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HOUSE BILL 471

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

INTRODUCED BY

Zachary J. Cook

AN ACT

RELATING TO REAL PROPERTY; ENACTING THE UNIFORM ENVIRONMENTAL COVENANTS ACT; PROVIDING FOR COVENANTS RESTRICTING USE OF REAL PROPERTY SUBJECT TO AN ENVIRONMENTAL RESPONSE PROJECT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Uniform Environmental Covenants Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the Uniform Environmental Covenants Act:

A. "activity and use limitations" means restrictions or obligations created pursuant to the Uniform Environmental Covenants Act with respect to real property;

B. "agency" means the department of environment, the energy, minerals and natural resources department or any other state or federal agency that determines or approves the

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1 environmental response project pursuant to which the
2 environmental covenant is created;

3 C. "common interest community" means a condominium,
4 cooperative or other real property with respect to which a
5 person, by virtue of the person's ownership of a parcel of real
6 property, is obligated to pay property taxes or insurance
7 premiums or for maintenance or improvement of other real
8 property described in a recorded environmental covenant that
9 creates the common interest community;

10 D. "environmental covenant" means a servitude
11 arising under an environmental response project that imposes
12 activity and use limitations;

13 E. "environmental response project" means a plan or
14 work performed for environmental remediation of real property
15 and conducted:

16 (1) under a federal or state program governing
17 environmental remediation of real property;

18 (2) incident to closure of a solid or
19 hazardous waste management unit, if the closure is conducted
20 with approval of an agency; or

21 (3) under a state voluntary cleanup program
22 authorized in the Voluntary Remediation Act;

23 F. "holder" means the grantee of an environmental
24 covenant as specified in Subsection A of Section 3 of the
25 Uniform Environmental Covenants Act;

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1 G. "person" means an individual; corporation;
2 business trust; estate; trust; partnership; limited liability
3 company; association; joint venture; public corporation;
4 government; governmental subdivision, agency or
5 instrumentality; or any other legal or commercial entity;

6 H. "record", when used as a noun, means information
7 that is inscribed on a tangible medium or that is stored in an
8 electronic or other medium and is retrievable in perceivable
9 form; and

10 I. "state" means a state of the United States, the
11 District of Columbia, Puerto Rico, the United States Virgin
12 Islands or any territory or insular possession subject to the
13 jurisdiction of the United States.

14 SECTION 3. [NEW MATERIAL] NATURE OF RIGHTS--SUBORDINATION
15 OF INTERESTS.--

16 A. Any person, including a person that owns an
17 interest in real property, an agency or a municipality or other
18 unit of local government, may be a holder. An environmental
19 covenant may identify more than one holder. The interest of a
20 holder is an interest in real property.

21 B. A right of an agency pursuant to the Uniform
22 Environmental Covenants Act or pursuant to an environmental
23 covenant, other than a right as a holder, is not an interest in
24 real property.

25 C. An agency is bound by any obligation it assumes

1 in an environmental covenant, but an agency does not assume
2 obligations merely by signing an environmental covenant. Any
3 other person that signs an environmental covenant is bound by
4 the obligations the person assumes in the environmental
5 covenant, but signing the environmental covenant does not
6 change obligations, rights or protections granted or imposed
7 under law other than the Uniform Environmental Covenants Act,
8 except as provided in the environmental covenant.

9 D. The following rules apply to interests in real
10 property in existence at the time an environmental covenant is
11 created or amended:

12 (1) an interest that has priority under other
13 law is not affected by an environmental covenant unless the
14 person that owns the interest subordinates that interest to the
15 environmental covenant;

16 (2) the Uniform Environmental Covenants Act
17 does not require a person who owns a prior interest to
18 subordinate that interest to an environmental covenant or to
19 agree to be bound by the environmental covenant;

20 (3) a subordination agreement may be contained
21 in an environmental covenant covering real property or in a
22 separate record. If the environmental covenant covers commonly
23 owned property in a common interest community, the record may
24 be signed by any person authorized by the governing board of
25 the owners' association; and

1 (4) an agreement by a person to subordinate a
2 prior interest to an environmental covenant affects the
3 priority of that person's interest but does not by itself
4 impose any affirmative obligation on the person with respect to
5 the environmental covenant.

6 SECTION 4. [NEW MATERIAL] CONTENTS OF ENVIRONMENTAL
7 COVENANT.--

8 A. An environmental covenant shall:

9 (1) state that the instrument is an
10 environmental covenant executed pursuant to the Uniform
11 Environmental Covenants Act;

12 (2) contain a legally sufficient description
13 of the real property subject to the environmental covenant;

14 (3) describe the activity and use limitations
15 on the real property;

16 (4) identify every holder;

17 (5) be signed by the agency, every holder and
18 every owner of the fee simple of the real property subject to
19 the environmental covenant; and

20 (6) identify the name and location of any
21 administrative record for the environmental response project
22 reflected in the environmental covenant.

23 B. In addition to the information required by
24 Subsection A of this section, an environmental covenant may
25 contain other information, restrictions and requirements agreed

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1 to by the persons who signed it, including:

2 (1) requirements for notice following transfer
3 of a specified interest in, or concerning proposed changes in
4 use of, applications for building permits or proposals for any
5 site work affecting the contamination on the property subject
6 to the environmental covenant;

7 (2) requirements for periodic reporting that
8 describe compliance with the environmental covenant;

9 (3) rights of access to the property granted
10 in connection with implementation or enforcement of the
11 environmental covenant;

12 (4) a brief narrative description of the
13 contamination and remedy, including the contaminants of
14 concern, the pathways of exposure, limits on exposure and the
15 location and extent of the contamination;

16 (5) limitation on amendment or termination of
17 the environmental covenant in addition to those contained in
18 Sections 9 and 10 of the Uniform Environmental Covenants Act;
19 and

20 (6) rights of the holder in addition to the
21 holder's right to enforce the environmental covenant pursuant
22 to Section 11 of the Uniform Environmental Covenants Act.

23 C. In addition to other conditions for the agency's
24 approval of an environmental covenant, the agency may require
25 those persons specified by the agency who have interests in the

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1 real property to sign the environmental covenant.

2 SECTION 5. [NEW MATERIAL] VALIDITY--EFFECT ON OTHER
3 INSTRUMENTS.--

4 A. An environmental covenant that complies with the
5 Uniform Environmental Covenants Act runs with the land.

6 B. An environmental covenant that is otherwise
7 effective is valid and enforceable even if:

8 (1) it is not appurtenant to an interest in
9 real property;

10 (2) it can be or has been assigned to a person
11 other than the original holder;

12 (3) it is not of a character that has been
13 recognized traditionally in common law;

14 (4) it imposes a negative burden;

15 (5) it imposes an affirmative obligation on a
16 person having an interest in the real property or on the
17 holder;

18 (6) the benefit or burden does not touch or
19 concern real property;

20 (7) there is no privity of estate or contract;

21 (8) the holder dies, ceases to exist, resigns
22 or is replaced; or

23 (9) the owner of an interest subject to the
24 environmental covenant and the holder are the same person.

25 C. An instrument that creates restrictions or

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1 obligations with respect to real property that would qualify as
2 activity and use limitations, except for the fact that the
3 instrument was recorded before July 1, 2019, is not invalid or
4 unenforceable because of any of the limitations on enforcement
5 of interests described in Subsection B of this section or
6 because it was identified as an easement, servitude, deed
7 restriction or other interest. The Uniform Environmental
8 Covenants Act does not apply in any other respect to such an
9 instrument.

10 D. The Uniform Environmental Covenants Act does not
11 invalidate or render unenforceable any interest, whether
12 designated as an environmental covenant or other interest, that
13 is otherwise enforceable under the law of New Mexico.

14 SECTION 6. [NEW MATERIAL] RELATIONSHIP TO OTHER LAW.--

15 A. The Uniform Environmental Covenants Act does not
16 authorize a use of real property that is otherwise prohibited
17 by zoning, by a law other than the Uniform Environmental
18 Covenants Act regulating use of real property or by a recorded
19 instrument that has priority over the environmental covenant.
20 An environmental covenant may prohibit or restrict a use of
21 real property that is authorized by zoning or by a law other
22 than the Uniform Environmental Covenants Act.

23 B. Nothing in the Uniform Environmental Covenants
24 Act modifies, limits or otherwise affects any obligation under
25 the Voluntary Remediation Act, the New Mexico Mining Act, the

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1 Surface Mining Act, the Oil and Gas Act, the Water Quality Act,
2 the Ground Water Protection Act, the Hazardous Waste Act, the
3 Solid Waste Act or any other law governing an environmental
4 response project or any rule or regulation adopted under those
5 laws.

6 C. Public notices, opportunities for public
7 comments and opportunities to request a hearing in connection
8 with an environmental response project shall identify whether
9 an environmental covenant is proposed.

10 D. Nothing in the Uniform Environmental Covenants
11 Act shall be construed to limit or otherwise affect the rights
12 of any party to enforce a right of the party concerning the
13 property subject to an environmental covenant or property
14 affected by an environmental covenant.

15 E. Nothing in the Uniform Environmental Covenants
16 Act shall be construed to limit or otherwise affect any
17 obligation of a party to protect soil, surface water or ground
18 water quality or to remediate contamination of soil, surface
19 water or ground water.

20 SECTION 7. [NEW MATERIAL] NOTICE.--

21 A. A copy of an environmental covenant shall be
22 provided by the persons and in the manner required by the
23 agency to:

24 (1) each person that signed the environmental
25 covenant;

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1 (2) each person holding a recorded interest in
2 the real property subject to the environmental covenant;

3 (3) each person in possession of the real
4 property subject to the environmental covenant;

5 (4) each municipality or other unit of local
6 government in which real property subject to the environmental
7 covenant is located; and

8 (5) any other person the agency requires.

9 B. The validity of an environmental covenant is not
10 affected by failure to provide a copy of the environmental
11 covenant as required under this section.

12 SECTION 8. [NEW MATERIAL] RECORDING.--

13 A. An environmental covenant and any amendment,
14 assignment or termination of the environmental covenant or any
15 subordination agreement contained in a separate record shall be
16 recorded in every county in which any portion of the real
17 property subject to the environmental covenant is located. For
18 purposes of indexing, a holder shall be treated as a grantee.

19 B. Except as otherwise provided in Subsection C of
20 Section 9 of the Uniform Environmental Covenants Act, an
21 environmental covenant is subject to the laws of New Mexico
22 governing recording and priority of interests in real property.

23 SECTION 9. [NEW MATERIAL] DURATION--AMENDMENT BY COURT
24 ACTION.--

25 A. An environmental covenant is perpetual unless it

1 is:

2 (1) by its terms limited to a specific
3 duration or terminated by the occurrence of a specific event;

4 (2) terminated by consent pursuant to Section
5 10 of the Uniform Environmental Covenants Act;

6 (3) terminated pursuant to Subsection B of
7 this section;

8 (4) terminated by foreclosure of an interest
9 that has priority over the environmental covenant; or

10 (5) terminated or modified in an eminent
11 domain proceeding, but only if:

12 (a) the agency that signed the
13 environmental covenant is a party to the proceeding;

14 (b) all persons identified in
15 Subsections A and B of Section 10 of the Uniform Environmental
16 Covenants Act are given notice of the pendency of the
17 proceeding; and

18 (c) the court determines, after hearing,
19 that the termination or modification will not adversely affect
20 human health or the environment.

21 B. If the agency that signed an environmental
22 covenant has determined that the intended benefits of the
23 environmental covenant can no longer be realized, a court,
24 under the doctrine of changed circumstances, in an action in
25 which all persons identified in Subsections A and B of Section

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1 10 of the Uniform Environmental Covenants Act have been given
2 notice, may terminate the environmental covenant or reduce its
3 burden on the real property subject to the environmental
4 covenant. The agency's determination or its failure to make a
5 determination upon request is subject to review pursuant to law
6 other than the Uniform Environmental Covenants Act.

7 C. Except as otherwise provided in Subsections A
8 and B of this section, an environmental covenant may not be
9 extinguished, limited or impaired through issuance of a tax
10 deed, foreclosure of a tax lien, application of the doctrine of
11 adverse possession, prescription, abandonment, waiver, lack of
12 enforcement, acquiescence or a similar doctrine, or Section
13 45-2-901 NMSA 1978 or Sections 45-2-908 through 45-2-914 NMSA
14 1978.

15 SECTION 10. [NEW MATERIAL] AMENDMENT OR TERMINATION BY
16 CONSENT.--

17 A. An environmental covenant may be amended or
18 terminated by consent only if the amendment or termination is
19 signed by:

- 20 (1) the agency;
- 21 (2) the current owner of the fee simple of the
22 real property subject to the environmental covenant, unless
23 waived by the agency;
- 24 (3) each person that originally signed the
25 environmental covenant, unless the person waived in a signed

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1 record the right to consent or a court finds that the person no
2 longer exists or cannot be located or identified with the
3 exercise of reasonable diligence; and

4 (4) the holder, except as otherwise provided
5 in Paragraph (2) of Subsection D of this section.

6 B. If an interest in real property is subject to an
7 environmental covenant, the interest is not affected by an
8 amendment of the environmental covenant unless the current
9 owner of the interest consents to the amendment or has waived
10 in a signed record the right to consent to amendments.

11 C. Except for an assignment undertaken pursuant to
12 a governmental reorganization, an assignment of an
13 environmental covenant to a new holder is an amendment.

14 D. Except as otherwise provided in an environmental
15 covenant:

16 (1) a holder may not assign the holder's
17 interest without consent of the other parties;

18 (2) a holder may be removed and replaced by
19 agreement of the other parties specified in Subsection A of
20 this section; and

21 (3) a court of competent jurisdiction may fill
22 a vacancy in the position of holder.

23 SECTION 11. [NEW MATERIAL] ENFORCEMENT OF ENVIRONMENTAL
24 COVENANT.--

25 A. A civil action for injunctive or other equitable

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1 relief for violation of an environmental covenant may be
2 maintained by:

3 (1) a party to the environmental covenant;

4 (2) the agency or, if it is not the agency,
5 the department of environment;

6 (3) any person to whom the environmental
7 covenant expressly grants power to enforce or any other person
8 authorized to enforce the environmental covenant;

9 (4) a person whose interest in the real
10 property or whose collateral or liability may be affected by
11 the alleged violation of the environmental covenant; or

12 (5) a municipality or other unit of local
13 government in which the real property subject to the
14 environmental covenant is located.

15 B. The Uniform Environmental Covenants Act does not
16 limit the regulatory authority of the agency or other
17 governmental agency under law other than the Uniform
18 Environmental Covenants Act with respect to an environmental
19 response project.

20 C. A person is not responsible for or subject to
21 liability for environmental remediation solely because it has
22 the right to enforce an environmental covenant.

23 SECTION 12. [NEW MATERIAL] REGISTRY--SUBSTITUTE NOTICE.--

24 A. The department of environment shall establish
25 and maintain a registry that contains all environmental

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1 covenants and any amendment to or termination of any of those
2 covenants. The registry may also contain any other information
3 concerning environmental covenants and the real property
4 subject to them which the department of environment considers
5 appropriate. The registry is a public record for purposes of
6 the Inspection of Public Records Act.

7 B. After an environmental covenant or an amendment
8 or termination of a covenant is filed in the registry
9 established pursuant to Subsection A of this section, a notice
10 of the covenant, amendment or termination that complies with
11 this section may be recorded in the land records in lieu of
12 recording the entire covenant. Any such notice must contain:

13 (1) a legally sufficient description and any
14 available street address of the real property subject to the
15 covenant;

16 (2) the name and address of the owner of the
17 fee simple interest in the real property, the agency and the
18 holder if other than the agency;

19 (3) a statement that the covenant, amendment
20 or termination is available in a registry at the department of
21 environment, which discloses the method of electronic access;
22 and

23 (4) a statement that the notice is
24 notification of an environmental covenant executed pursuant to
25 the Uniform Environmental Covenants Act.

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1 C. A statement in substantially the following form,
2 executed with the same formalities as a deed, satisfies the
3 requirements of Subsection B of this section:

4 "1. This notice is filed in the land records
5 of the [political subdivision of [insert the name of
6 jurisdiction in which the real property is located]] pursuant
7 to Section 12 of the Uniform Environmental Covenants Act.

8 2. This notice and the covenant, amendment or
9 termination to which it refers may impose significant
10 obligation with respect to the property described below.

11 3. A legal description of the property is
12 attached as Exhibit A to this notice. The address of the
13 property that is subject to the environmental covenant is
14 [insert address of property] [not available].

15 4. The name and address of the owner of the
16 fee simple interest in the real property on the date of this
17 notice is [insert name of current owner of the property and the
18 owner's current address as shown on the tax records of the
19 jurisdiction in which the property is located].

20 5. The environmental covenant, amendment or
21 termination was signed by [insert name and address of the
22 agency].

23 6. The environmental covenant, amendment or
24 termination was filed in the registry on [insert date of
25 filing].

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1 7. The full text of the covenant, amendment or
2 termination and any other information required by the agency is
3 on file and available for inspection and copying in the
4 registry maintained for that purpose by the Department of
5 Environment at [insert address and room of building in which
6 the registry is maintained]. The covenant, amendment or
7 termination may be found electronically at [insert web address
8 for the covenant]."

9 SECTION 13. [NEW MATERIAL] REGULATIONS.--The department
10 of environment shall adopt and promulgate regulations necessary
11 to implement the provisions of the Uniform Environmental
12 Covenants Act. Such regulations shall include a schedule of
13 fees for environmental covenants, not exceeding the reasonable
14 cost of administering the registry created pursuant to the
15 Uniform Environmental Covenants Act. Fees collected pursuant
16 to this section shall be deposited in the water quality
17 management fund.

18 SECTION 14. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND
19 CONSTRUCTION.--In applying and construing the Uniform
20 Environmental Covenants Act, consideration shall be given to
21 the need to promote uniformity of the law with respect to its
22 subject matter in states that enact it.

23 SECTION 15. [NEW MATERIAL] RELATION TO ELECTRONIC
24 SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform
25 Environmental Covenants Act modifies, limits or supersedes the

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1 federal Electronic Signatures in Global and National Commerce
2 Act but does not modify, limit or supersede 15 USCA Section
3 7001(c) or authorize electronic delivery of any of the notices
4 described in 15 USCA Section 7003(b).

5 SECTION 16. [NEW MATERIAL] SAVING CLAUSE.--The Uniform
6 Environmental Covenants Act does not affect an action
7 commenced, a proceeding brought or a right accrued before July
8 1, 2019.

9 SECTION 17. APPLICABILITY.--The provisions of the Uniform
10 Environmental Covenants Act apply to environmental covenants
11 arising on or after July 1, 2019. The provisions of the
12 Uniform Environmental Covenants Act shall not apply to lands
13 held in trust by the state pursuant to the act of congress of
14 June 20, 1910, entitled "An act to enable the people of New
15 Mexico to form a constitution and state government and be
16 admitted into the union on an equal footing with the original
17 states".

18 SECTION 18. EFFECTIVE DATE.--The effective date of the
19 provisions of this act is July 1, 2019.