**STATE OF NEW MEXICO**
**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**

# APPLICANTS' OPPOSITION TO NMOGA AND IPANM'S JOINT MOTION TO DISMISS

## Preliminary Statement

The New Mexico Oil and Gas Association and Independent Petroleum Association of New Mexico's ("Oil and Gas Associations") move to dismiss Applicants' proposed amendments to (1) 19.15.8.9.A NMAC requiring financial assurance be in place prior to drilling or "acquisition," claiming the proposal requires the Oil Conservation Division ("OCD") to approve "ownership transfers," and (2) 19.15.8.9.D, E, and F NMAC, establishing new categories of financial assurance for marginal wells and inactive wells, claiming these new categories are outside the authority of the Oil and Gas Act ("Act"). Oil and Gas Associations are wrong on both counts.

First, Oil and Gas Associations misunderstand Applicants' proposal at 19.15.8.9.A NMAC. Applicants do not propose to change current regulatory requirements or practice, but propose language merely to **clarify** that financial assurance must be in place prior to drilling or acquisition of operational authority. Applicants do not propose giving OCD authority to approve "ownership transfers" or "regulate acquisitions," as Oil and Gas Associations claim. Indeed, Applicants made this clear in their direct case when their expert Peter Morgan, J.D., testified that the proposed amendment in question "does not change current practice but simply clarifies the regulatory requirement" that "financial assurance is in place prior to drilling or acquisition."

Morgan Dir. Test. at 0327[1] [Apps' Ex. 15].

Second, the Act is clear that the Oil Conservation Commission ("Commission") has the duty to "establish categories of financial assurance," including those separate and apart from the categories of financial assurance required in statute, such as the category for a blanket plugging financial assurance not to exceed $250,000. Applicants propose new categories of financial assurance for "marginal wells" and inactive wells, which is fully consistent with this Commission's authority under the Act to establish different categories of financial assurance.

Oil and Gas Associations' Motion to Dismiss should be denied.

## Argument

### I. APPLICANTS' PROPOSED AMENDMENT AT 19.15.8.9.A NMAC CLARIFIES EXISTING REGULATORY REQUIREMENTS

Applicants propose the following amendment to 19.15.8.9.A NMAC:

> **19.15.8.9.A Applicability.** An operator who has drilled or acquired, is drilling or proposes to drill or acquire an oil, gas or injection or other service well within this state shall furnish a financial assurance acceptable to the division in accordance with 19.15.8.9 NMAC and in the form of an irrevocable letter of credit, plugging insurance policy or cash or surety bond running to the state of New Mexico conditioned that the well be plugged and abandoned and the location restored and remediated in compliance with commission rules, unless the well is covered by federally required financial assurance. The division shall not approve and the operator shall not proceed with any proposed drilling or acquisition until the operator has furnished the required financial assurance.

As discussed in Mr. Morgan's direct and rebuttal testimony, Morgan Dir. Test. at 0327; Morgan Reb. Test. at 1145-1148 [Apps' Ex. 81], this proposed amendment clarifies what is implicit in the existing rule—financial assurance must be in place prior to drilling or the acquisition of operational authority. The rule currently provides: "An operator who has drilled or **acquired**, is

[1] Applicants cite herein to the Bates stamped page numbers in their exhibits.

drilling or proposes to drill or **acquire** an oil, gas or injection or other service well within this state shall furnish a financial assurance acceptable to the division . . . .” 19.15.8.9.A NMAC (emphasis added). The clear implication of this provision is that financial assurance must be in place **prior** to drilling or acquiring a well. Applicants’ amendment makes express what is implied, and clarifies that financial assurance must be in place prior to drilling or acquiring a well. It is also clear from the context of this provision that the “acquisition” referred to is the acquisition of operational authority of a well.

Mr. Morgan explained this in some detail in his rebuttal testimony:

> Taken in context, “acquisition” clearly means “acquisition of operating authority.” The terms “acquire,” “acquired,” and “acquiring” already appear in multiple places within the “Financial Assurance” provisions of 19.15.8 NMAC. The stated “objective” of this section is: “To establish financial assurance requirements for persons, firms, corporations or associations who have drilled or **acquired**, are drilling or propose to drill or **acquire** an oil, gas or injection or other service well to furnish financial assurance acceptable to the division.” 19.15.8.6 NMAC (emphasis added); *see also* 19.15.8.9.A NMAC; 19.15.8.12.A NMAC; 19.15.8.14.A NMAC; 19.15.9.9.C(2) NMAC. This existing usage includes instances where—as with the proposed amendment—the acquisition has not yet occurred. 19.15.8.6 NMAC (“propose to . . . acquire”); 19.15.8.9.A NMAC (“proposes to . . . acquire”). In all cases, “acquire” (or its related forms) refers to an activity or proposed activity within the scope of OCD’s jurisdiction: acquisition of operating authority. So, too, with the proposed amendment.

Morgan Reb. Test. at 1147 (emphasis in original). Applicants have simply carried this language, used repeatedly, forward.

The Oil and Gas Associations have not identified any instance of OCD interpreting these existing references to “acquisition” as applying prior to the purchase or sale of a well. Instead, OCD only applies the existing provisions of Section 19.15.8 NMAC within the context of its well-established authority to regulate the drilling of new wells or the acquisition of operating authority for an existing well via a change of operator application. That is the same context and

intent for the proposed amendment.

Oil and Gas Associations paint the proposed amendment as an impermissible foray into the regulation of acquisitions and property transactions. Mot. Dismiss at 5. This is a puzzling interpretation of Applicants' proposed amendments, especially in light of Mr. Morgan's direct testimony on the intent of the amendment. There is no intent to require OCD to comb through well sale or transfer documents and approve the bona fides of such transactions. Applicants propose a requirement governing the **timing** of submission of financial assurance instruments to OCD, a requirement fully within the Commission's authority to regulate financial assurance under Section 70-2-14 of the Act. *See, e.g.,* 19.15.8, -10, -11, -12, -13 NMAC (exemplifying the Commission's application of similar authority in other contexts).

Nor does the New Mexico Legislative Finance Committee ("LFC"), in its recent report on orphan wells, relate to this provision. First, contrary to Oil and Gas Associations' representations, the LFC did not state that OCD lacks authority to regulate transfers. LFC, *Policy Spotlight: Orphaned Wells*, June 24, 2025, at 2-3; *see* Mot. Dismiss at 5 n.1. The report merely advises the Legislature to amend the Act "to **clarify** OCD's authority" over the transfer of wells, and encourages the OCD to promulgate rules "**clarifying** that [low-producing wells'] transfer is contingent on regulatory approval." *Id.* at 2-3 (emphasis added). More importantly, as discussed, the proposed provision in question addresses financial requirements at the point of transfer—not OCD's regulation of transfer itself.

Applicants' proposed amendment to 19.15.8.9.A NMAC clarifies the existing requirement that financial assurance be furnished when an operator drills or acquires a well, and is permissible under the Act. There should have been no doubt as to Applicants' intent with respect to this proposed amendment after reading Mr. Morgan's direct and rebuttal testimony.

But if there were, or if Oil and Gas Associations have alternative language that accomplishes the same purpose, they could have first discussed their concerns or proposals for alternative language with Applicants. Instead, they opted to file a motion to dismiss with the Commission.

## II. APPLICANTS' PROPOSALS ARE CONSISTENT WITH THE ACT'S DIRECTION TO THE COMMISSION TO ESTABLISH CATEGORIES OF FINANCIAL ASSURANCE

### A. Financial Assurance Requirements in the Act

The Act requires that operators furnish financial assurance for the plugging and abandonment of their wells, and expressly states that the Commission[2] "**shall** establish categories of financial assurance after notice and hearing." NMSA 1978, § 70-2-14(A) (emphasis added). In establishing categories of financial assurance, the Act directs OCD to "consider the depth of the well involved, the length of time since the well was produced, the cost of plugging similar wells and such other factors as the oil conservation division deems relevant." *Id.* The Act also identifies several specific categories for inclusion in OCD's rules: "a blanket plugging financial assurance" no greater than $250,000, a blanket plugging financial assurance for temporarily abandoned status wells no less than $50,000, "a one-well plugging financial assurance in amounts determined sufficient to reasonably pay the cost of plugging the wells," and a one well financial assurance for wells in temporarily abandoned status more than two years. *Id.*

### B. Applicants' Financial Assurance Proposals Challenged by Oil and Gas Associations

Consistent with the Act, Applicants propose the following amendments. The amendments

[2] Section 70-2-14 refers to the authority of the Oil Conservation Division ("OCD"). The Commission exercises concurrent jurisdiction and authority with OCD. NMSA 1978, § 70-2-6(B).

relating to marginal wells were initially proposed by OCD in its February 12, 2025 Redline Proposals [Apps' Ex. 5], and were adopted by Applicants:

**19.15.2.7.M NMAC:**

. . .

**(2) "Marginal well"** means an oil or gas well that produced less than 180 day and less than 1,000 barrels of oil equivalent within a consecutive 12 month period.

**19.15.8.9 NMAC:**

. . .

**D. Marginal wells and inactive wells.** Notwithstanding the provisions in Subsection C(2) in this Section:

**(1)** As of the [effective date of amendments] a transferee operator shall provide a one well plugging financial assurance of $150,000 for each marginal well prior to transfer.

**(2)** Beginning January 1, 2028, an operator shall provide a one well plugging financial assurance for each marginal well. Each operator with a marginal well or wells shall annually review the number of marginal wells registered to the operator and shall update the one well plugging financial assurance by May 1 of each year.

**(3)** An operator with over 15 percent of their wells in marginal or inactive well status, or a combination thereof, shall provide a one well plugging financial assurance in the amount of $150,000 for each well registered to the operator until the percentage of the operator's marginal and inactive wells is decreased below 15 percent.

**(4)** An operator may furnish all necessary one well plugging financial assurance in the form of a single instrument.

**E.~~D.~~ Inactive wells and wells in approved and expired temporarily abandoned status.** An operator shall provide financial assurance for wells that are inactive and wells in approved and expired temporarily abandoned status, ~~covered by Subsection A of 19.15.8.9 NMAC that have been in temporarily abandoned status for more than two years~~ or for which the operator is seeking approved temporary abandonment pursuant to 19.15.25.13 NMAC in one of the following categories:

**(1)** a one well plugging financial assurance in the amount of $150,000 per well; ~~$25,000 plus $2 per foot of the projected depth of a proposed well or the depth of an existing well; the depth of a well is the true vertical depth for vertical and horizontal wells and the measured depth for deviated and directional wells;~~ or

**(2)** a blanket plugging financial assurance equal to an average of $150,000 per well covering all wells of the operator subject to Subsection E~~D~~ of 19.15.8.9 NMAC.~~:~~

~~**(a)** $150,000 for one to five wells;~~
~~**(b)** $300,000 for six to 10 wells;~~
~~**(c)** $500,000 for 11 to 25 wells; and~~
~~**(d)** $1,000,000 for more than 25 wells.~~

**F.~~D.~~** Operators who have on file with the division a blanket plugging financial assurance that does not cover additional wells shall file additional one ~~single~~ well plugging ~~bond~~ financial assurance for any wells not covered by the existing blanket plugging financial assurance ~~bond~~ in an amount as determined by Section 19.15.8.9 NMAC, subject to any limitations in Section 70-2-14 NMSA 1978 or, in the alternative, may file a financial assurance in the form of a single instrument.

~~replacement blanket bond.~~

The yellow highlighted language represents language negotiated among OXY USA, Inc. ("OXY"), OCD, and Applicants, as explained in Applicants' rebuttal testimony. Morgan Reb. Test. at 1148, 1158-1159 [Apps' Ex. 81].[3] Applicants' financial assurance proposals at 19.15.8.9.D, E, and F NMAC fall into three categories:

- **One well** plugging financial assurance of $150,000 for marginal wells at 19.15.8.9.D(1) and (2) NMAC;
- **One well** plugging financial assurance of $150,000 for an operator with 15% or more of their wells in marginal and/or inactive status at 19.15.8.9.D(3) NMAC; and
- **One well** plugging financial assurance of $150,000 for all inactive wells, including inactive wells in approved or expired temporary abandonment at 19.15.8.9.E NMAC or a blanket bond equal to an average of $150,000 per well.

For the administrative convenience of operators and OCD, all one well financial assurances may be submitted in the "form of a single instrument." A "single instrument" is not a "blanket bond," and the two should not be confused.

### C. Applicants' One Well Financial Assurance Proposals Do Not Violate the Statutory Ceiling on Blanket Financial Assurance

Oil and Gas Associations first argue that Applicants' proposed amendments to 19.15.8.9.D, E, and F NMAC "exceed the express statutory ceiling on bonding established at Section 70-2-14(A)." Mot. Dismiss at 10.

Oil and Gas Associations are just wrong. They erroneously conflate distinct elements of the statute's blanket financial assurance and one well financial assurance provisions, suggesting that **one well** financial assurances that cumulatively amount to more than $250,000 violate the statutory cap on **blanket** bonding. Mot. Dismiss at 10-11. Such an interpretation misapprehends

[3] While OXY opposes the marginal well category, OXY counsel suggested the highlighted language if the marginal well proposal is adopted by the Commission.

the plain language of the Act as well as Applicants' proposals for one well financial assurance.

Blanket and one well financial assurance are different concepts, and the statute expressly provides for both. *See* NMSA 1978, § 70-2-14(A). As Mr. Morgan explains in his rebuttal testimony, a blanket bond is a unique form of financial assurance under which an "operator is allowed to provide coverage for multiple wells at a fixed amount, such that as the number of covered wells increases, the per well coverage decreases." Morgan Reb. Test. at 1145 [Apps' Ex. 81]. Under the Act, there is **no cap** on "one-well plugging financial assurance in amounts determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance." NMSA 1978, § 70-2-14(A). Had the legislature intended to impose a cap on the total amount of financial assurance that may be required of a single operator, it could have done so, but only through an express provision to that effect, not through a reference specific to blanket bonding.

Applicants' proposed amendments—including the one well financial assurances proposed for marginal wells, operators with 15% or more of marginal and/or inactive wells, and inactive wells including approved and expired temporary abandoned wells—all are authorized by the Act. These proposals are authorized **specifically** by the provision in the Act authorizing one well financial assurance sufficient to pay the cost of plugging and **generally** by the provision authorizing the Commission to establish different categories of financial assurance. They do not run afoul of the Act but fall squarely within the Act's authority.[4]

[4] Oil and Gas Associations claim the Legislature's consideration of Senate Bill 189 during the 2018 legislative session and House Bill during the 2024 legislative session somehow foreclose the Commission's adoption of Applicants' proposals for one well financial assurance. Mot. Dismiss at 12. Oil and Gas Associations' self-serving characterization of what occurred during legislative sessions is irrelevant. Nothing can be read into the Legislature's failure to pass.

### D. The Marginal Well Categories of Financial Assurance Do Not Violate the Act

#### 1. The marginal well categories do not violation the statutory ceiling on blanket financial assurance

Next, Oil and Gas Associations take special aim at Applicants' proposals for marginal wells. Marginal wells are low-producing wells that operate sporadically over the course of 12 months. These wells make up 2,200 wells or 3.7% of all wells (exclusive of wells presumed not to have beneficial use) and account for only 0.045% of production in the state. Apps' Ex. 40. These are wells at higher risk of becoming orphaned and the responsibility of the State. *See, e.g.*, Purvis Dir. Test. at 0734-0736 [Apps' Ex. 30].

Oil and Gas Associations first argue, again, the marginal wells proposals run afoul of the $250,000 cap for "blanket plugging financial assurance" because "they remove certain active wells" from the cap. Mot. Dismiss at 13. They further assert, "[t]he Act contains no authorization for the Commission to carve out additional categories of **active** wells to evade this express cap." *Id.* (emphasis added). This argument is flawed for a number of reasons.

First, the Legislature's requirement that the Commission establish categories of financial assurance represents an explicit grant of authority. *See* NMSA 1978, § 70-2-14(A). Applicants and OCD's proposal of a new marginal well category fits within this express authority, accounting for both OCD's cost of plugging and systemic risk to the State. *See N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996-NMCA-098, ¶ 10, 122 N.M. 332 (statute directing agency to establish fee schedule demonstrated legislative intent for agency to adopt regulatory fees). The addition of a new marginal well category does not render existing categories meaningless—it creates more options in the regulatory scheme for financial assurance to account for varying risk

*State v. Vest*, 2021-NMSC-020, ¶ 34. This argument is frivolous. The relevant inquiry is what is authorized under terms of the Act. *Id.*

levels associated with a wells production profile and among operators relative to their well portfolio. The creation of the marginal well definition and the associated financial assurance provisions are authorized under the Commission's express authority in the Act.

Second, Oil and Gas Associations assertion that financial assurance for **all active** wells is governed by the Act's cap on "blanket plugging financial assurance" entirely misreads the plain language of the Act. Nowhere in the Act does it say that the cap on "blanket plugging financial assurance" applies to all active wells. The statutory cap on blanket bonding does not specify whether it applies to active or inactive wells, although the Commission's current rules apply the cap to active wells. 19.15.8.9.C NMAC. Nor does the Act limit the Commission from determining which wells may be eligible for blanket bonds, only that blanket plugging financial assurance is one of the categories that must be included, among others that may be authorized by the Commission.

Again, the Commission is obligated under the Act to establish categories of financial assurance. In establishing different categories, the Commission may take into consideration "factors [it] deems relevant." NMSA 1978, § 70-2-14(A). Applicants have produced considerable expert testimony and data that support establishing a category of marginal wells—low and sporadic producing wells that represent a higher risk of becoming orphaned than other active wells. The risk of orphaning is certainly an appropriate factor for the Commission to consider in establishing different categories of financial assurance.

### 2. The marginal well categories do not violate the one well financial assurance requirement for wells in temporary abandonment more than two years

Oil and Gas Associations next argue that the marginal well financial assurance categories somehow run afoul of the Act's requirement that wells in temporary abandonment for more than

two years have one well financial assurance. That provision provides that:

> The oil conservation [commission] shall require a one-well financial assurance on any well that has been held in a temporarily abandoned status for more than two years or, at the election of the operator, may allow an operator to increase its blanket plugging financial assurance to cover wells held in temporarily abandoned status.

NMSA 1978, § 70-2-14(A). Oil and Gas Associations claim this provision "expressly limits single-well bond to wells 'held in temporarily abandoned status for more than two years.'" Mot. Dismiss at 14.

The Act does no such thing. The Act allows the Commission to establish different categories of financial assurance and to establish one well financial assurance to cover the cost of plugging. Both these provisions authorize one well financial assurance for additional categories, in addition to the one well financial assurance required for wells in temporary abandonment more than two years. Moreover, there is no language—express or otherwise—that limits one well financial assurance to wells in temporary abandonment for more than two years.

### 3. The marginal well categories do not violate the Act's requirements for setting financial assurance amounts

Finally, Oil and Gas Associations argue that the $150,000 one well financial assurance amount "disregards Section 70-2-14(A)'s express directive that financial assurance amounts must account for factors such as well depth, production history, and comparable costs." Mot. Dismiss at 15. The provision referenced by Oil and Gas Associations provides:

> In establishing categories of financial assurance, the oil conservation division shall consider the depth of the well involved, the length of time since the well was produced, the cost of plugging similar wells and such other factors as the oil conservation division deems relevant.

NMSA 1978, § 70-2-14(A).

Oil and Gas Associations again miss the mark. First, whether the $150,000 amount takes

account of the statutory factors is a matter of evidence and is not appropriately the subjection of a motion to dismiss on purely legal grounds.

Second, Applicants have produced evidence that the $150,000 amount is based on the statutory factors—and more. Morgan Dir. Test. at 0329. While these factors are among those that the Commission must consider in setting financial assurance amounts, there is no specific formula set in statute for how these factors must play into the amount set by the Commission. Moreover, the Commission may consider "other factors [it] deems relevant." NMSA 1978, § 70-2-14(A). The Commission has wide discretion setting financial assurance amounts, and any decisions will be a matter of the evidence adduced at hearing. Dismissal at this time is inappropriate.

Oil and Gas Associations further claim the $150,000 amount meets the Act's requirement that one well financial assurance be set at an amount "determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance." *Id.* Again, this is a matter of evidence to be adduced at hearing and is not appropriately the subject of a motion to dismiss on legal grounds.

Nonetheless, Applicants have produced a multitude of evidence that the $150,000 amount reflects the average cost of plugging to OCD. *See, e.g.,* Morgan Dir. Test. at 00328-29. Indeed, LFC reports that the average cost to plug a single orphaned well is $163,000, rendering $150,000 a reasonable—low, even—approximation of the agency's cost of plugging wells. LFC, *Policy Spotlight: Orphaned Wells* at 13.[5]

[5] Oil and Gas Associations argue the costs to operators to plug wells is less than $150,000. Mot. Dismiss at n.13. Again, this is an argument based on evidence, and not appropriate for a motion to dismiss. But suffice it to say, the cost to operators is beside the point because financial assurance will only be called upon if an operator orphans a well for OCD to plug.

## Conclusion

Based on the foregoing, Applicants respectfully request denial of Oil and Gas Associations' Joint Motion to Dismiss.

Respectfully submitted,

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Certificate of Service

I certify that on September 30, 2025, I served by a copy of this pleading to the following via email:

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