STATE OF NEW MEXICO
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS TO 19.15.2, 19.15.5, 19.15.8, 19.15.9, AND 19.15.25 NMAC **CASE NO. 24683**

THE NEW MEXICO OIL AND GAS ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO'S REPLY TO APPLICANTS' OBJECTION TO EXPEDITED JOINT MOTION TO REOPEN EVIDENTIARY RECORD

The New Mexico Oil and Gas Association ("NMOGA") and Independent Petroleum Association of New Mexico ("IPANM") (collectively, the "Industry Associations" or "Trades"), through their counsel of record, submit this Reply in Support of their *Expedited Joint Motion to Reopen Evidentiary Record* (hereinafter, "Motion"), responding to the objections raised by Applicants, led by the Western Environmental Law Center ("WELC").

I. PRELIMINARY STATEMENT

Applicants concede that HB 80 is relevant enough for the Commission to notice and consider HB 80 and the underlying New Mexico Legislative Finance Committee fiscal impact reports and New Mexico Energy, Minerals, and Natural Resources Department ("EMNRD") bill analysis. That concession confirms the central issue is process, not the relevance of HB 80 being signed into law. Applicants' admission that HB 80 bears on this rulemaking establishes that the chief question for the Commission to determine pertains to its own process: whether the Commission will address HB 80 on a record adequate to support reasoned decision-making, or instead, as WELC proposes, by administrative notice coupled with a five-page supplemental briefing filed with the Parties' Closing Documents.

The answer is straightforward: the Commission should grant the Motion. Doing so

conforms with the Commission's duty to pass rules rooted in substantial evidence and avoids challenges for ignoring an "important aspect of the problem." This rulemaking was initiated on the premise that New Mexico faced a massive orphan well funding shortfall and that Applicants' proposed amendments across OCD's financial assurance, compliance, operatorship, and abandonment regulations ("Proposed Rules" or "Proposed Amendments"), most notably the $150,000 one-well financial assurance provision proposed for all well types, regardless of well status or type,[1] were needed in substantial part because the Reclamation Fund could not cover the gap between the available operator-provided financial assurance and the estimated shortfall of funds available through the Reclamation Fund. *Motion* ¶¶ 3-8, 51-53, 55. HB 80 is a major legislative enactment directed at that very subject. IPANM is prepared to provide supplemental financial analysis as described below and from its already admitted Economist Expert, Dr. Robert Arscott, by the current April 3rd closing deadline. This should dispel any claims of impropriety and delay.

And on the same day HB 80 became law, Co-Applicant, San Juan Citizens Alliance ("SJCA") filed a district-court complaint advancing a materially different causal theory of the same "orphan well problem" than the one that Applicants have advanced in this rulemaking. These are not trivial developments. They are exactly the sort of changed circumstances an agency must confront before adopting final rules. Applicants respond in three ways, none of which are persuasive.

First, Applicants try to recast the Proposed Rules as purely "preventative," even though

[1] Proposed: 19.15.8.9(C)(1) NMAC (individually secured "active wells" immediately effective with promulgation of the Proposed Amendments); *id.* (D)(1)-(2) (every Low Producing Well, immediately effective for transfers but otherwise delayed to mid-2029); *id.* (E) (all wells in a high-risk portfolio with 20% or more Temporarily Abandoned ("TA'd") and/or "inactive wells" but effective date delayed to mid-2029); *id.* (F)(1)-(2) (every TA'd and inactive well, regardless if covered by blanket financial assurance instrument, immediately effective); *id.* (G) (each well not covered by existing blanket financial assurance, immediately effective with promulgation of the Proposed Amendments).

their own witnesses repeatedly tied the Applicants' proposals to OCD's plugging costs, anticipated increases in the number of orphaned wells, and the inadequacy of the Reclamation Fund (which was referenced 144 times on the hearing record alone, not considering discussions in pre-filed testimony). *Motion* ¶¶ 3-8, 51-53, 55. Moreover, HB 80 and the SJCA complaint are more entwined than the Applicants would have this Commission acknowledge. Co-Applicant SJCA[2] specifically requests in its prayer for relief that the New Mexico First Judicial District Court:

- "Declar[e] that Defendants are out of compliance with their duties under the Oil and Gas Act by assuming noncompliant operators' plugging and remediation obligations and expending funds from the Oil and Gas Reclamation Fund without forfeiting such operators' financial assurance and otherwise taking mandatory steps to enforce cleanup obligations against such operators; . . .

- Enjoin[] Defendants [the State and EMNRD] to comply with the mandatory financial assurance collection and forfeiture provisions of the Oil and Gas Act, including securing additional financial assurance for wells inactive for longer than two years, and forfeiting an operator's financial assurance if the operator fails to comply with the Division's order to plug or remediate a well;

- Enjoin[] Defendants from expending funds from the Oil and Gas Reclamation Fund to plug, abandon, restore, or remediate any well or well site without forfeiting the well operator's financial assurance and otherwise taking mandatory steps to enforce plugging, abandonment, restoration, and remediation obligations from the operator of such well[.]

Motion Att. E at 49-50.

Second, Applicants cite generic abuse-of-discretion cases about reopening records in wholly different contexts, while ignoring that discretion must be exercised in a manner consistent with reasoned administrative decision-making.

Third, Applicants dismiss the SJCA complaint because its allegations are not yet proven and because WELC's counsel says it was unaware that SJCA was filing it. Applicants miss the point. The relevance of the SJCA complaint is not that its allegations represent adjudicated facts.

[2] *But see Notice of Withdrawal of San Juan Citizens Alliance as a Party* filed March 13, 2026, addressed herein, Page 11, *infra.*

It is that a Co-Applicant in this rulemaking identified the cause of the "orphan well problem" to be OCD enforcement practices, to another New Mexico tribunal, not the level or lack of financial assurance, as Applicants have stressed to this Commission all along.

By way of analogy, a party cannot build its case in one proceeding on the premise that the toolbox is empty and then, when convenient, recast the dispute elsewhere as a complaint that the tools inside were not used adequately. Either the authority was absent, or it existed and was not exercised; WELC and its Co-Applicants cannot have it both ways. The Commission should reopen the record to address such reversible logic.

II. ARGUMENT

A. Applicants Concede HB 80 is Material; Administrative Notice Plus Five Pages of Briefing is not a Substitute for a Comprehensive and Reasoned Record

Applicants do not dispute that HB 80 is relevant. On the contrary, they affirmatively request that the Commission take administrative notice of HB 80 and allow supplemental briefing on its effect. *Applicants' Opposition* at 6-7. That concession matters. An agency may not acknowledge a contemporaneous statutory development as relevant and then cabin consideration of it to a procedure too cramped to permit meaningful analysis of its implications.

HB 80 is a major legislative response to the funding shortfall that Applicants placed at the center of this rulemaking. In their Motion, the Industry Associations explained in detail that WELC and OCD repeatedly justified the Proposed Rules by reference to the Legislative Finance Committee's June 2025 *Spotlight on Orphan Wells* (referred to at the hearing as the "LFC Report") assessment of the State's plugging exposure and the inadequacy of the Reclamation Fund. *Motion* ¶¶ 3-8, 51-53, 55. WELC's objection to the Motion never meaningfully grapples with that point. Instead, it creates and attacks a straw man: namely, that NMOGA and IPANM claimed HB 80 "solves" every issue implicated by the Proposed Rules. That is inaccurate. The Motion's point is

narrower and focused: HB 80 materially alters the necessity, proportionality, and evidentiary justification for rules supposedly calibrated to a pre-HB 80 funding landscape.

One can calculate that HB 80's projected revenue stream equates to approximately $35,000 starting in FY 2028 to $200,000 per at-risk well by FY 2037, fully covering the cost range used in WELC's own modeling. *Motion* ¶¶ 24, 26. However, neither the costs to plug wells nor the value of a dollar in tax revenue will remain static over time. To determine the proportionality and necessity of the amount of the proposed single well bonding, this Commission needs to understand what the additional funds can reasonably be projected to enable the Reclamation Fund to do in the future. This evidence is not in the legislation. IPANM wishes to have its previously admitted and recognized Economist Expert Witness, Dr. Robert Arscott, submit supplemental testimony about that precise issue and is prepared to submit written testimony in short order. IPANM assumes that the other parties will want the opportunity to probe and/or rebut that testimony and that the Commission may have questions for Dr. Arscott.

That is why the Applicants' proposed notice and limited briefing alternative must fail. Five pages filed within five days of an administrative-notice order is not a meaningful response to a $1.23 billion statutory development enacted after the close of evidence and directed to the same orphan well liability concerns that Applicants used to justify the changes embedded in the Proposed Rules. The Commission is not deciding a trivial matter. It is deciding whether to adopt sweeping rules affecting financial assurance, transfers, temporary abandonment, and related obligations across five parts of OCD's regulations, which are binding on this State's oil and gas industry. Applicants' own Objection labels the rulemaking "critical." Reasoned decision-making requires a remedy commensurate with the significance of the intervening development that HB 80 represents. The Commission may be tempted to "split the difference" by taking administrative

notice of HB 80 and allowing a few pages of additional briefing on the topic. This approach will only address a fraction of the issues raised by HB 80's passage and therefore does not comport with the Commission's duty to promulgate rules supported by substantial evidence.

Applicants claim that reopening the record is unnecessary because the Motion makes "no showing" of the relevant documents and witnesses to be considered. *Applicants' Opposition* at 5-7. This claim is erroneous. As detailed at length in the Motion, HB 80 fundamentally alters the factual premise underlying the Proposed Rules. It calls into question their necessity and proportionality. The Commission has a right and duty to address testimony in the record that has now been rendered moot and/or false by HB 80, including WELC's own direct testimony that the rulemaking might not be necessary should the Legislature create a "jumbo reclamation fund" because that would be among "the other ways" to solve the orphan well problem. *Motion* ¶¶ 5, 51-53. Applicants' *Opposition* simply ignores this contradiction.

As noted, to aid the Commission in its economic analysis of HB 80 and the impact on the Proposed Rules during deliberations, IPANM is prepared to submit written supplemental testimony from its Economist Expert Witness, Dr. Robert Arscott, and make Dr. Arscott available for remote direct examination, cross-examination, and questioning by the Commission. NMOGA and IPANM further identify three other categories of proposed evidence to be submitted if the Commission determines that reopening the record is the proper course of action to address recent developments. *See* Part II.G.1.i.-iv, *infra*.

B. Applicants' Newly Introduced Prevention/Remediation Distinction Collapses Under Their Own Record

Applicants now claim HB 80 is beside the point because the Reclamation Fund addresses orphan wells only "after the fact." *Applicants' Opposition* at 4. In contrast, the Proposed Rules now allegedly "prevent" wells from becoming orphaned in the first place. But that *post hoc*

distinction cannot be squared with the record that the Applicants themselves built.

Applicants' attempted distinction between prevention and remediation collapses under its own record testimony. *Applicants' Opposition* at 4. Rules based on OCD's plugging costs are, by definition, remediation metrics, because those costs occur only after a well is orphaned and the State intervenes. If the Proposed Rules were truly aimed at prevention, Applicants would have linked financial assurance levels to the deterrence necessary to prompt timely operator-led plugging, not to the inflated remediation costs of the State; Applicants' own witnesses so confirmed. *Motion* ¶¶ 43-44, 53. Mr. Peltz testified that "the approaching liability of an aging industry is orders of magnitude larger than the Reclamation Fund," and Mr. Morgan testified that "there's simply not enough money in the Reclamation Fund to cover the shortfall." *Motion* ¶¶ 19, n.9, 140. These are arguments directed to the State's projected cleanup burden, not prevention. Now that the Legislature has acted exactly as Mr. Peltz explained in his "jumbo fund" testimony, Applicants cannot deny the logical result of their own predicate being fulfilled. *Motion* ¶¶ 5, 51. Their newly claimed prevention/remediation distinction is a post hoc rationalization aimed at shielding the Proposed Rules from HB 80's implications. And the Commission should not adopt the rules before it without reopening the record to assess whether such a distinction is credible in the first place and remains valid in the face of HB 80 in the second, such that, as Applicants now suggest, the Proposed Rules can be justified as "preventative" measures despite the scant evidentiary record of this preventative intent. *Applicants' Opposition* at 4.

Applicants cannot recast their proposals as wholly divorced from the Reclamation Fund simply because the Legislature acted. If, as Applicants now say, the Proposed Rules have nothing meaningful to do with the adequacy of the Reclamation Fund, then large swaths of their own evidentiary presentation were beside the point. *See Motion* ¶¶ 3-8, 51-53, 55. If, on the other hand,

the Reclamation Fund's inadequacy was indeed part of the Proposed Rules justification, as the record demonstrates, then HB 80 matters, and materially so. *Motion* ¶¶ 10, 27, 52, 64.

The same is true of the proposed financial assurance amounts. Applicants' own framework tied those amounts to OCD's plugging costs. As the Motion explains, WELC's expert testified that "the only relevant figure for determining the typical cost to plug and abandon a New Mexico well is the cost to OCD." *Motion* ¶¶ 43-44, 53. If OCD's cost is the metric, HB 80's infusion of funding into the mechanism used to bear those costs is plainly relevant to whether the proposed financial assurance requirements remain necessary and, if so, proportionate. WELC's objection offers no principled way around that conclusion. *Motion* ¶ 61.

C. The Cases Applicants Cite Do Not Help Them; If Anything, They Confirm Reopening the Record is Appropriate

Applicants' response on the law is telling. They do not identify any case holding that an agency may ignore a material post-hearing statutory development that undercuts a core factual predicate of a pending rulemaking. Instead, they cite three cases, *Trujillo*, *Harrison*, and *Fox*, for the unremarkable proposition that motions to reopen are generally reviewed for abuse of discretion. *Applicants' Opposition* at 3.

The Industry Associations do not dispute that reopening rests within the Commission's discretion. But discretion is not license. It must be exercised according to reason and in a manner consistent with the Commission's duty to consider important aspects of the problem before it. *Motion* ¶¶ 1-2, n.5, 18, 29, 32, n.14, 34-35 46-47, 50, 55. That is precisely why Applicants' authorities do not carry the weight they assign them.

Trujillo does not help Applicants. *Applicants' Opposition* at 3. There, the New Mexico Court of Appeals upheld reopening the record because the governing rule allowed supplementation "under exceptional circumstances and in the interest of justice" and because the trial court had

broad discretion to reopen when new material warranted it. *Trujillo v. Los Alamos Nat. Lab'y*, 2016-NMCA-041, ¶¶ 25-26. *Trujillo* confirms that when significant developments arise after the close of evidence, reopening in the interest of justice is an entirely proper exercise of discretion.

Harrison is even further afield. *Applicants' Opposition* at 3. It was a criminal appeal reviewing a trial court's refusal to reopen for rebuttal polygraph testimony after the close of evidence, where the court considered diligence, cumulative value, and likely delay. *State v. Harrison,* 2000-NMSC-022, ¶ 56 *et seq.* That setting bears no resemblance to this one. Neither HB 80 nor the SJCA Complaint existed during the hearing. There could have been no earlier diligence in presenting what had not yet happened. And neither development is cumulative. Each goes directly to whether the factual premises of the Proposed Rules remain tenable and credible.

Fox is farther still. *Applicants' Opposition* at 3. It merely states the black-letter proposition that a motion to reopen is addressed to the trial court's discretion. *Fox v. Doak*, 1968-NMSC-031, ¶ 9. It says nothing about an agency's obligations when a major statutory enactment intervenes before a final decision. A case stating that a court has discretion tells the Commission nothing about how that discretion should be exercised.

By contrast, the authorities cited in the Industry Associations' *Motion to Reopen* are targeted at the actual problem before the Commission. *Atlixco* requires an agency to address important aspects of the problem at hand. *Motion* ¶¶ 1, 18, 29-31, 38, 60. *In re Rhino* confirms that an agency may not simply declare material evidence irrelevant to avoid confronting it. *Motion* ¶¶ 32-33, 52. *Ohio v. EPA* rejects agency decision-making that proceeds on obsolete premises after intervening developments have undermined the rule's foundation. *Motion* ¶¶ 34-35. *Ziffrin* and *Zen Magnets* underscore the same principle in slightly different forms: when the legal or factual landscape materially shifts during a pending administrative matter, the agency must account for

the change in a reasoned way. *Motion* ¶ 36.

Applicants' objection leaves those authorities unanswered. It instead says none of them imposes a "mandatory duty" to reopen. *Applicants' Opposition* at 2. That is a false target. The Industry Associations need not prove that reopening is compelled in every conceivable circumstance. They need only show that denying reopening here, despite a major legislative enactment and a Co-Applicant's materially inconsistent new pleading, is imprudent, likely constitutes an abuse of discretion, and would leave the Commission exposed to the very arbitrariness concerns those authorities identify. The Motion meets and exceeds that threshold.

D. The SJCA Complaint Matters Because It Reveals a Material Inconsistency in Applicants' Causal Theory, Not Because Its Allegations Have Already Been Proven True

Applicants say the SJCA Complaint is irrelevant because it contains "unsubstantiated allegations" and because allegations are not proper subjects of administrative notice. *Applicants' Opposition* at 1, 5. But the Industry Associations are not asking the Commission to treat the Complaint's allegations as adjudicated fact. The point made in the Motion is different and narrower.

The point is that a Co-Applicant in this rulemaking filed a pleading in district court on March 9, 2026, the very day HB 80 was signed, asserting that New Mexico's orphan-well problem stems from OCD's failure to use the enforcement tools it already has: forfeiture, collection of additional financial assurance, and indemnification actions. *Motion* ¶¶ 54-63. That theory is materially different from the theory that Applicants have pressed here, where inadequate financial assurance levels and the resulting shortfall in the Reclamation Fund were central justifications for the Proposed Rules. If SJCA's judicial position is correct, then raising per-well financial assurance levels to $150,000 will accomplish nothing because OCD will not forfeit those bonds either. The Complaint is, effectively, a Co-Applicant's own admission that the Proposed Rules do not resolve

the problem they claim this rulemaking will address**.**

It also does not matter whether counsel for Applicants knew of the Complaint. *Applicants' Opposition* at 5-6. If anything, the fact that a Co-Applicant's counsel drew the opposite causal conclusion from OCD's public enforcement data without WELC's knowledge emphasizes that the foundational assumptions of this rulemaking require review, not dismissal. The proper process for that review is a reopened record. That inconsistency is relevant whether the Complaint's allegations have yet been adjudicated. The Commission is entitled to know that one of the Applicants is simultaneously telling another tribunal that the real cause of the problem lies elsewhere. Agencies, like courts, are not required to pretend that a litigant's opposite-position pleading in another forum does not exist simply because the second pleading is newly filed.

Applicants' effort to distance themselves from the SJCA Complaint is also unavailing. *Applicants' Opposition* at 6, n.4. Their footnote says no WELC lawyer helped draft it and that WELC had no prior knowledge of SJCA's intention to join it. Even if accepted at face value, that is not a defense. At best, it means the Applicants' coalition is so internally fractured that one Co-Applicant is now advancing in district court a materially different causal account from the one the coalition of Applicants urged here. That is not a basis to ignore the contradiction. It is a reason to examine it more carefully before final agency action.

Nor does SJCA's attempted withdrawal solve the problem. SJCA's pending post-hearing withdrawal on March 13, 2026, immediately after counsel for the Industry Associations gave WELC notice of its forthcoming *Motion to Reopen the Record*, does nothing to erase the contradictory positions it simultaneously advanced before the Commission since Applicants filed their initial Proposed Amendments in June 2024 and issued the requisite public notice in the fall

of 2025,[3] the entire time the evidentiary record in this rulemaking was open, and now, in a New Mexico State Court. SJCA was a Co-Applicant while the record was open and while the rulemaking theory was being advanced. Its subsequent effort to step off the stage does not erase the position it endorsed here or the contradictory one it filed elsewhere.

E. A Co-Applicant's Contradictory Admissions Further Warrant a Reassessment of the Existing Record

Although secondary to HB 80, the lawsuit filed by a WELC Co-Applicant introduces factual assertions that directly contradict WELC's testimony in this proceeding. The complaint highlights conflicting claims about operator behavior, whether existing assurance is inadequate, and whether the State already possesses sufficient recovery tools. These new, contradictory admissions from a Co-Applicant underscore the need to reopen the record to avoid an arbitrary result. OCD and SLO summarily dismiss the Complaint as irrelevant simply because it is a pleading, asserting, without meaningful engagement, that it cannot justify reopening the record. But the allegations contained in the Complaint need not be proven to be relevant; it raises factual assertions that bear directly on the integrity and strength of the Applicants' underlying premises, which the Commission has both the right and the duty to examine.

1. Extending New Mexico Rules of Evidence Would Find the Co-Applicant's Complaint Relevant and Admissible, Potentially Even for the Truth of the Matter Asserted or at Least as a Prior Inconsistent Statement

That touchstone of relevance is key. Although the New Mexico Rules of Evidence and Civil Procedure are not binding in this rulemaking, 19.15.3.12(A)(1) NMAC, the Rules of Evidence provide clear and insightful guidance on whether evidence is relevant and admissible. Under New Mexico Rule of Evidence 11-801(D)(2) NMRA, a statement "offered against an

[3] N.M. Oil Conservation Comm'n, *Notice of Public Hearing for Proposed Rulemaking* (2025), https://www.emnrd.nm.gov/ocd/wp-content/uploads/sites/6/Notice-of-Rulemaking-Hearing-.pdf

opposing party" is not hearsay and is admissible for its truth, including statements made in other litigation, pleadings, and made by counsel on behalf of the party, as a "party-opponent admission" exception to the hearsay rule.[4] And under Rule 11-613 NMRA, any witness, including a party or party representative, may be impeached by showing they previously made a statement inconsistent with their current testimony or litigation position, either by admission from the witness or by extrinsic evidence (i.e., introducing the statement itself) if the witness is given an opportunity to explain or deny the inconsistency through cross-examination at trial. The New Mexico Supreme Court has explained:

> Thus, extrinsic evidence of a prior inconsistent statement—including a statement admitted under Rule 11-801(D)(1)(a) is always admissible for impeachment purposes, subject to the requirements of Rule 11-613 and to the general rules governing relevance. *See, e.g., State v. Davis,* 1981-NMSC-131, ¶¶ 18-20, 97 N.M. 130, 637 P.2d 561 (holding that the district court properly relied on Rule 11-403 NMRA to exclude extrinsic evidence of a prior inconsistent statement when the probative value of the evidence was substantially outweighed by the "needless presentation of cumulative evidence"). However, to introduce a prior inconsistent statement for its truth—as substantive proof of the matter asserted in the prior statement—the statement must have been given under "penalty of perjury" as provided in Rule 11-801(D)(1)(a) or fall within a hearsay exception under Rule 11-803 NMRA (1993). Due to the potential for misuse of a statement admitted only for impeachment purposes, a limiting instruction is often appropriate when a prior inconsistent statement cannot be considered for its truth. See UJI 14-5009 NMRA (articulating jury instructions concerning the admission of evidence for a limited purpose); *see also* 3 Mueller & Kirkpatrick, *supra*, § 6:99, at 614 ("Of course the court on request should give an appropriate limiting instruction advising the jury that the statement is admissible only for whatever light it might shed on the credibility of the witness, and not as proof of what the statement asserts . . . .").

State v. Astorga, 2015-NMSC-007, ¶ 35, 343 P.3d 1245, 1257.

NMOGA and IPANM's attachment of the SJCA complaint, therefore, functions at

[4] "The New Mexico Rules of Evidence [otherwise] prohibit the use of out-of-court statements, offered to prove the truth of the matter asserted, unless such a statement falls into a recognized hearsay exception and is relevant and otherwise admissible." *Id.; see* Rule 11-401 NMRA; Rule 11-403 NMRA; Rule 11-801 NMRA (describing the hearsay rule). Admission of hearsay statements is reviewed for an abuse of discretion. *State v. Williams,* 2010 N.M. App. Unpub. LEXIS 51 (Jan. 13, 2010) (citing *State v. Balderama,* 2004 NMSC 8, P 46, 135 N.M. 329, 88 P.3d 845).

minimum as extrinsic evidence of a prior inconsistent statement, and at most as an admission by a party opponent. Having introduced the SJCA Complaint themselves and having laid the foundation by identifying the time, place, and circumstances of the statement, *Motion* ¶¶ 54-63, NMOGA and IPANM have triggered the corresponding procedural entitlement: Co-Applicant SJCA must be afforded an opportunity to explain or deny the inconsistency (or perhaps its pending withdrawal amounts to a denial). Even if the Commission elects not to apply the Rules of Evidence directly, the same result follows under the doctrine of judicial estoppel, which prevents a party from taking a litigation position that is clearly inconsistent with one asserted in prior litigation, without requiring the prior statement to be formally admitted into evidence.

2. Extension of Judicial Estoppel Prohibits Contrary Litigation Positions

Even if this Commission chooses not to treat the Rules of Evidence as persuasive here, the doctrine of judicial estoppel still independently requires the same outcome. Under New Mexico law, judicial estoppel prevents a party from taking a legal position that clearly conflicts with a previous stance, especially when the earlier position was accepted by a tribunal, and shifting would result in an unfair advantage. Unlike evidentiary rules, judicial estoppel does not demand that the prior statement be formally introduced into evidence; it is a doctrine based on maintaining litigation integrity and avoiding strategic inconsistency:

> Judicial estoppel is a doctrine that operates against the assertion of inconsistent positions. It prevents a party to an action from attempting to contradict a position in a legal proceeding which that party asserted in a previous judicial proceeding. Like stare decisis, it prevents inconsistency in the administration of justice. Unlike stare decisis, however, judicial estoppel cannot be invoked except against a party to the prior proceeding (or against a party within a single proceeding). The doctrine has not been uniformly adopted by either state or federal courts, and the Supreme Court has never ruled on it.[5]

[5] 18 Moore's Federal Practice - Civil § 134.01 ("Stare Decisis Compared to Judicial Estoppel") (2026).

New Mexico courts have long embraced judicial estoppel. *Csi v. Los Alamos Nat'l Bank,* No. 03-CV-1453 JC/ACT, 2006 U.S. Dist. LEXIS 113667, at *9 (D.N.M. May 25, 2006). And since 2005, the U.S. Court of Appeals for the Tenth Circuit also recognizes judicial estoppel (such that there is no longer an *Erie* problem about whether New Mexico state law or federal law governs judicial estoppel in cases arising in New Mexico). *Id.* (citing *Johnson v. Lindon City Corp.,* 405 F.3d 1065 (10th Cir. 2005) (adopting judicial estoppel as part of federal common law in the Tenth Circuit).

Therefore, NMOGA and IPANM's previous statements (as shown in the SJCA complaint attached to the *Motion to Reopen*) must be considered. Having presented those statements along with their timing, location, and context, they have triggered the Commission's duty to examine whether their current position conflicts with their earlier one, and Co-Applicant SJCA must be given an opportunity to explain or contest the inconsistency. *Motion* ¶ 56.

F. NMOGA/IPANM's Requested Relief Is Proportional to the Magnitude of the Developments

NMOGA and IPANM's requested schedule reflects the seriousness of a $1.23 billion statutory overhaul and Co-Applicant's simultaneous repudiation of its own causal theory in court, developments that cannot be responsibly assessed through a five-page filing on five days' notice. The Commission cannot claim a "rational connection between the facts found" and this rulemaking without first hearing and assessing testimony that was wholly changed by HB 80. *Motion* 38-41, 60-61. When the agency in *In re Rhino* ignored a central issue, the Court remedied the issue by ordering a new limited hearing, including cross-examination of prior witnesses. The Commission should likewise grant the Motion so it can meaningfully assess how HB 80 affects the necessity and proportionality of the Proposed Rules post-HB 80.

NMOGA and IPANM's requested relief (25 pages and 60-90 days[6]) is proportional to the

[6] An extension of 90 days should give the parties the opportunity to provide evidence and comments on how the

magnitude of what has occurred, while the Applicants' proposal of five pages in five days trivializes the scale and importance of these developments. But as noted below, the Industry Associations are prepared to submit their key financial impact analysis by the closing document deadline of April 3rd, so that potentially reopening the record does not delay this proceeding. *See* Part II.F.1.ii, *infra*.

That willingness aside, the Trades stress that HB 80 is a $1.23 billion statute enacted to address the very issue at the heart of this rulemaking, and the SJCA Complaint is a Co-Applicant's simultaneous court repudiation of the causal theory it previously advanced before the Commission. These are not minor or peripheral events; they go to the core justification for the Proposed Rules. In other words, these changes influence the crux of the "problem at hand." They cannot be adequately addressed in a five-page filing on five days' notice, nor should the Commission adopt rules based on such a superficial assessment of the impact of HB 80 and the SJCA Complaint. The relief sought aligns with both the scale of these developments and the remedy in *In re Rhino*. *Motion* ¶¶ 32-33, 52. The Commission should grant the Motion and the requested relief.

G. The Specific Evidence the Industry Associations Will Introduce Upon Reopening Is Concrete, Limited, and Directly Relevant

Contrary to OCD and SLO's assertions, Industry Associations have identified with precision the evidence they seek to introduce. The requested supplementation is narrow, directly tied to HB 80 and/or the SJCA lawsuit, and is essential for the Commission to meet its obligations under New Mexico administrative law principles.

1. Four Categories of Evidence on HB 80's Fiscal Impacts

In response to OCD and SLO's position that the Industry Associations provide any specific

rulemaking may be affected by the anticipated State Land Office bonding rule. The Industry Associations have been informed that a draft rule should be released in a few weeks for a thirty (30) day public comment period and a likely adoption date around June 1.

evidence or testimony that they intend to offer in support of their *Motion,* the Industry Associations seek to introduce four discrete categories of evidence, each addressing the statute's impact on the fiscal assumptions underlying the Proposed Rules and/or the contradictory cause of the orphan well problem as asserted by SCJA in new litigation.

i. HB 80 Official Analyses and Associated Legislative Documents

With respect to HB 80 and its official supporting materials, the Industry Associations will submit: the full text of HB 80, the HB 80 Fiscal Impact Report from NM Tax and Revenue, the EMNRD Agency Bill Analysis, the LFC Fiscal Impact Report, and the HB 80 Legislative History, floor debate and sponsor statement, as well as updated Reclamation Fund revenue projections reflecting the Oil and Gas Conservation Tax dedication through FY 2037 and legislative modeling showing expected annual inflows (collectively, the "HB 80 Official Analyses and Legislative Documents").

This evidence is necessary because it demonstrates how HB 80 replaces the "unfunded liability" predicate for the $150,000 one-well financial assurance and the underlying assumption for other Proposed Amendments. Administrative notice of HB 80's existence cannot establish its fiscal effects, the operative fact that the Commission must evaluate.

ii. Limited Financial Analysis By Admitted IPANM Economist Expert Dr. Arscott

To aid the Commission in its economic analysis of HB 80 and the impact on the Proposed Rules during deliberations, IPANM is prepared to submit a limited financial analysis, in the form of less than ten pages of written supplemental testimony from its admitted Economist Expert, Dr. Robert Arscott, with any related, referenced, or underlying report and spreadsheet(s) attached, and make Dr. Arscott available for remote examination, cross-examination, and questioning by the Commission. Issues to be addressed by Dr. Arscott include, but are not limited to, the following

key analyses:

- Modeling the Reclamation Fund balance and outflow trajectory;
- An analysis of how long it takes to work through the 700 orphaned wells and 1,400 at-risk wells as the non-reverting balance increases over time and at what pace, if possible;
- What the Reclamation Fund balance will look like over that timeline relative to OCD's realistic program output; and
- The number of wells that HB 80 funds will pay to be plugged and reclaimed, assuming OCD's own costs.

IPANM is prepared to provide those concise pages of supplemental testimony from Dr. Arscott by the closing document deadline of April 3, 2026, so that reopening the record for the limited purposes requested by the Industry Associations and keeping the current schedule are not made mutually exclusive. IPANM is not seeking additional or live witness testimony unless the parties assert or the Commission determines that HB 80 requires further interpretation or analysis beyond that provided by briefing and the limited, brief supplemental testimony and supporting documents Dr. Arscott intends to provide.

IPANM's supplemental HB 80 testimony and report prove that HB 80 is not just a new statute the Commission can take notice of in the abstract; it has concrete fiscal consequences that bear directly on the assumptions used to justify the proposed rules. IPANM's Dr. Arscott will show how HB 80 materially changes the fiscal and evidentiary context and therefore requires the Commission to reassess the necessity and proportionality of the $150,000 one-well financial assurance amount and other overhauls and increases, and materially weakens the funding-shortfall premise.

iii. Updated Statewide and Industry Plugging and Cost Projections

IPANM's supplemental testimony by Dr. Arscott will assess OCD plugging cost projections, assuming OCD's plugging and reclamation costs at an inflation rate of 2.5%, while holding contributions to the Reclamation Fund stagnant, to provide the most conservative estimate

possible. Given the direction under the Oil and Gas Act under Section 70-2-14(A), to set one-well financial assurance in an amount "sufficient to reasonably pay the cost," however, the Industry Associations are prepared to provide supplemental exhibits reflecting collected industry plugging cost data in comparison to HB 80's new per-well funding ratio and WELC's modeling, *Motion* ¶¶ 21, 24, 26, such that HB 80 alters or eliminates the need for proposed eight-fold financial assurance increases, *Motion* ¶¶ 7, 19, 28, 37, 44, 51, 59, 61-62. If the Commission agrees that such analysis would aid its post-HB 80 financial assessment, then the Industry Associations are willing to supplement the record as directed by the Commission and will make every attempt to do so by the April 3rd closing deadline.

iv. Evidence Related to the SJCA Complaint

Industry will introduce the SJCA Complaint itself, along with any additional pleadings, litigation materials, or related press releases or publications demonstrating contradictions between WELC, SJCA, and the other Co-Applicants' positions in this rulemaking and the factual assertions made in court. These inconsistencies must be part of the record to avoid an arbitrary outcome, even if the Commission ultimately assigns them limited weight. The lawsuit contains newly acquired factual assertions from a Co-Applicant that directly contradict central claims in the hearing record.

2. This Evidence Is Narrowly Tailored, Directly Relevant, and Procedurally Necessary

The items above are the only evidence Industry Associations seek to admit, and each category is tied directly to HB 80's fiscal consequences, the statutory requirements for financial assurance, and the need to maintain a legally defensible record on appeal. This targeted supplementation is far less intrusive than SLO's proposed expansion, which would improperly introduce unrelated issues such as oil-price volatility or new alleged violations. Industry's request is narrow, relevant, and procedurally required.

III. CONCLUSION

HB 80 and the SJCA Complaint fundamentally change the factual and legal landscape of this rulemaking. The record as it stands is stale and cannot support the Proposed Rules, and the Commission cannot fulfill its obligation to address key aspects of the issue without reopening the record. Applicants' objection never overcomes the central point: the evidentiary and legal landscape changed after the hearing closed, and it changed in ways that bear directly on the justification for the Proposed Rules. Applicants admit HB 80 is relevant. Their own record testimony ties the Proposed Rules to the inadequacy of the Reclamation Fund and OCD's plugging costs. Their cases dodge the issue at hand and say only that reopening is discretionary, not that denial is reasonable here. And the SJCA Complaint presents a material contradiction in the Applicants' causal theory underlying the Proposed Rules that the Commission should not ignore.

These developments undercut the assumptions supporting the Proposed Rules, particularly the $150,000 one-well financial assurance amount applicable to all well types regardless of status or type, *see* n.1, *supra*, and reshape the statutory framework the Commission must apply. Reopening is necessary to: (1) admit HB 80 Official Analyses and Legislative Documents, Dr. Arscott's supplemental analyses, new or revised plugging cost projections, and the SJCA complaint and related evidence, *see* Part II.G.1.i.-iv, *supra*; (2) allow limited briefing on the statute's effect on the Proposed Rules and complaint's effect on their underlying justification and assumptions on which the amendments are based, (3) correct the now-obsolete assumptions embedded in Applicants' Proposed Rules, and (4) ensure that any final rules are reasonable, proportionate, and aligned with current law.

The Industry Association's request remains narrowly tailored: it seeks only to introduce HB 80, its fiscal analyses, additional industry plugging cost projections if deemed helpful to the

Commission, and limited evidence related to the SJCA complaint. In opposing reopening, SLO and OCD rely solely on the pre-HB 80 record and do not address the statute's immediate and substantial impact on the Proposed Rules. Denying reopening risks adoption of rules that will be overturned as arbitrary, capricious, unsupported by the record, and contrary to law. Because the governing legal context has changed in ways the existing record does not capture, reopening the record is both necessary and appropriate. While NMOGA and IPANM believe their originally requested relief (25 pages and 60-90 days) is proportionate to the magnitude of both recent legal developments described above, IPANM is prepared to submit at least the limited financial analysis by its Economist Expert, Dr. Arscott, by the closing deadline date of April 3, 2026.

WHEREFORE, the Industry Associations respectfully request that the Commission consider and grant their Motion to Reopen the Record, and such other relief as the Commission deems necessary and proper.

Respectfully submitted,

BEATTY & WOZNIAK, P.C.

By: _____

Miguel A. Suazo
James P. Parrot
Ryan McKee
Valkyrie E. Buffa
Jacob L. Everhart
500 Don Gaspar Ave.,
Santa Fe, NM 87505
(505) 946-2090
msuazo@bwenergylaw.com
jparrot@bwenergylaw.com
rmckee@bwenergylaw.com
kbuffa@bwenergylaw.com
jeverhart@bwenergylaw.com
Attorneys for New Mexico Oil and Gas Association

HINKLE SHANOR LLP

By: */s/ Andrew J. Cloutier*

Andrew J. Cloutier
Ann Cox Tripp
P.O. Box 10
Roswell, NM 88202-0010
acloutier@hinklelawfirm.com
atripp@hinklelawfirm.com
Attorneys for Independent Petroleum Association of New Mexico

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NMOGA and IPANM Joint Reply in Support of Motion to Reopen and Responding to Applicants' Opposition was served to counsel of record by electronic mail this 25th day of March 2026, as follows:

Tannis Fox
Senior Attorney
Morgan O'Grady
Staff Attorney
Western Environmental Law Center
409 East Palace Avenue, #2
Santa Fe, New Mexico 87501
505.629.0732
fox@westernlaw.org
ogrady@westernlaw.org

Kyle Tisdel
Managing Attorney
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571
575.613.8050
tisdel@westernlaw.org

Matt Nykiel
Staff Attorney
Western Environmental Law Center
224 West Rainbow Boulevard, #247
Salida, Colorado 81201
720.778.1902
nykiel@westenlaw.org
Attorneys for Applicants Western Environmental Law Center, Citizens Caring for the Future, Conservation Voters New Mexico Education Fund, Diné C.A.R.E., Earthworks, Naeva, New Mexico Interfaith Power and Light, San Juan Citizens Alliance, and Sierra Club.

Felicia Orth
Hearing Officer
New Mexico Energy, Minerals, and Natural Resources Department
Wendell Chino Building
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
Felicia.l.orth@gmail.com
Oil Conservation Commission Hearing Officer

Jesse Tremaine
Chris Moander
Assistant General Counsels
New Mexico Energy, Minerals, and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
jessek.tremaine@emnrd.nm.gov
chris.moander@emnrd.nm.gov
Attorneys for Oil Conservation Division

Michael H. Feldewert
Adam G. Rankin
Paula M. Vance
P.O. Box 2208
Santa Fe, New Mexico 87504
mfeldewert@hollandhart.com
agrankin@hollandhart.com
pmvance@hollandhart.com
Attorneys for OXY USA Inc.

Andrew J. Cloutier
Ann Cox Tripp
Hinkle Shanor LLP
P.O. Box 10
Roswell, New Mexico 88202-0010
acloutier@hinklelawfirm.com
atripp@hinklelawfirm.com
Attorneys for Independent Petroleum Assoc of NM

Jennifer L. Bradfute
Matthias Sayer
Bradfute Sayer P.C.
P.O. Box 90233
Albuquerque, New Mexico 87199
jennifer@bradfutelaw.com
matthias@bradfutelaw.com

Jordan L. Kessler
EOG Resources, Inc.
125 Lincoln Avenue, Suite 213
Santa Fe, New Mexico 87501
Jordan_kessler@eogresources.com
Attorneys for EOG Resources, Inc.

Zachary A. Shandler
Assistant Attorney General
New Mexico Department of Justice
P.O. Box 1508
Santa Fe, New Mexico 87504
zshandler@nmdoj.gov
Oil Conservation Commission Counsel

Mariel Nanasi
Lead Attorney and Executive Director
New Energy Economy
422 Old Santa Fe Trail
Santa Fe, NM 87501
505-469-4060 (cell)
MNanasi@NewEnergyEconomy.org
Attorney for New Energy Economy

Sheila Apodaca
New Mexico Energy, Minerals, and Natural Resources Department
Wendell Chino Building
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
occ.hearings@emnrd.nm.gov
Oil Conservation Commission Clerk

Nicholas R. Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
inspector@sunshineaudit.com

Rachael Ketchledge