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FISCAL IMPACT REPORT

ORIGINAL DATE 1-25-09

SPONSOR Madalena LAST UPDATED _____ HB 92

SHORT TITLE Indian Arts and Crafts Sales Act Changes SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

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

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB93

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General's Office (AGO)
 Indian Affairs Department (IAD)

No Response Received From

Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

House Bill 92 amends the Indian Arts & Crafts Sales Act at Sec. 30-33-9 (NMSA 1978) to enhance the penalties associated with misrepresentation, false or fraudulent sales of Indian handmade or authentic Indian arts and crafts. HB 92 would increase the civil penalty from the current maximum of \$500 to a maximum of \$5,000 per violation.

In addition, HB 92 would increase the three-step criminal penalties in current law and add two new ones – 2nd and 3rd degree felonies. Violations would be prosecuted by the attorney general or a district attorney.

The increased penalties would apply to any person who willfully and knowingly violates the provisions of the Indian Arts & Crafts Sales Act, and are based on the value of the property, as follows:

- Petty misdemeanor involving property valued at less than \$250 (instead of \$2,500 in current law) – fine of not less than \$100 per violation per day, up to maximum fine of \$500, or imprisonment in the county jail for a term not to exceed 6 months, or both;
- Misdemeanor involving property valued at \$250-\$499 (instead of \$2,500-\$19,999 in current law) – fine of not less than \$100 per violation per day, up to maximum fine of \$1,000, or imprisonment in county jail for not more than one year, or both;
- 4th Degree Felony involving property valued at \$500-\$2,499 (instead of more than \$20,000 in current law) – fine of not less than \$100 per violation per day, up to maximum of \$5,000, or up to 18 months imprisonment in county jail, or both;
- 3rd Degree Felony involving property valued at \$2,500-\$19,999 – fine of not less than \$200 per violation per day, up to maximum fine of \$5,000, or up to three years imprisonment, or both; and
- 2nd Degree Felony involving property valued at or exceeding \$20,000 – fine of not less than \$500 per violation per day, up to maximum fine of \$10,000, or up to nine years imprisonment, or both.

SIGNIFICANT ISSUES

Administrative Office of the Courts points out that state law has long established penalties for unfair or fraudulent sales of Indian goods. However, the existing penalties have not been updated since 1991, and may not be a strong enough deterrent to prevent these types of crimes. Fraudulent arts and crafts compete daily with authentic Indian arts and crafts in the marketplace. With the current popularity of Indian-made goods, especially in New Mexico, there are powerful incentives for people to make money off unsuspecting customers. This consumer fraud not only hurts buyers, it also erodes the livelihood and culture of Native American artists, craftspeople, and tribes and pueblos.

The purpose of HB 92 is to make the penalties under the Indian Arts and Crafts Sale Act consistent with the civil penalties established in the state's Unfair Practices Act (Sec. 57-12-2 NMSA 1978) and the criminal penalties in existing state law relating to other general property crimes, such as fraud and embezzlement in Chapter 30.

PERFORMANCE IMPLICATIONS

HB 92 will enhance criminal prosecutions of violations of the Indian Arts and Crafts Sales Act by the Attorney General and district attorneys by setting the felony threshold at a level that makes such prosecutions realistic.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB93 appropriates \$100,000 to the Attorney General for investigation and prosecution of the New Mexico Indian Arts and Crafts Sales Act, including for staff, the costs and expenses of enforcement, and for consumer education.

HB 83 appropriates \$50,000 to the Cultural Affairs Department for studying the contribution of

Native American arts and crafts to the economy, culture and social fabric of New Mexico and appropriates an additional \$50,000 to the Cultural Affairs Department to study the extent to which articles represented for sale in New Mexico as authentic Native American arts and crafts are misrepresented in regard to their materials, artists of origin, place of origin and manner of production.

TECHNICAL ISSUES

Administrative Office of the Courts suggests clean up language to insert “by” on page 2, line 14, in amending subsection C of 30-33-9. For consistency purposes, subsection E should also insert “by” on page 3, line 9, after the word “or” and before the word “up”.

OTHER SUBSTANTIVE ISSUES

According to the Attorney General’s Office, the New Mexico Indian Arts and Crafts Sales Act (“IACSA”) has both civil and criminal penalty provisions for acts of fraud. However, there is a great disparity between the offense value ranges under the Criminal Code and the offense value ranges under the IACSA. Most significantly, while a person committing fraud unrelated to the sale of Indian arts and crafts is guilty of a felony if the property at issue is valued at more than \$500, a person committing fraud in the sale of Indian Arts and Crafts cannot be convicted of a felony (4th degree) unless the property is valued at \$20,000 or more. A prosecutor is generally required to charge an accused under a specific statute (here, the IACSA), rather than under a general statute (§ 30-16-6), so in a fraudulent transaction involving Indian art, a person who defrauded a consumer of property valued at \$19,999.99 could only be charged with a misdemeanor (the penalty under the Indian Arts and Crafts Sales Act). Under § 30-16-6(E), fraud valued at \$19,999.99 would constitute a 3rd degree felony. The proposed amendments will eliminate this anomaly and will bring the two statutes (§ 30-16-6 and § 30-33-9) into agreement as to the levels (petty misdemeanor, misdemeanor, 4th degree felony, etc.) and value ranges of all included offenses. The proposed amendments will enhance the district attorneys’ ability to charge and prosecute high-dollar fraud in the Indian arts and crafts industry.

Currently, the civil penalty for a willful violation of the IACSA is \$500. § 30-33-9(B). The Unfair Practices Act gives courts the authority to impose a civil penalty of up to \$5,000 per willful violation, in its discretion. § 57-12-11. The proposed amendment raises the potential IACSA civil penalty to the same level as the Unfair Practices Act, again, eliminating the inconsistency.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Not enacting HB 92 would limit the State of New Mexico’s ability to address violations of the New Mexico Indian Arts and Crafts Sales Act.

EO/mt