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SENATE BILL 85

**53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**

INTRODUCED BY

Richard C. Martinez

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. [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 or any other state or federal agency that determines or approves the environmental response project pursuant to which the

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

15 A. Any person, including a person that 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 that 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

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. [NEW MATERIAL] CONTENTS OF ENVIRONMENTAL  
6 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 every owner of the fee simple of the real property subject to  
18 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.   ~~[NEW MATERIAL]~~ VALIDITY--EFFECT ON OTHER

2 INSTRUMENTS.--

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

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

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

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

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

13                   (4)  it imposes a negative burden;

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

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

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

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

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

24           C.   An instrument that creates restrictions or  
25 obligations with respect to real property that would qualify as

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1 activity and use limitations, except for the fact that the  
2 instrument was recorded before July 1, 2016, 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. [NEW MATERIAL] 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 does not  
23 displace the Voluntary Remediation Act, the New Mexico Mining  
24 Act, the Surface Mining Act, the Oil and Gas Act, the Water  
25 Quality Act or any other law governing an environmental

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1 response project.

2 C. Public notices, opportunities for public  
3 comments and opportunities to request a hearing in connection  
4 with an environmental response project shall identify whether  
5 an environmental covenant is proposed.

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

7 A. A copy of an environmental covenant shall be  
8 provided by the persons and in the manner required by the  
9 agency to:

10 (1) each person that signed the environmental  
11 covenant;

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

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

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

19 (5) any other person the agency requires.

20 B. The validity of an environmental covenant is not  
21 affected by failure to provide a copy of the environmental  
22 covenant as required under this section.

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

24 A. An environmental covenant and any amendment,  
25 assignment or termination of the environmental covenant shall

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1 be recorded in every county in which any portion of the real  
2 property subject to the environmental covenant is located. For  
3 purposes of indexing, a holder shall be treated as a grantee.

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

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

10 A. An environmental covenant is perpetual unless it  
11 is:

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

14 (2) terminated by consent pursuant to Section  
15 10 of the Uniform Environmental Covenants Act;

16 (3) terminated pursuant to Subsection B of  
17 this section;

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

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

22 (a) the agency that signed the  
23 environmental covenant is a party to the proceeding;

24 (b) all persons identified in  
25 Subsections A and B of Section 10 of the Uniform Environmental

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1 Covenants Act are given notice of the pendency of the  
2 proceeding; and

3 (c) the court determines, after hearing,  
4 that the termination or modification will not adversely affect  
5 human health or the environment.

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

17 C. Except as otherwise provided in Subsections A  
18 and B of this section, an environmental covenant may not be  
19 extinguished, limited or impaired through issuance of a tax  
20 deed, foreclosure of a tax lien, application of the doctrine of  
21 adverse possession, prescription, abandonment, waiver, lack of  
22 enforcement, acquiescence or a similar doctrine, or Section  
23 45-2-901 NMSA 1978 or Sections 45-2-908 through 45-2-914 NMSA  
24 1978.

25 SECTION 10. [NEW MATERIAL] AMENDMENT OR TERMINATION BY

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1 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 that 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, an assignment of an  
23 environmental 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 the holder's
- 2 interest without 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. [NEW MATERIAL] ENFORCEMENT OF ENVIRONMENTAL  
9 COVENANT.--

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

- 13 (1) a party to the environmental covenant;
- 14 (2) the agency or if it is not the agency, the
- 15 department of environment;
- 16 (3) any person to whom the environmental
- 17 covenant expressly grants power to enforce;
- 18 (4) a person whose interest in the real
- 19 property or whose collateral or liability may be affected by
- 20 the alleged violation of the environmental covenant; or
- 21 (5) a municipality or other unit of local
- 22 government in which the real property subject to the
- 23 environmental covenant is located.

24 B. The Uniform Environmental Covenants Act does not  
25 limit the regulatory authority of the agency under law other

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1 than the Uniform Environmental Covenants Act with respect to an  
2 environmental response project.

3 C. A person is not responsible for or subject to  
4 liability for environmental remediation solely because it has  
5 the right to enforce an environmental covenant.

6 SECTION 12. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND  
7 CONSTRUCTION.--In applying and construing the Uniform  
8 Environmental Covenants Act, consideration shall be given to  
9 the need to promote uniformity of the law with respect to its  
10 subject matter in states that enact it.

11 SECTION 13. [NEW MATERIAL] RELATION TO ELECTRONIC  
12 SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform  
13 Environmental Covenants Act modifies, limits or supersedes the  
14 federal Electronic Signatures in Global and National Commerce  
15 Act but does not modify, limit or supersede 15 USCA Section  
16 7001(c) or authorize electronic delivery of any of the notices  
17 described in 15 USCA Section 7003(b).

18 SECTION 14. [NEW MATERIAL] SAVING CLAUSE.--The Uniform  
19 Environmental Covenants Act does not affect an action  
20 commenced, a proceeding brought or a right accrued before July  
21 1, 2018.

22 SECTION 15. APPLICABILITY.--The provisions of the Uniform  
23 Environmental Covenants Act apply to environmental covenants  
24 arising on or after July 1, 2018. The provisions of the  
25 Uniform Environmental Covenants Act shall not apply to lands

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1 held in trust by the state pursuant to the act of congress of  
2 June 20, 1910, entitled "An act to enable the people of New  
3 Mexico to form a constitution and state government and be  
4 admitted into the union on an equal footing with the original  
5 states".

6 SECTION 16. EFFECTIVE DATE.--The effective date of the  
7 provisions of this act is July 1, 2018.

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