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HOUSE BILL 48

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

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.

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 the environmental response project pursuant to which the

1 environmental covenant is created;

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

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

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

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

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

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

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

25 G. "person" means an individual; corporation;

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1 business trust; estate; trust; partnership; limited liability
2 company; association; joint venture; public corporation;
3 government; governmental subdivision, agency or
4 instrumentality; or any other legal or commercial entity;

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

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

13 Section 3. NATURE OF RIGHTS--SUBORDINATION OF
14 INTERESTS.--

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

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

24 C. An agency is bound by any obligation it assumes
25 in an environmental covenant, but an agency does not assume

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

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

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

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

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

25 (4) an agreement by a person to subordinate a

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

5 Section 4. CONTENTS OF ENVIRONMENTAL COVENANT.--

6 A. An environmental covenant shall:

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

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

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

14 (4) identify every holder;

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

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

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

25 (1) requirements for notice following transfer

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

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

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

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

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

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

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

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

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

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

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

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

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

11 (4) it imposes a negative burden;

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

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

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

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

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

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

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

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

12 Section 6. RELATIONSHIP TO OTHER LAW.--

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

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

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1 Section 7. NOTICE.--

2 A. A copy of an environmental covenant shall be
3 provided by the following persons and in the manner required by
4 the agency to:

5 (1) each person who signed the environmental
6 covenant;

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

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

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

14 (5) any other person the agency requires.

15 B. The validity of an environmental covenant is not
16 affected by failure to provide a copy of the environmental
17 covenant as required under this section.

18 Section 8. RECORDING.--

19 A. An environmental covenant and any amendment or
20 termination of the environmental covenant shall be recorded in
21 every county in which any portion of the real property subject
22 to the environmental covenant is located. For purposes of
23 indexing, a holder shall be treated as a grantee.

24 B. Except as otherwise provided in Subsection C of
25 Section 9 of the Uniform Environmental Covenants Act, an

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1 environmental covenant is subject to the laws of New Mexico
2 governing recording and priority of interests in real property.

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

4 A. An environmental covenant is perpetual unless it
5 is:

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

8 (2) terminated by consent pursuant to Section
9 10 of the Uniform Environmental Covenants Act;

10 (3) terminated pursuant to Subsection B of
11 this section;

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

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

16 (a) the agency that signed the
17 environmental covenant is a party to the proceeding;

18 (b) all persons identified in
19 Subsections A and B of Section 10 of the Uniform Environmental
20 Covenants Act are given notice of the pendency of the
21 proceeding; and

22 (c) the court determines, after hearing,
23 that the termination or modification will not adversely affect
24 human health or the environment.

25 B. If the agency that signed an environmental

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1 covenant has determined that the intended benefits of the
2 environmental covenant can no longer be realized, a court,
3 under the doctrine of changed circumstances, in an action in
4 which all persons identified in Subsections A and B of Section
5 10 of the Uniform Environmental Covenants Act have been given
6 notice, may terminate the environmental covenant or reduce its
7 burden on the real property subject to the environmental
8 covenant. The agency's determination or its failure to make a
9 determination upon request is subject to review pursuant to the
10 Administrative Procedures Act.

11 C. Except as otherwise provided in Subsections A
12 and B of this section, an environmental covenant may not be
13 extinguished, limited or impaired through issuance of a tax
14 deed, foreclosure of a tax lien or application of the doctrine
15 of adverse possession, prescription, abandonment, waiver, lack
16 of enforcement, acquiescence or a similar doctrine.

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

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

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

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1 environmental covenant, unless the person waived in a signed
2 record the right to consent or a court finds that the person no
3 longer exists or cannot be located or identified with the
4 exercise of reasonable diligence; and

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

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

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

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

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

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

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

24 Section 11. ENFORCEMENT OF ENVIRONMENTAL 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;
5 (3) any person to whom the environmental
6 covenant expressly grants power to enforce;

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

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

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

17 C. A person is not responsible for or subject to
18 liability for environmental remediation solely because that
19 person has the right to enforce an environmental covenant.

20 Section 12. FILE--SUBSTITUTE NOTICE.--

21 A. The department of environment shall establish
22 and maintain a file that contains all environmental covenants
23 and any amendment or termination of those covenants. The file
24 may also contain any other information concerning environmental
25 covenants and the real property subject to them that the

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1 department of environment considers appropriate. The file is a
2 public record.

3 B. After an environmental covenant or an amendment
4 or termination of a covenant is filed in the file established
5 pursuant to Subsection A of this section, a notice of the
6 covenant, amendment or termination that complies with this
7 section may be recorded in the land records in lieu of
8 recording the entire covenant. Any such notice shall contain
9 the following:

10 (1) a legally sufficient description and any
11 available street address of the real property subject to the
12 covenant;

13 (2) the name of the owner of the fee simple
14 interest in the real property, the agency and the holder if
15 other than the agency;

16 (3) a statement that the covenant, amendment
17 or termination is available in a file at the department of
18 environment and that discloses the method of any electronic
19 access; and

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

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

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

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

7 3. A legal description of the real property is attached
8 as Exhibit A to this notice. The address of the real property
9 that is subject to the environmental covenant is [insert
10 address of real property][not available].

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

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

16 6. The environmental covenant, amendment or termination
17 was filed in the file on [insert date of filing].

18 7. The full text of the environmental covenant, amendment
19 or termination and any other information required by the agency
20 is on file and available for inspection and copying in the file
21 maintained for that purpose by the department of environment at
22 [insert address and room of building in which the file is
23 maintained]. The environmental covenant, amendment or
24 termination may be found electronically at [insert web address
25 for covenant].".

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

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

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

16 Section 16. SEVERABILITY.--If any part or application of
17 the Uniform Environmental Covenants Act is held invalid, the
18 remainder or its application to other situations or persons
19 shall not be affected.

20 Section 17. APPLICABILITY.--The provisions of the Uniform
21 Environmental Covenants Act apply to environmental covenants
22 arising before or after the effective date of that act, but
23 shall not apply to lands held in trust by the state pursuant to
24 the act of congress of June 20, 1910, entitled "An act to
25 enable the people of New Mexico to form a constitution and

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1 state government and be admitted into the union on an equal
2 footing with the original states".

3 Section 18. EFFECTIVE DATE.--The effective date of the
4 provisions of this act is July 1, 2007.

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