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FISCAL IMPACT REPORT

ORIGINAL DATE 2/06/19
 SPONSOR HJC LAST UPDATED 3/14/19 HB CS/312/aSFI#1/ec
 SHORT TITLE Seizure & Disposition of Forfeited Property SB _____
 ANALYST Edwards

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
Unknown, see Fiscal Implications	Unknown, see Fiscal Implications	Unknown, see Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Unknown, see Fiscal Implications	Unknown, see Fiscal Implications	Unknown, see Fiscal Implications	Unknown, see Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Public Safety (DPS)
 Law Office of the Public Defender (LOPD)
 Administrative Office of the Courts (AOC)
 New Mexico Attorney General (NMAG)
 Administrative Office of the District Attorney (AODA)
 New Mexico Municipal League
 New Mexico Counties

SUMMARY

Synopsis of SFI#1 Amendment

Senate Floor Amendment #1 to House Judiciary Committee Substitute to House Bill 312 amends Section 8(H), governing the property of innocent owners, by requiring that forfeited firearms,

ammunition, or explosives subject to forfeiture that are not returned to an innocent owner must be destroyed upon a motion by the law enforcement agency and an order of the court.

Synopsis of Original Bill

The House Judiciary Committee (HJC) substitute for House Bill 312 would amend the Forfeiture Act, allowing criminal forfeiture in the state pursuant to state law. The bill clarifies that abandoned property is not subject to the provisions of 29-1-14 NMSA 1978 which governs unclaimed property including deadly weapons, controlled substances, and other contraband.

The bill adds an exemption for animals that are subject to seizure, impoundment removal from custody or destruction for public health, safety and welfare purposes. The bill also exempts real property or personal property that is located on real property that is subject to destruction to protect public health, safety and welfare, and it exempts forfeiture that results from a lien for charges or assessments.

When determining the value of a forfeited asset, the bill allows the court to consider the nonmonetary value of the property the defendant would suffer if the forfeiture occurs. The bill authorizes two expenses before revenues are deposited in to the general fund: 1) reimburse the costs to the State Treasurer to store forfeited items and 2) pay reasonable expenses for law enforcement agencies or the Treasurer to dispose of property.

The bill requires the preparation of an annual report within 60 days following the conclusion of each fiscal year regarding seizures and forfeitures conducted pursuant to “applicable state law” rather than the Forfeiture Act.

The act contains an emergency clause.

FISCAL IMPLICATIONS

Senate Floor Amendment #1 to House Bill 312 may result in some savings to law enforcement agencies by reducing storage requirements. No destruction costs have been provided for this analysis; it is unclear how the requirement to destruct property pursuant to Section 8(H) as amended may effect agencies.

It is unclear what financial effects this bill may have. Neither New Mexico Counties nor the Municipal League included a fiscal impact statement in their analyses of the bill. The bill may have an effect on revenues flowing to the general fund if forfeitures decrease due to the provisions of the bill. The bill adds new language allowing funds realized from state forfeitures to 1) reimburse the costs to the State Treasurer to store forfeited items and 2) pay reasonable expenses for law enforcement agencies or the Treasurer to dispose of property. After these expenses, the remaining balances flow to the general fund as mandated by current law. These provisions could lower forfeiture revenues that flow to the general fund.

STO expressed concerns that proceeds from the sale of the forfeited property will not be sufficient to cover costs incurred by the law enforcement agencies to store, protect, and transfer the property to the Treasurer’s Office. This could leave the Treasurer’s Office in a position in which the office would be obligated to reimburse law enforcement and pay disposal expenses out of STO’s general fund.

As required by 31-27-9 NMSA 1978 (Section 10 of this bill), every law enforcement agency is required to annually report on the agency's seizures and forfeitures conducted to the Department of Public Safety. However, only one agency reported in 2017, Angel Fire Police Department for a total \$17.9 thousand.

The Department of Public Safety estimates there will be no fiscal impact to the agency as a result of this bill. In 2015, House Bill 560 eliminated the department's participation in the federal forfeiture sharing program by redirecting forfeiture revenue from DPS to the general fund which is unallowable by federal regulation, effectively ending DPS' forfeiture practices. As a result, this bill should have no impact on DPS.

The AODA points out "there is reference to the Sunshine Portal for publication of the Notice For Foreclosure and deletes notice by newspaper. However, in review of the sunshine portal the portal would need to be updated as there is no subsection that could post forfeitures. The cost of updating portal is unclear."

Section 4, Subsection F(3) could have an impact on Law Office of the Public Defender (LOPD) resources in that it increases the burden for a claimant to seized property by requiring that in addition to showing that the claimed property is the only means of the defendant paying for legal representation, the claimant will also have to show that the State failed to make a prima facie case that the property was proceeds of a crime. In such instances, if the claimant fails to persuade the court on this second factor, s/he may not be able to pay her or his legal counsel of choice and may require the services of LOPD. However, such costs are likely absorbable within the ordinary resources of the Public Defender.

The Administrative Office of the Courts states there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. HB 312 also requires the NM Supreme Court to issue procedural court rules to implement the provisions of the Act. Any additional fiscal impact on the Judicial Branch would be proportional to the enforcement of this law, new requirements, hearings and accountings, and challenges to the seizure and forfeiture of property. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

New Mexico Counties explains:

House Bill 312 is a New Mexico Counties priority. Unintended consequences from the 2015 amendments to the Forfeiture Act have caused hardship to local law enforcement. Use of the term "abandoned property" in the Forfeiture Act (31-27-1 NMSA 1978 et seq.) created confusion regarding the proper handling and disposal of abandoned and unclaimed property that would otherwise be governed by 29-1-14 NMSA 1978 and required the state treasurer to assume responsibility for processing abandoned property that should be handled at the local level. The 2015 amendments also did not extend the state Forfeiture Act to local forfeiture programs.

It requires conviction prior to forfeiture and extends due process protections to local forfeiture programs. It requires proceeds from forfeiture to go to the general fund. It allows the state treasurer to designate appropriate entities to dispose of forfeited property potentially saving substantial transportation and storage costs. It provides remedies for defendants who

would otherwise need the property to pay their attorney fees as well as protections for innocent owners. It also provides for reimbursement for law enforcement for the costs of storage, maintenance, transportation and disposal of properly forfeited property. While modest, these improvements to the Forfeiture Act will provide much needed relief to local law enforcement.

LOPD explains the inability of a defendant to retain the attorney of his or her choosing because the law enforcement agency was able to make a prima facie case that the property was proceeds of a crime (even if were otherwise proven that the property was the only means of securing the desired legal counsel) could present 6th Amendment right to counsel issues.

The AOC submitted the following analysis:

1) HB 312, Section 8 amends Section 31-27-7.1 NMSA 1978, governing innocent owners, to provide that in order to forfeit an innocent owner's property, the person is required to prove, by clear and convincing evidence, that at the time the person acquired the property, the person had knowledge that the property was subject to forfeiture.

2) HB 312, Section 4(G) provides that if the court orders a return of funds or property, it shall require an accounting, required to be held in camera. The bill also amends Section 31-27-4.1(G) NMSA 1978 to require the court to hear arguments as to what portion of the funds or property should pay attorney's fees and what portion should be forfeited, and to issue a distribution order.

3) Section 4(C) provides that following the seizure of property, the defendant in the related criminal matter or another person who claims an interest in the seized property may, at any time before the 120th day following the filing of the forfeiture action in court, claim an interest in the seized property. It is noted that the jurisdictional deadline requires sentencing to occur in 90 days.

4) In 2015, the HB 560 amendments to the Forfeiture Act abolished civil forfeitures, and effectively took the financial incentive out of police asset forfeiture by forcing all seized money and assets into the state's general fund. The HB 560 amendment to Section 31-27-8 NMSA 1978 explicitly provided that, "a law enforcement agency shall not retain forfeited or abandoned property." The HB 312 amendment to Section 31-27-8 requires that, unless it is returned to an owner, a law enforcement agency shall dispose of forfeited or abandoned property as provided in Section 31-27-7 NMSA 1978, providing that proceeds of the sale of forfeited property shall be distributed: first, to reimburse specified reasonable expenses for storage, etc. and to prepare required reports; second, to pay reasonable expenses incurred to dispose of the property; and third, any remaining balance shall be deposited in the general fund. Subsection F provides that property subject to forfeiture in a law enforcement agency's possession becomes disclaimed property. Subsection E, in HB 233, introduced in 2018, provided that disclaimed property shall be disposed of in the same manner as provided in Section 29-1-15 NMSA 1978, requiring money derived by a peace officer from the sale of unclaimed personal property be paid to the appropriate treasurer for credit to the general fund of the state, county or municipality. In contrast, HB 312, Section 7(E) provides that disclaimed property be disposed of in the same manner as provided in Section 7(B), requiring distribution: first, to reimburse reasonable expenses related to storage, protection and transfer of the property; second, to pay reasonable expenses incurred to dispose of the property; and third, any remaining balance to be deposited in the general fund.

OTHER SUBSTANTIVE ISSUES

NMAG points out HB 312 requires the Supreme Court to promulgate procedural rules to implement the provisions of the Act. This would appear to be especially relevant for the amendments contained in Section 4 of the bill. Amendments to the Rules of Civil Procedure (NMRA Sets 1 – 3) and the Rules of Criminal Procedure (NMRA Sets 5 – 7) may be required.

STO explains the bill could be amended to provide a threshold or cap on the expenses that a law enforcement agency can claim that would not exceed the profits derived from the sale.

TE/sb