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## FISCAL IMPACT REPORT

ORIGINAL DATE 1-26-06

SPONSOR Heaton LAST UPDATED \_\_\_\_\_ HB 314

UNIFORM ENVIRONMENTAL COVENANTS

SHORT TITLE ACT SB \_\_\_\_\_

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ANALYST Hadwiger

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
	\$20.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of Bill

House Bill 314 would enact the Uniform Environmental Covenants Act to 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. HB314 provides that an entity may not restrict the use of groundwater “in exchange for” cleaning it up to state water quality standards. HB314 also establishes a state registry for contaminated sites to which environmental covenants have been attached. The bill makes a \$20 thousand appropriation from the general fund to the Department of Environment (NMED) in FY07 to establish and maintain a database of all environmental covenants.

### FISCAL IMPLICATIONS

The appropriation of \$20 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY07 would revert to the general fund. Maintenance of the database of environmental covenants is likely to have a

recurring cost, the amount of which would depend on the size of the database. Also, it is possible that NMED will require additional legal support to participate in development of environmental covenants. NMED does not anticipate any recurring budget impact.

## SIGNIFICANT ISSUES

HB314 follows a model statute developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide a legal mechanism (a valid real property servitude) to allow restricted use of properties that cannot be economically remediated for unrestricted use. The model statute is amended to reflect changes proposed when this bill was presented to the legislature last year (HB889). The NCCUSL explains the benefits of the model ordinance as follows:

*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. This Act addresses a variety of common law doctrines... that cast doubt on such enforceability.*

*A second important policy served by this Act 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.*

*Large numbers of contaminated sites are unlikely to be successfully recycled until regulators, potentially responsible parties, affected communities, prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these actions in recorded instruments which will be reflected in the title abstract of the property in question.*

NMED indicated that, 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 from an economic 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 HB314.

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 noted that the primary difference between HB314 and the model statute is that the NCCUSL had membership from across the country, resulting in legislative language with a slant toward eastern states that use more surface waters and that have more redevelopment issues. HB314 prohibits agencies would be prohibited from approving any covenant on the use of groundwater unless state standards will be achieved through an approved clean-up plan. If state standards cannot be achieved, entities seeking such covenants may apply to the Water Quality Control Commission for alternative standards under the Water Quality Act. HB314 also includes a provision for a state registry for environmental covenants filed with the state. Such a system would serve New Mexicans well by providing for a “one-stop” for information on all polluted sites with some kind of environmentally-driven land-use restriction. NMED does not believe such a registry, once established, would be an onerous burden to maintain.

EMNRD anticipated no negative impact from the bill. On the contrary, EMNRD indicated that the proposed environmental covenants may offer a vehicle whereby a covenant may be placed on mine-impacted land to prevent certain activity from occurring on that land that could present a hazard to humans. For example, a covenant could be placed on mine tailings to prevent a residential development on the site in the future if such development would be hazardous to humans.

The State Land Office expressed concerns about the impact of the bill on that agency.

1. The most apparent issues presented by the UECA for the Land Office relate to the peculiar jurisdiction and authority of this agency. Since the Commissioner represents a federally created trust with plenary jurisdiction over the trust lands, there is some question as to whether this statute could effectively limit his ability to manage and control the trust. More specifically, since one commissioner cannot usually bind a subsequent commissioner with his or her administrative decisions, the question arises as to whether the imposition of environmental covenants by one commissioner could properly limit a subsequent commissioner’s use of trust lands, particularly if the covenants were subsequently determined not to be in the best interests of the trust. Finally, since the statute specifically defines the covenants as an interest in real property, and since the Enabling Act proscribes against the disposition of such interests without advertisement, public auction, and compensation for true value, it is likely that the granting of an environmental covenant without meeting these constitutional requirements would void the covenant.
2. Non-fiscal impact issues for the Land Office include: Section 6B would place some limits

on how we remediate trust lands, but these are probably reasonable; Section 8A will impose some additional minimal duties on our Records Division; Section 9B would subject the Land Office to the APA in the event of an enforcement action; and Section 11A presumably waives any sovereign immunity the SLO would have in an enforcement action.

### **PERFORMANCE IMPLICATIONS**

NMED noted the Hazardous Waste Bureau tracks performance measures related to remediation at national laboratories. HB314 could help accelerate land transfers as wastes are remediated.

### **ADMINISTRATIVE IMPLICATIONS**

NMED would develop systems for tracking contaminated parcels, deed restrictions placed with counties and land ownership.

### **TECHNICAL ISSUES**

According to NMED, the bill requires that an environmental covenant be recorded with the county in which the subject property is located. Many of New Mexico's worst contaminated sites are on federal facilities or are federally-owned. The federal government does not generally register deeds, much less use restrictions, for its properties with New Mexico county offices.

### **ALTERNATIVES**

SLO suggested that the bill should exempt trust lands.

### **QUESTIONS**

1. What are some examples of properties in New Mexico that would be benefited from adoption of this bill? What are prospective uses for these properties?