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FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/17

SPONSOR Gentry LAST UPDATED 03/17/17 HB 410/aHJC/aHFI#1/aSJC

SHORT TITLE Definition of Arson and Aggravated Arson SB _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate Increase	Indeterminate Increase	Indeterminate Increase	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Office of the Attorney General (OAG)
 Department of Game and Fish (DGF)
 Energy, Minerals and Natural Resources Department (EMNRD)
 Public Regulation Commission (PRC)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment removes new language regarding aggravated arson on page 4 of the introduced bill as indicated below:

- Causing great bodily harm to a public safety officer performing the officer’s duties,
- Property damage and other losses greater than \$1 million,
- Causing or proximately causing damage to multiple structures in a single violation by a person convicted of arson within the past 10 years or by a person using a device designed to accelerate the fire or delay its ignition.

Synopsis of House Floor Amendment #1

House Floor amendment number 1 to House Judiciary Committee amendment to House Bill 410 strikes the HJC amendment in its entirety and makes the following changes

- Amends the title of the bill by removing “amending the definition of arson” and

“incorporating the cost of fire suppression into the calculation of loss attributed to arson”,

- Adds agricultural products to the list of items damaged or destroyed by arson,
- Removes the requirement for the courts to calculate property damages and other losses,
- Removes the amended definition of aggravated arson made by the original bill and changes the action of a person to maliciously or willfully and unlawfully damaging,
- Changes a previous conviction of arson to “felony” arson.

The Floor amendment addresses recommendations by agencies in their responses to the original bill.

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 410 removes a few changes proposed by the original bill and addresses recommendations by agencies in their responses. The amendment

- Adds agricultural products to the definition of wildland,
- Removes the requirement for the courts to calculate property damages and other losses,
- Removes “unlawful” from the definition of aggravated arson,
- Removes the causing or proximate cause to burn multiple structure from aggravated arson, and
- Changes a previous conviction of arson to “felony” arson.

Synopsis of Bill

House Bill 410 amends the definition of arson by adding “unlawfully” when describing the starting of a fire or causing an explosion and “aiding or counseling in the burning of property” when describing the intent of destroying or damaging property.

The bill adds a new subsection on how to calculate the amount of damage and other losses requiring the court to consider the cost of fire suppression in the calculation.

The bill inserts “unlawful” into the definition of aggravated arson and amends aggravated arson to include

- Causing great bodily harm to a public safety officer performing the officer’s duties,
- Property damage and other losses greater than \$1 million,
- Causing or proximately causing damage to multiple structures in a single violation by a person convicted of arson within the past 10 years or by a person using a device designed to accelerate the fire or delay its ignition.

The bill defines wildland to mean “brush-covered land, cut-over land, forest, grasslands, woods or wild land-urban interface”.

FISCAL IMPLICATIONS

According to the Administrative Office of the Courts (AOC), the potential sanctions under this amendment are so severe that many accused persons will 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. In addition, the conflicts of law and constitutional issues implicated by these amendments make appellate litigation very likely,

which also require additional judge, staff, and courtroom time. These additional costs are not capable of quantification.

A single change to a criminal statute may have minimal fiscal impact; however, an increase of these cases may require additional resources. Although it is difficult to accurately estimate the cost of increased trials because of this or similar legislation, it is important to note that the average salaries, benefits and other costs yearly, in thousands, for the district courts, district attorneys and public defenders are as follow:

- District Attorneys: \$195.4
- District Courts: \$335.6
- PDD: \$202.7

LFC files show that the jury and witness fund shortfall for FY17 is estimated to be \$609 thousand even with a reduction in the hourly rate below the federal minimum rate of \$6.25 per hour. The FY16 shortfall was \$994.5 thousand.

The Energy, Minerals and Natural Resources Department (EMNRD) reports that this bill will have a fiscal impact on it for training, transportation, per diem and enforcement but is unable to accurately estimate the fiscal impact.

SIGNIFICANT ISSUES

The Office of the Attorney General (OAG) points out that accomplice liability exists in New Mexico, UJI 14-2822. Thus, it is unclear why “aiding or counseling in the burning of property” would need to be added to the definition of arson. Moreover, most criminal statutes heighten the penalty for a crime that results in great bodily harm or death. *See e.g.*, § 30-3-5. It is unclear why “death” is not included in § 30-17-6(A)(1).

EMNRD reports that the cost for wildfire suppression over the past two years is approximately \$13.4 thousand per incident and concludes that adding the cost of fire suppression to the cost of damages caused by the arson will increase the degree of the offense.

ADMINISTRATIVE IMPLICATIONS

The Department of Game and Fish often conducts habitat restoration work, which may include the use of fire as a management tool. DGF does not believe that the addition of “wildland” as defined in this bill will impact its ability to conduct habitat restoration work.

TECHNICAL ISSUES

AOC notes the following potential problems with the bill:

1. adding the term “unlawfully” to 30-17-5 creates the possibility that less-serious fire crimes such as “Improper Handling of Fire” (30-17-1 – petty misdemeanor) and “Use of an Engine Without a Spark Protector,” (30-17-1 – petty misdemeanor) may lead to felony prosecutions of individuals not apparently intended to fall under the scope of this arson statute.

2. Adding the phrase “or aiding or counseling in the burning of property” appears to be an attempt to include something akin to either *accessory* (30-1-3), and arguably, *conspiracy* (30-28-2), or *criminal solicitation* (30-2-28-3) within the existing Arson and Negligent Arson statute (30-17-1). However, accessory, conspiracy, and criminal solicitation are separate “inchoate” offenses that can be applied to any underlying criminal offence (i.e., *accessory to arson*; *conspiracy to commit arson*; or *criminal solicitation of arson*). Whether the intent of the amendment is to include any or all of the three inchoate crimes just discussed, adding them to 30-17-1 would put the statute in conflict with 30-1-3, 30-28-2, and 30-28-3, or at the very least, be unnecessarily repetitive and potentially confusing. Additionally, by including inchoate crimes within the existing arson statutes, the discretion of prosecutors is limited, and juries are potentially deprived of the discretion to convict on, say, conspiracy alone where the evidence does not establish the elements of arson beyond a reasonable doubt. In the event that a prosecutor decides to charge both conspiracy and arson, then double jeopardy is implicated since conspiracy is, arguably, already in the arson statute itself. This may lead to less-frequent convictions for arson due to the conflict between the inchoate statutes and the amended arson statute.
3. There is the potential that the law could punish rural residents more harshly than urban residents because of possibly slower response time from public safety officers to suppress a fire. (The bill requires the courts to calculate the total amount of property damage, including the cost of fire suppression (which largely determines the severity of the punishment).) This implicates questions of due process and equal protection that may trigger appellate litigation on constitutional grounds.

EMNRD suggests adding “grain or other cropland” to the definition of wildland to be consistent with the Forest Conservation Act.

EMNRD suggests adding firefighting personnel to the list of persons to whom negligent or aggravated arson causes bodily injury, great bodily harm or death.

ABS/sb/jle