

LFC Requester:	Chenier, Eric
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date 3/5/15
Original **Amendment** **Bill No:** HB560
Correction **Substitute**

Sponsor: Rep. Zachary Cook **Agency Code:** Attorney General's Office
Short Title: FORFEITURE PROCEDURES & REPORTING **Person Writing:** Yvonne Chicoine, AAG
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

BILL SUMMARY

Synopsis: HB560 rewrites and adds new sections to the New Mexico Forfeiture Act (sections 1-13). It makes conforming amendments related to the law governing permitting requirements for excavation of archaeological sites, NMSA 1978, § 18-6-11 (section 14), and for unmarked burials, NMSA 1978, § 18-6-11.2 (section 15). Further, it makes conforming amendments to the criminal statutes governing unauthorized recordings, NMSA 1978, § 30-16B-8 (section 16), controlled substances, NMSA 1978, § 30-31-34 (section 17-18), imitation controlled substances, NMSA 1978, § 30-31A-9 (section 19), and racketeering, NMSA 1978, § 30-42-4 (section 20).

FISCAL IMPLICATIONS

HB 560 may have a fiscal implications on the office of the attorney general, which investigates and prosecutes crimes implicating the Forfeiture Act.

SIGNIFICANT ISSUES

1. The bill does not contemplate the various ways in which criminal actions may be initiated, i.e., by complaint, indictment or information, see, e.g., proposed § 31-27-5(A).
2. The thirty-day timetable contained in amended § 31-27-5 may be unworkable where cases are particularly complicated and may require clarification, such that forfeiture action might be initiated at the later of the two dates. *See State v. Norman Benally*, No. 31,972 (N.M. Ct. App. Jan. 29, 2015).
3. The bill does not define "forfeiture" or "seizure." *See Benally*, No. 31,972, ¶ 12. Consideration should be given to defining "substantial probability," which is used in § 31-27-4.
4. The bill does not appear to deal with forfeiture actions arising out of misdemeanor offenses because all provisions relate to actions being brought in district court.
5. The bill does not anticipate that criminal charges can be resolved in ways that do not result in a conviction, e.g., conditional discharge.
6. By providing that forfeiture proceedings will follow trial, the bill does not contemplate resolution of cases other than by trial; it is unclear how persons other than the criminal defendant will have notice regarding the forfeiture action where the forfeiture action follows immediately after trial.
7. Continuation of criminal proceedings so jury can consider forfeiture issues will complicate and lengthen trial procedures; may require additional evidentiary proceedings apart

from resolution of criminal action. What are implications of including evidence for forfeiture proceeding in guilt-phase of proceeding. This evidence might be deemed prejudicial because it is not an element of the criminal offense

8. Representation by the public defender in forfeiture proceedings is beyond the scope of constitutional requirements for representation of indigent defendants.

9. The bill is not clear whether all forfeiture proceedings are subject to the rules of criminal procedure or the rules of civil procedure.

10. Consideration should be given to including provision for a reporting requirement to the office of the attorney general, see, e.g., proposed new section contained in section 11 of the bill.

11. Use of term “ancillary proceeding” to refer to forfeiture proceeding at the *conclusion* of trial might give rise to confusion and double jeopardy issues. *State v. Nunez*, 2000-NMSC-013, makes clear double jeopardy is violated if the guilt phase of a criminal prosecution and the forfeiture proceeding occur as the result of separate proceedings. *Nunez* states double jeopardy is avoided if the guilt-phase and the forfeiture proceeding occur as part of a “bi-furcated” proceeding. *See Nunez*, ¶ 104 (“[I]f [the State] elects to bring both a forfeiture complaint and a criminal proceeding growing out of the same facts, the action may be brought only in a single, bifurcated proceeding.”); *see id.* ¶ 94 (“Because of the strength of New Mexico precedent, the punitive nature of in rem jurisdiction, the deterrent function of the sanction, the lack of correlation between the penalty and the crime, the fact that the sanction is tied to a crime, the exclusion of innocent owners from the sanction, and the fact that a fundamental right is affected, we conclude that the remedial objectives of forfeitures under the Controlled Substances Act are incidental, and that the purposes of the sanction are decidedly punitive for double-jeopardy purposes.”).

12. What is basis for requiring jury to decide forfeiture issues? Trial courts regularly decide other non-guilt issues.

13. Through its use of “related” in connection with the criminal and the forfeiture proceedings, the bill may not make clear that to avoid double jeopardy implications the two proceedings are actually a bi-furcated single proceeding. The same could be true with respect to the language in § 31-27-6(C) which provides that the forfeiture proceeding “will begin after the conclusion of the trial for the related criminal matter.”

14. Likewise, provision for two separate judgments (one in criminal action and one following forfeiture proceeding) implies there are two separate actions.

15. Relation-back implications of language in proposed § 31-27-7(A) that the state “acquires provisional title to seized property at the time the property was used or acquired in connection with an offense that subjects the property to forfeiture” needs to be considered.

16. Some temporal limit should be imposed on third party claims. *See* § 31-27-7.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

1. Consequences of removing provision regarding seizures incident to “administrative inspection warrants” unclear. See proposed language of § 31-27-4(E)(1).
2. The bill allows for publication on “the sunshine portal” but that term is not defined.
3. In proposed § 31-27-4.1, is “legal counsel” intended to mean something different than “legal representation”?
4. In proposed § 31-27-4.1, motions should require notice to the State.
5. In proposed § 31-27-4.1, the section should also indicate the court in which the petition for replevin should be filed.
6. In § 31-27-5, should person to whom property is relinquished be required to provide proof of ownership of the property?
7. Relationship of proposed § 31-27-6(H) to Forfeiture Act is unclear.
8. Proposed § 31-27-4(B) does not include provision for forfeiture of conveyances.
9. Proposed § 31-27-4.1(A) might be improved if it spoke in terms of property “subject to seizure” (rather than “subject to forfeiture”).
10. Proposed § 31-27-7.1(F) needs to be clarified where it states that for the state “to successfully forfeit the property,” it must prove . . .
11. Section 11 of bill might be amended to include a deadline for when agency reports are to be submitted to DPS.
12. Section 12 should include language requiring the courts to issue orders requiring the return of property; these orders should include information as to whom the court is requiring law enforcement to release the property.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo.

AMENDMENTS

N/A