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HOUSE BILL 314

**47TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2006**

INTRODUCED BY

John A. Heaton

FOR THE RADIOACTIVE AND HAZARDOUS MATERIALS COMMITTEE

AN ACT

RELATING TO REAL PROPERTY; ENACTING THE UNIFORM ENVIRONMENTAL COVENANTS ACT; PROVIDING FOR COVENANTS RESTRICTING USE OF REAL PROPERTY SUBJECT TO ENVIRONMENTAL REMEDIATION; MAKING AN APPROPRIATION.

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

Section 1. SHORT TITLE.--This act may be cited as the "Uniform Environmental Covenants Act".

Section 2. 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 or any other state or federal agency that determines or approves

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1 the 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. NATURE OF RIGHTS--SUBORDINATION OF  
15 INTERESTS.--

16           A. Any person, including a person who 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

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1 in an environmental covenant, but an agency does not assume  
2 obligations merely by signing an environmental covenant. Any  
3 other person who 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

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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. CONTENTS OF ENVIRONMENTAL COVENANT.--

7 A. An environmental covenant shall:

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

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

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

15 (4) identify every holder;

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

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

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

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

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

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

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

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

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

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

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1           Section 5. VALIDITY--EFFECT ON OTHER INSTRUMENTS.--

2           A. An environmental covenant that complies with the  
3 Uniform Environmental Covenants Act runs with the land.

4           B. An environmental covenant that is otherwise  
5 effective is valid and enforceable even if:

6                   (1) it is not appurtenant to an interest in  
7 real property;

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

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

12                   (4) it imposes a negative burden;

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

16                   (6) the benefit or burden does not touch or  
17 concern real property;

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

19                   (8) the holder dies, ceases to exist, resigns  
20 or is replaced; or

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

23           C. An instrument that creates restrictions or  
24 obligations with respect to real property that would qualify as  
25 activity and use limitations, except for the fact that the

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1 instrument was recorded before the effective date of the  
2 Uniform Environmental Covenants Act, is not invalid or  
3 unenforceable because of any of the limitations on enforcement  
4 of interests described in Subsection B of this section or  
5 because it was identified as an easement, servitude, deed  
6 restriction or other interest. The Uniform Environmental  
7 Covenants Act does not apply in any other respect to such an  
8 instrument.

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

13 Section 6. RELATIONSHIP TO OTHER LAW.--

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

22 B. The Uniform Environmental Covenants Act  
23 supplements and does not displace the Voluntary Remediation  
24 Act, the New Mexico Mining Act, the Surface Mining Act, the Oil  
25 and Gas Act, the Water Quality Act or any other law governing



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1 an environmental response project.

2 C. An agency shall not approve a servitude or other  
3 restriction on the use of ground water unless an environmental  
4 response project has been approved and the agency has  
5 determined that the environmental response project will achieve  
6 compliance with ground water standards adopted or alternative  
7 abatement standards approved pursuant to the Water Quality Act.  
8 For the purposes of this subsection, "ground water" means water  
9 below the land surface in a zone of saturation.

10 Section 7. NOTICE.--

11 A. A copy of an environmental covenant shall be  
12 provided by the following persons and in the manner required by  
13 the agency to:

14 (1) each person who signed the environmental  
15 covenant;

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

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

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

23 (5) any other person the agency requires.

24 B. The validity of an environmental covenant is not  
25 affected by failure to provide a copy of the environmental

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1 covenant as required under this section.

2 Section 8. RECORDING.--

3 A. An environmental covenant and any amendment or  
4 termination of the environmental covenant shall be recorded in  
5 every county in which any portion of the real property subject  
6 to the environmental covenant is located. For purposes of  
7 indexing, a holder shall be treated as a grantee.

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

12 Section 9. DURATION--AMENDMENT BY COURT ACTION.--

13 A. An environmental covenant is perpetual unless it  
14 is:

15 (1) by its terms, limited to a specific  
16 duration or terminated by the occurrence of a specific event;

17 (2) terminated by consent pursuant to Section  
18 10 of the Uniform Environmental Covenants Act;

19 (3) terminated pursuant to Subsection B of  
20 this section;

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

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

25 (a) the agency that signed the

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1 environmental covenant is a party to the proceeding;

2 (b) all persons identified in  
3 Subsections A and B of Section 10 of the Uniform Environmental  
4 Covenants Act are given notice of the pendency of the  
5 proceeding; and

6 (c) the court determines, after hearing,  
7 that the termination or modification will not adversely affect  
8 human health or the environment.

9 B. If the agency that signed an environmental  
10 covenant has determined that the intended benefits of the  
11 environmental covenant can no longer be realized, a court,  
12 under the doctrine of changed circumstances, in an action in  
13 which all persons identified in Subsections A and B of Section  
14 10 of the Uniform Environmental Covenants Act have been given  
15 notice, may terminate the environmental covenant or reduce its  
16 burden on the real property subject to the environmental  
17 covenant. The agency's determination or its failure to make a  
18 determination upon request is subject to review pursuant to the  
19 Administrative Procedures Act.

20 C. Except as otherwise provided in Subsections A  
21 and B of this section, an environmental covenant may not be  
22 extinguished, limited or impaired through issuance of a tax  
23 deed, foreclosure of a tax lien or application of the doctrine  
24 of adverse possession, prescription, abandonment, waiver, lack  
25 of enforcement, acquiescence or a similar doctrine.

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1           Section 10. AMENDMENT OR TERMINATION BY CONSENT.--

2           A. An environmental covenant may be amended or  
3 terminated by consent only if the amendment or termination is  
4 signed by:

5                     (1) the agency;

6                     (2) the current owner of the fee simple of the  
7 real property subject to the environmental covenant, unless  
8 waived by the agency;

9                     (3) each person who originally signed the  
10 environmental covenant, unless the person waived in a signed  
11 record the right to consent or a court finds that the person no  
12 longer exists or cannot be located or identified with the  
13 exercise of reasonable diligence; and

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

16           B. If an interest in real property is subject to an  
17 environmental covenant, the interest is not affected by an  
18 amendment of the environmental covenant unless the current  
19 owner of the interest consents to the amendment or has waived  
20 in a signed record the right to consent to amendments.

21           C. Except for an assignment undertaken pursuant to  
22 a governmental reorganization, assignment of an environmental  
23 covenant to a new holder is an amendment.

24           D. Except as otherwise provided in an environmental  
25 covenant:

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1 (1) a holder may not assign interest without  
2 consent of the other parties;

3 (2) a holder may be removed and replaced by  
4 agreement of the other parties specified in Subsection A of  
5 this section; and

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

8 Section 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.--

9 A. A civil action for injunctive or other equitable  
10 relief for violation of an environmental covenant may be  
11 maintained by:

12 (1) a party to the environmental covenant;

13 (2) the agency;

14 (3) any person to whom the environmental  
15 covenant expressly grants power to enforce;

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

19 (5) a municipality or other unit of local  
20 government in which the real property subject to the  
21 environmental covenant is located.

22 B. The Uniform Environmental Covenants Act does not  
23 limit the regulatory authority of the agency under law other  
24 than the Uniform Environmental Covenants Act with respect to an  
25 environmental response project.

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1 C. A person is not responsible for or subject to  
2 liability for environmental remediation solely because that  
3 person has the right to enforce an environmental covenant.

4 Section 12. FILE--SUBSTITUTE NOTICE.--

5 A. The department of environment shall establish  
6 and maintain a file that contains all environmental covenants  
7 and any amendment or termination of those covenants. The file  
8 may also contain any other information concerning environmental  
9 covenants and the real property subject to them that the  
10 department of environment considers appropriate. The file is a  
11 public record.

12 B. After an environmental covenant or an amendment  
13 or termination of a covenant is filed in the file established  
14 pursuant to Subsection A of this section, a notice of the  
15 covenant, amendment or termination that complies with this  
16 section may be recorded in the land records in lieu of  
17 recording the entire covenant. Any such notice shall contain  
18 the following:

19 (1) a legally sufficient description and any  
20 available street address of the real property subject to the  
21 covenant;

22 (2) the name of the owner of the fee simple  
23 interest in the real property, the agency and the holder if  
24 other than the agency;

25 (3) a statement that the covenant, amendment

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1 or termination is available in a file at the department of  
2 environment and that discloses the method of any electronic  
3 access; and

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

7 C. A statement in substantially the following form,  
8 executed with the same formalities as a deed in this state,  
9 satisfies the requirements of Subsection B of this section:

10 "1. This notice is filed in the land records of the  
11 county in which the real property is located pursuant to  
12 Section 12 of the Uniform Environmental Covenants Act.

13 2. This notice and the covenant, amendment or termination  
14 to which it refers may impose significant obligations with  
15 respect to the real property described below.

16 3. A legal description of the real property is attached  
17 as Exhibit A to this notice. The address of the real property  
18 that is subject to the environmental covenant is [insert  
19 address of real property][not available].

20 4. The name and address of the owner of the fee simple  
21 interest in the real property on the date of this notice is  
22 [insert name of current owner of the real property].

23 5. The environmental covenant, amendment or termination  
24 was signed by [insert name and address of agency].

25 6. The environmental covenant, amendment or termination

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1 was filed in the file on [insert date of filing].

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

10 Section 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.--  
11 In applying and construing the Uniform Environmental Covenants  
12 Act, consideration shall be given to the need to promote  
13 uniformity of the law with respect to its subject matter in  
14 states that enact it.

15 Section 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL  
16 AND NATIONAL COMMERCE ACT.--The Uniform Environmental Covenants  
17 Act modifies, limits or supersedes the federal Electronic  
18 Signatures in Global and National Commerce Act but does not  
19 modify, limit or supersede 15 USCA Section 7001(a) or authorize  
20 electronic delivery of any of the notices described in 15 USCA  
21 Section 7003(b).

22 Section 15. SAVING CLAUSE.--The Uniform Environmental  
23 Covenants Act does not affect an action commenced, proceeding  
24 brought or right accrued before the effective date of that act.

25 Section 16. APPROPRIATION.--Twenty thousand dollars

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1 (\$20,000) is appropriated from the general fund to the  
2 department of environment for expenditure in fiscal year 2007  
3 to provide for the establishment and maintenance of a file that  
4 contains all environmental covenants pursuant to the Uniform  
5 Environmental Covenants Act. Any unexpended or unencumbered  
6 balance remaining at the end of fiscal year 2007 shall revert  
7 to the general fund.

8 Section 17. SEVERABILITY.--If any part or application of  
9 the Uniform Environmental Covenants Act is held invalid, the  
10 remainder or its application to other situations or persons  
11 shall not be affected.

12 Section 18. APPLICABILITY.--The provisions of the Uniform  
13 Environmental Covenants Act apply to environmental covenants  
14 arising before or after the effective date of that act, but  
15 shall not apply to lands held in trust by the state pursuant to  
16 the act of congress of June 20, 1910, entitled "An act to  
17 enable the people of New Mexico to form a constitution and  
18 state government and be admitted into the union on an equal  
19 footing with the original states".

20 Section 19. EFFECTIVE DATE.--The effective date of the  
21 provisions of this act is July 1, 2006.