense to a misdemeanor for subsequent offenses. The bill does not apply to “law enforcement officials or other employees of the state or a political subdivision of the state that in the course of the lawful discharge of their duties move or remove a descansos that obstructs or damages any public road in this state.”

FISCAL IMPLICATIONS

The Second Judicial District Attorney’s Office notes that persons punished for violating the proposed statute could be incarcerated for up 180 days on a first offense and up to 364 days on a second offense. See, Section 31-19-1, NMSA.

SIGNIFICANT ISSUES

According to the Second Judicial District Attorney’s Office, there is no limitation stated on the size of the memorials or specifics regarding their location which—if very large or ornate or close to the traveled portion of a road--might be distracting and/or obstruct visibility or create other hazards. As stated: “alongside a public road” might give rise to a claim that a memorial should be allowed on private property. Protection of a memorial on public property, if it is religious in nature, might be considered a violation of the Establishment Clause of the First Amendment to the United States Constitution, even if the memorial was erected and/or maintained by a private citizen.

The AGO identifies the following legal issues.

The Memorial Sign Program has been established by the New Mexico Department of Transportation in NMAC 18.20.7. That program regulates the application for and placement of memorial signs, but does not provide for the placement of other structures. Other than the memorial signs provided by that rule, New Mexico law does not allow for the placement or regulation of memorials along public highways or roads.

Under current state law, the erection of a “descanso” may be considered to be “trespassing” and/or in violation of DOT regulations. They may also be prohibited by state law prohibiting the erection of any structure upon any highway. NMSA Section 67-7-2. Another DOT rule prohibits “encroachments” and “obstructions” on highway right-of-ways. NMAC 18.20.5. Therefore, this bill has the effect of attaching criminal penalties to the destruction or defacing of an unauthorized structure.

The bill uses the term “descanso” which can be translated from Spanish to English as "resting place (of a dead person)," from the verb descansar "to (have a) rest." It is unclear why the Spanish terminology is used, and is unclear whether the bill intends to prohibit the defacement or destruction of all roadside memorials, or just those having Spanish characteristics. Further, the bill does not describe the memorials it seeks to protect or authorize their placement.

Further, the bill implies that law enforcement officers or public employees may remove a descansos only if it obstructs or damages the public road. This is a question of fact, which may

subject those officers and employees to criminal liability. Also, the holder of the right-of-way and/or owner of the land upon which the right-of-way lies usually has authority to manage that property. This bill might affect their management rights and obligations.

ALTERNATIVES

As suggest by the AGO, the bill should specifically describe the structures it seeks to protect, authorize their placement in accordance with DOT regulations, consider the safety of those placing the structures and motorists and the rights of property owners and right-of-way holders to manage property along public highways.

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