

State Land Office Proposed Amendments to 19.2.100.23 NMAC

Oral Comments on Behalf of the New Mexico Oil and Gas Association and Permian Basin Petroleum Association

Good afternoon Madam Hearing Officer, my name is Adam Rankin, from the Santa Fe Office of Holland and Hart. I am here on behalf of the New Mexico Oil and Gas Association, or NMOGA, with my partner Robert Sutphin and our colleague Olga Serafimova.

Thank you for the opportunity to comment on the Proposed Rule.

NMOGA has actively engaged with the State Land Office throughout this rulemaking process — meeting with leadership and staff, participating in listening sessions and workshops, and submitting informal comments and a proposed alternative rule.

NMOGA and its members appreciate the engagement and process they have been afforded and the consideration given.

While several of NMOGA's comments were addressed in the final Proposed Rule, numerous fundamental issues remain unresolved. NMOGA remains committed to good-faith dialogue, but because key legal issues were not resolved at the outset, we must raise them here.

NMOGA supports the adoption of bonding rules that comply with all constitutional and statutory requirements. NMOGA also supports promulgating fair and reasonable rules that are protective of the state's trust resources for current and future generations. But any rule adopted by the Commissioner, the State Land Office, or any other state agency must be authorized under the existing constitutional and statutory framework.

For the reasons I will outline, NMOGA respectfully requests that the State Land Office reject the Proposed Rule and adopt NMOGA's proposed revisions, which are attached to our written comments as Exhibit A, and are intended to align with the bonding requirements currently imposed by statute and incorporated into the oil and gas statutory lease forms.

To the extent the State Land Office rejects our legal position, NMOGA has submitted substantive comments on each provision through its Vice President of Regulatory Affairs, Andrea Felix, attached as Exhibit B, but expressly reserves all rights and arguments it may raise in a legal challenge.

The Permian Basin Petroleum Association adopts and endorses NMOGA's comments.

Plain-Language Overview for the Commission

Before I walk through the details, here is the core problem in plain terms. The Legislature gave the State Land Office one narrow bonding tool: protect surface buyers from damage to their livestock, crops, water, and improvements when state minerals are leased for oil and gas.

The Proposed Rule tries to expand that tool through rulemaking into a full environmental bonding program — well plugging, spill cleanup, reservoir damage — but the Legislature already granted that authority through a comprehensive legislative framework to the OCD, which has its own bonds, its own dedicated oil and gas tax-funded reclamation fund, and its own enforcement powers.

The practical result is double bonding from two agencies for the same work on the same land.

This cannot be what the Legislature intended or authorized — there is no legal mechanism for the State Land Office to allocate bonding funds to plugging, reclamation, or remediation. The Legislature has strictly

provided for how SLO's revenues are to be spent, and the Proposed Rule does not fit within that framework.

We also know it can't be what the Legislature intended because the Proposed Rule conflicts with the statutory forms for oil and gas leases and the sole statute governing State Land Office bonding authority.

The New Mexico Constitution authorizes the Legislature – not the State Land Office – to dictate the lease provisions and terms for all mineral leases, including oil and gas leases.

Oil and gas production is so critical to the state's revenue and budget—funding nearly 50% of the state's coffers—that the Legislature decided not to leave any aspect of state oil and gas lease terms to chance or to the discretion of the Commissioner of Public Lands.

Oil and gas leases are the only state mineral leases where the entire lease form is dictated by statute – for all other mineral leases, the Legislature leaves most provisions to the Commissioner's discretion.

But that is not the case for oil and gas leases – it is too important to the state's economics to allow a single elected official to determine how they should be managed. The Commissioner is not authorized to change a word — not even a comma. The bonding requirements are locked in by statute.

Nearly 100 years ago, the Legislature set the bonding requirements in the statutory lease form and mirrored them in Section 19-10-26.

Dissatisfied with that scope, the State Land Office now seeks to create new bonding provisions and reporting requirements by rule, with retroactive application to already-existing lease agreements.

The Legislature Has Narrowly Defined SLO's Bonding Authority

SLO itself acknowledges that its authority over oil and gas leases on trust lands begins at Section 19-10-1. Of those provisions, Section 19-10-26 is the sole authority to require financial assurance of any kind — and that authority is exceedingly narrow.

Section 19-10-26 applies only to oil and gas leases that embrace a severed surface estate that was sold prior to issuance of the oil and gas lease.

This is confirmed by each statutory oil and gas lease form — Sections 19-10-4.1, 4.2, and 4.3 — all of which require that the sale of the surface estate must have occurred prior to execution of the lease.

Under these statutes, the bond must be filed before drilling operations commence.

Either the lessee or an operator may execute and file a bond.

Bonds must be in favor of the State of New Mexico and for the use and benefit of the purchaser of the severed surface estate; not the Commissioner, not the State Land Office, and not the trust beneficiary.

The bond may only be used to cover specific, statutorily defined damages — namely, damages to livestock, range, water, crops, or tangible improvements.

And the surface estate purchaser has an unequivocal right to waive the bond requirement.

These are not mere guidelines. These are legislative directives that define the outer boundaries of the State Land Office's bonding authority.

The Current Rule Already Exceeds Statutory Authority

The current Rule already fails to comply with these limitations.

It does not limit the bond requirement to oil and gas leases encompassing surface estates sold prior to the execution of the lease but applies to all leases.

It does not require a bond before drilling operations commence but instead requires one before any prospecting activities commence.

And it does not limit the bond to the benefit of the surface estate purchaser but extends it to trust beneficiaries and surface lessees.

The Proposed Rule Adds Numerous Additional Unlawful Provisions

Rather than correct these infirmities, the Proposed Rule compounds them with additional unlawful provisions.

First, the Proposed Rule abolishes an operator's statutory right to file a bond and places that responsibility solely on the lessee. This directly contradicts Section 19-10-26.

Second, the Proposed Rule requires that the bond be in favor of the Commissioner and State Land Office instead of the State of New Mexico, again in direct contravention of the statute.

Third, the Proposed Rule expands the permissible uses of bond funds to include plugging wells, remediating spills, and addressing damage to mineral resources and reservoirs — none of which are authorized by Section 19-10-26.

Fourth, the Proposed Rule sets mandatory minimum financial assurance amounts while giving the State Land Office unfettered authority to exceed those amounts and grants the State Land Office broad discretion to vary bond amounts based on subjective factors. These provisions are arbitrary, capricious, and without statutory basis.

Fifth, the Proposed Rule eliminates the surface estate purchaser's statutory right to waive bond requirements, applies retroactively, provides for lease cancellation for noncompliance, and fails to require adequate notice to affected lessees and operators.

SLO's Cited Constitutional and Statutory Authority Does Not Support the Proposed Rule

The State Land Office cites Article 13 of the New Mexico Constitution and Sections 19-1-1 and 19-1-2 as authority. None provide the necessary legal support.

Article 13 is not self-executing. The New Mexico Supreme Court has held that a constitutional provision is not self-executing where it "merely indicates a principle without laying down rules having force of law." And Article 13 must be read with Article 24, Section 1, which provides that oil and gas lease terms are prescribed by the Legislature — not the State Land Office.

The Supreme Court has also held that the Commissioner's dominion over public lands is not "absolute" — the Commissioner is "merely an agent of the state with such powers, *and only such*, as have been conferred upon him by the Constitution *and laws of the state*."

Section 19-10-26 addresses the State Land Office's bonding authority specifically, and under settled principles of statutory construction, this specific statute controls over more general provisions like Section 19-1-1.

The Legislature Has Established a Comprehensive Framework Under OCD

There is a critically important reason the State Land Office's bonding authority is so narrow. The Legislature created a separate, comprehensive framework for unplugged wells, reclamation, and remediation on state lands — and entrusted it to the Oil Conservation Division.

The Legislature created the Oil and Gas Reclamation Fund to finance plugging, reclamation, and remediation through OCD. That Fund has an independent, continuous, non-reverting revenue source through the oil and gas conservation tax — paid for by oil and gas operators, not public taxpayers.

OCD has comprehensive statutory bonding authority, power to order wells plugged and lands reclaimed, and robust enforcement mechanisms including bond forfeiture and civil suits.

The OCD is a constituent agency of the Water Quality Control Commission, not the State Land Office.

And, OCD has authority and jurisdiction over the disposition of non-domestic, oil-field wastes, not the State Land Office.

The Legislature deliberately structured these authorities to avoid overlap. Section 19-10-26 and the statutory lease forms limit the State Land Office to damages to livestock, range, water, crops, or tangible improvements.

OCD's rules explicitly provide that its bond funds may not be used for those same purposes. The two frameworks are complementary by design — not duplicative.

The Reporting Requirements and Lease Cancellation Provisions Lack Authority

I will conclude with two additional points. There is no statutory authority for the Proposed Rule's reporting requirements or for requiring reports under penalty of perjury — a fourth-degree felony under New Mexico law. The State Land Office may not use limited rulemaking authority to create criminal liability where the Legislature has not done so.

Likewise, there is no authority for the lease cancellation provisions. The State Land Office's power to cancel a lease is limited to noncompliance with the lease's terms -- dictated by the Legislature -- and only after an opportunity to cure. Because the Proposed Rule's provisions have no corresponding terms in the statutory lease forms, or mechanism to be incorporated into the governing leases, the State Land Office lacks authority to cancel any lease under this Rule.

Conclusion

In closing, NMOGA has offered constructive revisions that limit the Rule's scope to what is authorized under existing law, include suggested financial assurance options for multiple leases, and avoid double recovery issues.

The State Land Office may not use this rulemaking process to arrogate to itself powers that the Legislature has not granted — or has expressly entrusted to other agencies.

The Proposed Rule exceeds the State Land Office's statutory authority in fundamental ways.

NMOGA respectfully requests that SLO reject the Proposed Rule and adopt NMOGA's proposed revisions.

Thank you.

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