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HOUSE BILL 889

**47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005**

INTRODUCED BY

John A. Heaton

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

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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. NATURE OF RIGHTS--SUBORDINATION OF  
14 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

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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.

24 Section 7. NOTICE.--

25 A. A copy of an environmental covenant shall be

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1 provided by the persons and in the manner required by the  
2 agency to:

3 (1) each person that signed the environmental  
4 covenant;

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

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

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

12 (5) any other person the agency requires.

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

16 Section 8. RECORDING.--

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

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

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

2           A. An environmental covenant is perpetual unless it  
3 is:

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

6                   (2) terminated by consent pursuant to Section  
7 10 of the Uniform Environmental Covenants Act;

8                   (3) terminated pursuant to Subsection B of  
9 this section;

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

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

14                           (a) the agency that signed the  
15 environmental covenant is a party to the proceeding;

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

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

23           B. If the agency that signed an environmental  
24 covenant has determined that the intended benefits of the  
25 environmental covenant can no longer be realized, a court,

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1 under the doctrine of changed circumstances, in an action in  
2 which all persons identified in Subsections A and B of Section  
3 10 of the Uniform Environmental Covenants Act have been given  
4 notice, may terminate the environmental covenant or reduce its  
5 burden on the real property subject to the environmental  
6 covenant. The agency's determination or its failure to make a  
7 determination upon request is subject to review pursuant to the  
8 Administrative Procedures Act.

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

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

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

19 (1) the agency;  
20 (2) the current owner of the fee simple of the  
21 real property subject to the environmental covenant, unless  
22 waived by the agency;

23 (3) each person that originally signed the  
24 environmental covenant, unless the person waived in a signed  
25 record the right to consent or a court finds that the person no

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1 longer exists or cannot be located or identified with the  
2 exercise of reasonable diligence; and

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

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

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

13 D. Except as otherwise provided in an environmental  
14 covenant:

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

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

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

22 Section 11. ENFORCEMENT OF ENVIRONMENTAL COVENANT.--

23 A. A civil action for injunctive or other equitable  
24 relief for violation of an environmental covenant may be  
25 maintained by:

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1 (1) a party to the environmental covenant;

2 (2) the agency;

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

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

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

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

15 C. A person is not responsible for or subject to  
16 liability for environmental remediation solely because it has  
17 the right to enforce an environmental covenant.

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

23 Section 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL  
24 AND NATIONAL COMMERCE ACT.--The Uniform Environmental Covenants  
25 Act modifies, limits or supersedes the federal Electronic

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1 Signatures in Global and National Commerce Act but does not  
2 modify, limit or supersede 15 USCA Section 7001(a) or authorize  
3 electronic delivery of any of the notices described in 15 USCA  
4 Section 7003(b).

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

8 Section 15. 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 16. 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.

15 Section 17. EFFECTIVE DATE.--The effective date of the  
16 provisions of this act is July 1, 2005.