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FISCAL IMPACT REPORT

ORIGINAL DATE
LAST UPDATED 1-30-09 **HB** 163

SPONSOR Vaughn

SHORT TITLE Criminal Trespass Notice Requirements **SB** _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

State Land Office (SLO)

New Mexico Public Defender (NMPD)

Energy, Minerals and Natural Resources Department (EMNRD)

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

The Attorney General's Office (AGO) indicates that this legislation lessens the burdens on property owners and occupants of real property to provide notice that trespass or entry is forbidden.¹ There is no appropriation attached to this legislation.

SIGNIFICANT ISSUES

AGO further indicates that HB 163 amends N.M.S.A 1978, § 30-14-1 by eliminating the requirement that property owners post "No Trespass" signs at the vehicle entrances to a property. Rather it states that the existence of a fence enclosing any property or placement of orange paint markers or a form of written communication is sufficient notice against those who trespass or

¹ The AGO response carries the caveat, *This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request.*

enter upon the land without the owner's consent. Further, that prosecutions for Criminal Trespass rely heavily on the concept of "notice" and it is unclear whether the fencing of real property or other options in itself constitutes sufficient notice to inform an individual that his actions are subject to criminal sanction.

The Energy, Minerals and Natural Resources Department (EMNRD) advises that the current criminal statute for criminal trespass requires the landowner, lessee or person in control to provide notice to the public that trespass or entry without permission is forbidden. Such notice must provide the name and address of the person with the authority to provide permission to enter the property. Signage with this notice must be posted at obvious points of access and, if the property is not fenced, must be posted every 500 feet along the external boundary of the property. Large property owners find it difficult to establish and maintain the signage required to give proper notice against trespass. The proposed amendment would relieve this by removing the signage requirements and making written communication, a fence or other enclosures of the property designed to exclude intruders or to contain livestock, a sign posted on the property or at the entrance of a building, or an orange mark painted on a tree adequate notice against trespass. The orange paint must be vertical lines of not less than eight inches in length and one inch in width, placed so that the bottom of the mark is not less than three feet from the ground or more than five feet from the ground and placed so that they are readily visible to a person approaching the property and no more than five hundred feet apart on forested land and one thousand feet apart or line of sight visible on land other than forested land. Further that:

HB 163 would simplify the notice requirements for criminal trespass by making the act of crossing a fence or walking past an orange mark on a tree a misdemeanor in New Mexico – if the owner, lessee or person in control on the other side of that fence or orange mark does not provide prior permission for entry. However, fences and orange tree marking do not always indicate that land is private. New Mexico is approximately one-third public domain. Public lands used for grazing, Bureau of Land Management (BLM), National Forests, etc., are crisscrossed with thousands of miles of livestock fences that are public land on both sides and only separate pastures. Livestock fences also frequently occur on boundaries for National Park/National Forest, BLM/ National Forest, State Park/BLM, public road right of way/BLM, and many other adjoining jurisdictions where public entry does not require prior permission. Also, painted trees are common in public forests because forest managers and researchers often paint trees to mark timber sales, thinning operations or research plots. A variety of colors are used and orange is a common choice. Painted trees in a forest may be entirely within public domain and have no relation to property boundaries. If a person is not intimately familiar with land ownership patterns that person must assume that crossing a fence or passing an orange mark on a tree could be criminal trespass, which may not be the case. The tourist industry in New Mexico is highly reliant on free use of public domain. Fear of being cited for criminal trespass could unintentionally prevent use of public lands.

The New Mexico Public Defender raises a number of discussion issues including an observation that one potential challenge this amendment could face from a criminal defendant could be that it disposes of the knowledge requirement for criminal trespass. In order for one to be guilty of criminal trespass under § 30-14-1 NMSA, it must be proven that he or she entered or remained on the property without authorization, knowing that consent has been denied or withdrawn. *See State v. McCormack*, 101 N.M. 349, 352, 682 P2d. 742, 745 (Ct. App. 1984). Dispensing with

the requirement that the owner of the property must convey written communication to any potential passer by stating that entry on the land is not permitted may give the passer by the impression that entry is permitted. Furthermore, the mere fact that there is a fence on the property without any written communication denying entry may not give sufficient notice to a passer by that entry is not permitted. NMPD further adds that:

“(t) He existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). Or as Justice Murphy stated in his dissent to *U.S. v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943): ‘It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who * * * has no evil intention or consciousness of wrongdoing.’ But as pointed out in *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959): ‘Still, it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter * * * (though) there is precedent in this Court that this power is not without limitations.’ See, s 40A-9-3, N.M.S.A.1953 (2d Repl.Vol. 6, 1973 Supp.); s 40A-9-4, N.M.S.A.1953 (2d Repl.Vol. 6 1973 Supp.); s 40A-6-3, N.M.S.A.1953 (2d Repl.Vol. 6) and *Church v. Terr.*, 14 N.M. 226, 91 P. 720 (1907) and *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949); s 40A-7-3, N.M.S.A.1953 (2d Repl.Vol. 6); s 40A-7-5, N.M.S.A.1953 (2d Repl.Vol. 6). The courts of this State have long adhered to the common law tradition that criminal intent is an essential element of every crime unless the Legislature expressly declares otherwise. See *State v. Craig*, 70 N.M. 176, 372 P.2d 128 (1962): The amendment to this statute appears to dispense with the general mens rea requirement for criminal trespass since it does away with the knowledge requirement by not obligating owners of property to post written communications. If criminal trespass is intended to be a strict liability crime then the language of this bill must expressly state this.

The Administrative Office of the Courts suggests that, in substituting one set of requirements for posting notice of private property for another, disputes may arise as to whether the new requirements were satisfied by the property owner, whether the defendant received clear notice of private property, and whether, therefore, criminal trespass was “knowingly” committed. The amended language indicating that “written communication by the owner” would constitute sufficient notice to the public may be problematic as there is no explanation as to what constitutes such “written communication” nor where and how often it is to be posted. Is a one-time notice published in the local newspaper sufficient? HB 163 does not provide guidance regarding such “written communication.” Any disputes will need to be resolved by the courts and could lead defendants to invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees, and these additional costs are not capable of quantification.

PERFORMANCE IMPLICATIONS

EMNRD notes that forestry division personnel frequently work in forests with pasture fences and trees with orange marks painted on them. Most of the time, these fences and trees do not indicate a change in landownership unless they are marked with signs. If enacted this amendment could cause delays relating to the forestry division being able to notify landowners that damage from fire, theft or trespass is occurring on their property.

AOC advises that the courts are participating in performance based budgeting, and this bill may impact the courts' performance based budgeting measures, which may result in a need for additional resources. For example, the district court's performance measure clearance rates may be impacted if disputes regarding proper notice of private property lead to an increased demand for jury trials and fewer plea bargains, thereby increasing the amount of judge and clerk time needed to dispose of cases.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The State Land Office suggests that existing law contains specific provisions relating to trespass upon state trust lands. See NMSA 1978, § 19-6-1 (1912) *et seq.* As currently written, the bill does not appear to alter these existing provisions relating to trespass upon state trust lands. The statutes amended by the bill do not pertain to state trust lands, and the proposed amendments would not bring state trust lands within the scope of those statutes.

OTHER SUBSTANTIVE ISSUES

EMNRD states:

HB 163 does not define "forested lands", it would be helpful to define this term, perhaps as a number of trees per acre or percentage of tree-crown cover. Forestry Division rules define forest as one acre with at least 10 percent tree-crown cover. It also does not indicate what constitutes written communication. Does this include e-mail or a letter posted on a gate? It is also unclear what an "enclosure of the property designed to exclude intruders" is. How is this different from a fence?

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

EMNRD indicates that private land owners will continue to be required to post property with signs.

AMENDMENTS

None suggested by respondents.

BW/mc