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Sec. 3. The definition section contains definition of conviction, crime, law enforcement officer, owner and property and a new definition of property subject to forfeiture.

Sec. 4. This section sets out jurisdiction in the district court and venue. Venue for a pre-seizure order is in the district court for the county where the property is located, except if it is a business, in which case it is in the district court for the county where the principal office of the business is located. If property is seized without a court order, venue is in the district court for the county in which the property was seized.

Sec. 5. Property may be seized pursuant to an order issued by the district court based on a sworn application of a law enforcement officer and after a finding that there is a substantial probability the state will prevail on the issue of forfeiture and a concern that the property will be removed if not seized and that seizing the property outweighs the hardship to the party of interest. Seizure other than of a residence or business can take place without a court order if the seizure is incident to an arrest, the property was subject to a prior judgment, and there is probable cause to believe the property is forfeitable and delay would frustrate the procedure.

Sec. 6. Set out post seizure requirements. Within thirty days following the seizure, law enforcement shall immediately apply for a court order if the property was seized without a prior court order. Notice and an opportunity to be heard should be provided on the application by persons known to claim ownership of the property. If the application of seizure order is denied, the property should be returned to the owner unless their possession is illegal. If an order was or is entered and forfeiture is pursued, both the forfeiture and the related crime shall be prosecuted in a bifurcated trial.

Sec. 7. In a bifurcated trial the criminal rules apply to the criminal prosecution and the civil rules apply to the forfeiture.

Sec. 8. The state must prove the forfeiture by clear and convincing evidence and the court shall be the trier of facts.

Sec. 9. A hearing process is set to determine ownership. Service is made as required by rule 1-004 NMRA and is served upon the person from whom the property was seized, which includes all known or person's reasonably believed to be owners.

Sec. 10. Claims to the property are due thirty days after the service for the complaint. At the hearing the court will determine who owns the property. If no claims are filed in a timely manner, a default judgment is entered. If the owner is not the person who committed the crime, the proceeding shall be dismissed and the property returned to the owner unless the property is illegal. Reasonable attorneys fees and costs shall be awarded to a prevailing claimant. The attorneys fees and costs shall be paid by the law enforcement agency making the seizure. If the court determines that the property is subject to forfeiture, it shall enter a judgment of forfeiture if the criminal prosecution results in a conviction and the value of the property does not unreasonably exceed the pecuniary gain derived or sought to be derived by the crime, the pecuniary loss caused or the value of the convicted owner's interest in the property.

Sec. 11. Monies forfeited or monies from sale of forfeiture assets go first for storage costs, second to restitution, then into the general fund, or to the Game Protection Fund in an amount equal to the prosecution costs and then to the general fund.

Sec. 12. This section sets out how property seized is to be kept. Seized currency shall be deposited with the district court clerks and put in an interest bearing account. Other property shall be placed

under seal and removed to a place designated by the district court or held in the custody of the seizing agency.

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

Significant Issues

The bill would make the following notable changes in current law:

1. A complaint seeking forfeiture can be filed only when a law enforcement agency receives a claim to seized property.
2. The bill permits the award of attorneys fees and costs to a prevailing claimant.
3. The state is required to pay any attorneys fees or costs awarded.
4. The district court is required to file a decision within sixty-days unless "good cause is shown."
5. A judgment on a forfeiture action may be entered only after related criminal proceedings become final.
6. Proceedings from forfeitures go first to restitution for victims, to the Game Protection Fund, as applicable, and to the general fund.

This bill will affect agency budgets and general fund revenue. 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. However, the risk of having to pay attorney's fees out of an agency budget may be a disincentive to prosecuting forfeiture cases.

Section 5 creates a hearing mechanism similar to a temporary restraining order hearing that could increase the number of hearings in courts. Additionally, given the constitutional requirements articulated by the New Mexico Supreme Court in State v. Nunez, this bill will introduce significant procedural complexities for the courts in forfeiture actions.

FISCAL IMPLICATIONS

It is estimated the general fund will see a \$4,408.4 increase from forfeiture proceeds that, under current law, go to local government, DPS and the Game Protection Fund. This amount would likely be somewhat less due to the new provision allowing for costs for storage and restitution to victims. The cost estimates are based on the following calculations for FY00:

- c The Second Judicial District Court reports that in FY2000 it saw forfeitures totaling \$289.0, 281 cars and 44 guns. It estimates that it had approximately 40-45% of all New Mexico civil cases that year. If it is assumed that each car had a value of \$6.0 and each gun had a value of \$0.2, this amounts to \$1,694.8. With cash forfeiture of \$289.0, this totals \$1,983.8. If this is 45% of the estimated forfeiture, the state total is estimated at \$4,408.4. From this total, the estimated distributions to the DPS and Game Protection Fund are as follows:
- c 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.

- c The Game and Fish Department currently receives approximately \$50,000 a year from forfeited vehicles, firearms and bows.

ADMINISTRATIVE IMPLICATIONS

It will cost the judicial information system \$400 for analysis, statewide update, distribution, and documentation of this new proceeding. Additionally, the AOC reports that there may be an administrative impact to the courts as a result of a new hearings such as hearings for orders of seizure.

RELATIONSHIP

This bill appears to duplicate SB314/SJC except that this bill does not provide for a trial by jury when the property subject to forfeiture has a value in excess of \$10.0. In HB 18/HJC, there is no provision for trial by jury.

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. However, 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.

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