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

APPLICATIONS OF GOODNIGHT MIDSTREAM PERMIAN, LLC FOR APPROVAL OF SALTWATER DISPOSAL WELLS LEA COUNTY, NEW MEXICO.

CASE NOS. 23614-23617

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN LLC TO AMEND ORDER NO. R-22026/SWD-2403 TO INCREASE THE APPROVED INJECTION RATE IN ITS ANDRE DAWSON SWD #1, LEA COUNTY, NEW MEXICO.

CASE NO. 23775

APPLICATIONS OF EMPIRE NEW MEXICO LLC TO REVOKE INJECTION AUTHORITY, LEA COUNTY, NEW MEXICO.

CASE NOS. 24018-24020, 24025

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN, LLC FOR APPROVAL OF A SALTWATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

DIVISION CASE NO. 24123
ORDER NO. R-22869-A

GOODNIGHT MIDSTREAM PERMIAN, LLC'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT ON EXCLUSION OF SAN ANDRES FORMATION WITHIN EMSU

Goodnight Midstream Permian, LLC ("Goodnight" or "GNM") submits this reply in support of its Renewed Motion for Judgment on Exclusion of San Andres Formation within EMSU ("Motion"). The Commission should grant Goodnight's Motion because the San Andres formation is—and always has been—ineligible for unitization under the Statutory Unitization Act. The San Andres formation cannot be unitized under the Act because the evidence adduced at hearing shows the San Andres formation is not a pool, has never been a source of primary recovery for oil or gas, and is geologically separate from the hydrocarbon-bearing Grayburg formation. Empire does not refute the evidence showing the San Andres is ineligible for unitization on the merits. Empire, instead, responds to the Motion on several procedural grounds, all of which are unavailing. For the following reasons, the Commission should grant Goodnight's Motion.

ARGUMENT

1. GNM's Motion is Properly Before the OCC.

A. Exclusion of the San Andres Aquifer from the ESMU is Not Outside the Scope of this Hearing.

Empire argues that GNM's Renewed Motion is improper because the issues contained therein have already been determined. Not only incorrect, this argument evidences Empire's misunderstanding of its own applications and requested relief.

Empire argues the OCC's decision to deny Goodnight's Motion for Partial Summary Judgment "necessarily reaffirmed the scope of the proceeding and confirmed that the Unitization Issue lies outside it." Resp. Br. at 4. Rather, the Commission's denial of the MPSJ was predicated on proper grounds for denying any motion for summary judgment: issues of fact. A summary judgment should only be granted when there is no genuine issue of material fact. Rule 3-703(C) NMRA (2006). GNM's request that the Commission revisit its decision in light of all the evidence presented prior to hearing is proper.[1]

The issue of whether the San Andres ("SADR") is properly included in the EMSU is not only well within the scope of this proceeding, but also a foundational issue on which Empire's requested relief is entirely predicated. Empire's applications seek to revoke prior orders permitting GNM to inject into the SADR on the grounds that the EMSU prohibits it, and that the SADR is therefore subject to both the EMSU Order and the Statutory Unitization Act ("SUA"). This issue cannot be outside the scope of the hearing, because granting Empire its requested relief would be a tacit ruling that the San Andres Aquifer is properly unitized in the EMSU. Because the SUA requires certain matters to be found as a precedent to the issuance of unitization orders (e.g., that the proposed reservoir be reasonably defined by production),

[1] New Mexico courts have held that "an administrative body acts in a 'quasi-judicial' capacity when it is "required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Zamora v. Vill. of Ruidoso Downs*, 1995-NMSC-072, ¶ 9, 907 P.2d 182.

the Commission must decide whether to exclude the SADR from the EMSU. *See* NMSA §§ 70-7-3; 70-7-5.

B. GNM's Motion is not a Collateral Attack on the Stay Order.

GNM's Motion is not an improper collateral attack like Empire suggests, and, as discussed *supra*, the exclusion of the SADR (and therefore this Motion) is not related to the stayed cases but fundamentally intertwined with Empire's applications. It is undisputed that the SADR has not been reasonably defined by development through primary production. GNM's FOF ¶ ¶ 39-47. Because it does not meet the statutory requirements for inclusion in the unitized interval, the Commission lacked (and continues to lack) the authority and jurisdiction to unitize the San Andres. When an order is issued without proper jurisdiction, it is void. *See Cont'l Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 20, 70 N.M. 310, 373 P.2d 809. Accordingly, GNM's Motion seeks to address a void order, and void orders are voidable at any time. See *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 12, 575 P.2d 1340 (holding that void orders "may be attacked at any time in a direct or collateral action.").

C. There is no violation of due process.

Empire claims that the Commission's consideration of this Renewed Motion violates its procedural due process rights because excluding the San Andres from the EMSU would deprive Empire of its right to develop the "significant ROZ that XTO identified within the unitized interval." Resp. Br. at 5. Procedural due process requires that "before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶ 21, 114 N.M. 103. Granting this Motion will not deprive Empire of any rights to develop a residual oil zone. The relief GNM requested will not impact oil or gas production—or EMSU operations more generally—now or going forward. If the Commission grants the Motion, Empire will still be able to develop any residual oil zone pursuant to its leasehold rights through a voluntary unit agreement or some other voluntary plan of development. Empire cannot rely on the Statutory Unitization Act to develop the SADR residual oil zone because the Act only allows Empire to

develop portions of pools that have been reasonably defined by development. Empire has not shown that it would be deprived of its property interest in developing any residual oil zone.

Empire further argues that granting the Motion would deprive Empire of its right to develop oil in the San Andres without due process because it "never litigated the unitization issue." Resp. Br. at 5. Empire complains that it did not present evidence, expert testimony, or legal arguments on the issue. *Id*. At the same time, Empire claims it "submitted expert testimony and supporting data showing that the San Andres formation contains a residual oil zone suitable for enhanced recovery." *Id*. at 4. Both statements cannot be true. As Empire itself already noted, the parties presented their arguments in briefing related to Goodnight's Motion for Partial Summary Judgment. The New Mexico Supreme Court has determined that procedural due process is not violated when "briefing on the question" is allowed. *Santa Fe Exploration Co.*, 1992-NMSC-044, ¶ 17. Empire has had opportunity to fully brief the issues and to submit evidence and testimony in support of its arguments. According to the New Mexico Supreme Court, "[m]ore is not required." *Id*. Finally, excluding the SADR from the EMSU would not impact Empire's property rights. Those are governed by its underlying leases and remain unaltered by an amendment to excluding the SADR from the EMSU.

D. OCC Retained Jurisdiction to Review This Matter.

Empire argues that the Commission cannot revise the Unit Agreement. Empire's argument misunderstands GNM's requested relief. In its Motion, GNM is asking the Commission to amend Commission Order No. R-7765 to exclude the San Andres from the unitized interval. The Commission retained jurisdiction in its Order "for the entry of such further orders as the Commission may deem necessary." Order No. R-7765 at 11. While it is true that the Unit Agreement and Unit Operating Agreement "shall be amended in any and all respects necessary to conform to the Division's order approving statutory unitization," any amendments do not require "the consent of signatories," as Empire suggests, because the Unit Agreement parties "shall be deemed to have hereby approved by the parties

hereto without any necessity for further approval by said parties." Unit Agreement at 20.[2] The Unit Agreement is predicated on the OCC's orders governing statutory unitization and is therefore based/dependent on the SUA and any subsequent orders. *Id*.

2. Empire Fails to Address or Otherwise Refute that the SADR has not been Reasonably Defined by Development.

Empire once again rests its argument on only one half of the statutory language, claiming that the statutory standard for unitization is whether it would "substantially increase the ultimate recovery of oil." Resp. Br. at 4. Empire goes on to state, without support, that the alleged ROZ is suitable for "enhanced oil recovery." *Id*. But under the SUA, primary production is a condition precedent to statutory unitization. NMSA § 70-7-1. Moreover, Empire's own pleadings state that the SADR ROZ has yet to be developed, and that it is, essentially, an exploratory unit. Resp. Br. at 2, 4. The SUA applies "to any type of operation that will substantially increase recovery of oil above the amount that would be recovered by primary recovery alone and **not to what the industry understands as exploratory units**," and that applications for unitization require that the reservoir be "reasonably defined by development." §§ 70-7-1; 70-7-5 (emphasis added); *see Santa Fe Expl. Co.*, 1992-NMSC-044, ¶ 31 (SUA does not apply to primary production). At the close of all the evidence- it is undisputed that the SADR is not, and has not been, reasonably defined by development. See GNM's Renewed Motion, at 6-7; see also GNM FOF ¶ ¶ 39-47.

3. Properly Excluding the SADR from the EMSU Does Not Circumvent the Duty to Prevent Waste.

Empire alleges that granting GNM's Renewed Motion would "sanction waste." Resp. Br., at 7. GNM is not suggesting that the Commission abandon its duty to protect against waste and impairment of correlative rights- nor could it as its duty is inherent within the Oil and Gas Act in its entirety. To be clear, nothing in Motion seeks to preclude Empire from developing an economic ROZ in the SADR (if one exists). As GNM explained in the Motion, the requested relief "will not impact oil or gas production—or

[2] The quoted provision is subject to two exceptions, neither of which is applicable here. *See* Unit Agreement at 20.

EMSU operations more generally—now or going forward." Mot. at 19. Contrary to Empire's contentions, granting GNM's Motion would not be to the exclusion of Empire's proposed plans. If the Commission grants the Motion, Empire will still be able to develop a SADR ROZ "through a voluntary unit agreement or some other voluntary plan of development," if it prevails at the hearing on the merits and proves that there is an economic ROZ in the SADR—although the evidence has established that there is no economic ROZ in the SADR or GNM's disposal zone. Mot. at 20. Excluding the SADR from the EMSU simply means that Empire cannot rely on the SUA for its plans to develop this alleged ROZ, because the SUA only allows for development of portions of pools that have been reasonably defined by development. NMSA § 70-7-5. GNM is asking the Commission to abide by its statutory duties, not ignore them.

CONCLUSION

Goodnight Midstream Permian respectfully requests the Commission grant the Motion and exclude the San Andres formation from the EMSU.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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