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FISCAL IMPACT REPORT

SPONSOR Heaton **DATE TYPED** 3/10/05 **HB** 889/aHENRC/aHFL#1

SHORT TITLE Uniform Environmental Covenants Act **SB** _____

ANALYST Hadwiger

APPROPRIATION (in \$000s)

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Department of Environment (NMED)
 Department of Finance and Administration (DFA)
 Energy, Minerals and Natural Resources Department (EMNRD)
 New Mexico State Land Office (SLO)

SUMMARY

Synopsis of the HF1#1

House Floor Amendment #1 would exempt lands held in trust by the state pursuant to the act of Congress of June 20, 1910 from the provisions of the Uniform Environmental Covenants Act.

Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee amendment to House Bill 889 would, by inserting, “the New Mexico Mining Act, the Surface Mining Act, the Oil and Gas Act, the Water Quality Act or any other law governing an environmental response project” into page 8, line 23, ensure that these referenced statutes are not superceded or displaced. It would also clarify that an entity may not restrict the use of groundwater “in exchange for” cleaning it up to state water quality standards. The amendment also establishes a state registry for contaminated sites to which environmental covenants have been attached.

Synopsis of Original Bill

House Bill 889 would adopt the Uniform Environmental Covenants Act. The Act would provide for enforcement of use limitations on real property due to adverse environmental conditions. The limitations would be codified in a deed restriction that runs with the land.

Significant Issues

HB889 as amended substantively includes the entirety of a model ordinance developed by the National Conference of Commissioners on Uniform State Laws to provide a legal mechanism (a valid real property servitude) to allow restricted use of properties that cannot be economically remediated for unrestricted use.

NMED explained the rationale for the Act as follows: In many cases, returning polluted sites to a less than pristine condition, or to a condition that requires owners or operators to restrict the use of the property, may be desirable, both from an economic and redevelopment standpoint. In other cases, it may be technically infeasible to clean up a site due to the nature of the contaminant, the subsurface, or other site characteristics. Even today, not all environmental clean ups of polluted properties result in the property being returned to unrestricted use. For example, an owner of a contaminated site may retain ownership of a parcel after clean up, and choose to return the site only to an industrial use. In this scenario potential exposure to humans would be less than that for, say, a residential or recreational scenario. In New Mexico, there is no authority to enforce such a land-use restriction. In any event, if exposure (i.e., land use) is controlled, human and environmental health and safety would not be likely to be compromised. These are the basic underpinnings of HB889.

NMED noted that HB889 could have a significant and positive impact on economic development in New Mexico. If all parties to the covenant are confident that site-appropriate activity and use limitations in the covenant will be enforced, it is more likely that environmental regulators and the owners of contaminated real property will allow those properties to be developed and used with appropriate controls, rather than be abandoned. Development of the property, particularly in current and former industrial areas, could help revitalize those areas and serve the economic and social interests of their residents. Such redevelopment need rely only on restricted use of the surface and soils. Redevelopment can and does occur during active ground water remediation.

NMED indicated the HENRC amendments alleviate concerns expressed in committee testimony that HB889 would allow entities that pollute groundwater to escape responsibility for cleaning it up if they simply restrict the current and future use of it. The amendments prohibit agencies from approving any covenant on the use of groundwater unless state standards will be achieved through an approved cleanup plan. If state standards cannot be achieved, entities seeking such covenants may appeal for alternative standards under the Water Quality Act.

EMNRD offered the following comments on HB889:

The New Mexico Mining Act, administered by Mining and Minerals Division, (MMD) requires mine operators to identify post mining land uses at the time of permit approval. This process allows mine operators, landowners and regulators to agree upon the type and level of reclamation that is implemented after mine closure. Many mine sites are not returned to pre-mining ecosystems but instead are more conducive for industrial land use utilizing existing

mine facilities as infrastructure. It appears HB889 is intended to supplement reclamation requirements contained in mining permits by providing for environmental covenants to run with the land. Restrictions on land use that would allow for environmental monitoring for extended periods may be appropriate for severely disturbed mine land. Having the covenants “run with the land” helps assure that engineering controls put into place until mine reclamation or remediation is complete will remain in place. Similarly, the Oil Conservation Division (OCD) administers abatement plans where ground water has been subjected to contamination. Abatement plans may require that actions to clean up contamination continue for a relatively long period of time and impose affirmative obligations on the landowner. The bill would help provide a framework for placing the responsibility for, and enforcing such obligations

The State Land Office indicated the following concerns with HB889:

The bill does not provide protection of landowners from lessees. It should provide that a lessee of land cannot create or grant an environmental covenant without first obtaining the written consent of the landowner, which consent should be indicated in the covenant itself.

The bill should provide that an agency cannot be granted an environmental covenant (and the consequent liability for enforcement) without its express consent, which consent should be included in the covenant itself.

FISCAL IMPLICATIONS

NMED anticipated no fiscal impact from the requirement to maintain a registry of covenants and minimal administrative impact.

OTHER SUBSTANTIVE ISSUES

According to the National Conference of Commissioners on Uniform State Laws, “environmental covenants are increasingly being used as part of the environmental remediation process for contaminated real property. An environmental covenant typically is used when the real property is to be cleaned up to a level determined by the potential environmental risks posed by a particular use, rather than to unrestricted use standards. Such risk-based remediation is both environmentally and economically preferable in many circumstances, although it will often allow the parties to leave residual contamination in the real property. An environmental covenant is then used to implement this risk-based cleanup by controlling the potential risks presented by that residual contamination. . . . Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be reflected on the land records and effectively enforced over time as a valid real property servitude. . . . A second important policy served by [statutes establishing environmental covenants] is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use.”

As of 2003, roughly one-half of the states had laws providing for land use restrictions in conjunction with risk-based remedies.

EMNRD indicated that mine operators may put up real property as collateral for financial assurance. Since HB889 requires that environmental covenants be recorded with the county in which the subject property is located, MMD would be able to determine quickly if covenant restrictions impact the appropriateness of accepting the real property for collateral.

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