

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

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

CASE NOS. 23614-23617

**RESPONSE TO GOODNIGHT’S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

For its response to Goodnight Midstream Permian LLC’s (“Goodnight”) Motion to Compel Production of Documents, Empire New Mexico LLC (“Empire”) states:

A. Introduction.

These consolidated cases are applications for commercial salt water disposal into the San Andres formation which underlies the Grayburg formation. Both the Grayburg formation and the San Andres formation are included in the vertical limits of the Eunice Monument South Unit (“EMSU”) and both formations are included in the Eunice Monument South Pool.

Goodnight contends that the San Andres formation is a suitable geologic interval for salt water disposal because it does not contain oil. Empire disagrees because the San Andres contains Residual Oil Zones that are capable of producing oil and gas. Empire will further demonstrate, among other things, that there is migration of water from the San Andres into the Grayburg formation and that disposal of produced water from sources outside of the Unit will cause migration of incompatible waters into the Grayburg formation, which is being produced via Empire’s water flood project.

The present discovery controversy arises from Goodnight’s subpoena for certain documents as stated in its Motion to Compel Production of Documents. In challenging Goodnight’s applications for salt water disposal, Empire retained expert witnesses and consultants

to demonstrate that Goodnight's applications should be denied. In objecting to certain requests for production of documents, Empire cited privileges concerning the work product doctrine and the attorney-client privilege. Goodnight argues that Empire should have produced materials and data upon which its experts and consultants relied upon for their conclusions.

From the beginning, Empire asked for more time within which to prepare a reservoir study.¹ This motion was challenged by Goodnight, resulting in a curtailed time frame for preparation of a case opposing Goodnight's applications. Normal discovery rules, as in litigation, cannot apply in this case, or for that matter in Oil Conservation Division proceedings.

B. Goodnight's Motion to Compel.

Goodnight's heavy-handed tactics in seeking to compel the production of information are contrary to Division rules and process under the circumstances here. Further, Goodnight assumes that all of the data it is now demanding was within Empire's possession, custody, or control at the time the subpoena was issued. Goodnight's position, however, is unsupported by the facts and the law. The motion is simply Goodnight's attempt to escape the inevitable result of its failure to adequately prepare for hearing. The Motion should be denied.

Goodnight's principal arguments are contained in Exhibit B of the Motion. These arguments, as Empire understands them, are as follows:

1. Robert F. Lindsay Statement.

Goodnight complains that data underlying the Lindsay report should have been produced in response to the subpoena. However, this data was never in the possession of Empire. Dr. Lindsay, who retired from Chevron, developed a data base on EMSU, EMSUB and AGU units from 1988 to 2002. The data base is 1386 total pages with 67 large illustrations. The data base

¹ See Empire Motion for Continuance and Amended Pre-Hearing Order filed on 8/24/23.

belongs to Chevron, and Dr. Lindsay was allowed to use it to develop the dissertation for his Ph.D., which, in turn, Dr. Lindsay used to develop his statement in anticipation of the hearing on Goodnight's applications. Further, Dr. Lindsay's report was not complete until October 24, 2023 and was not finalized for submission until two days later on October 26, 2023. Until that time, Empire was not aware of the information that Dr. Lindsay would be relying on in his statement.

To the extent that Goodnight contends the draft reports or documents therein are responsive to the subpoena, it is incorrect. Empire retained Dr. Lindsay and legal counsel in anticipation of this regulatory proceeding, and therefore, communications and draft reports prepared under such circumstances are protected under the work product privilege. Thus, under Rule 1-026(B)(5) NMRA, Dr. Lindsay's draft reports are protected. Having received Dr. Lindsay's statement, Goodnight's requests have now been answered. Before Dr. Lindsay's statement and exhibits were finalized, Empire was not in a position to respond to the subpoena other than objecting that the responsive information was immune from discovery under the work product doctrine. Empire did not have the materials to include in its response to the subpoena.

Moreover, Empire disagrees that it is now required to supplement its response to the subpoena by producing documents referenced in Dr. Lindsay's statement. *See New Mexicans for Free Enterprise v. The City of Santa Fe*, 2006-NMCA-007, ¶ 69, 138 N.M. 785 (recognizing that "all of the data underlying [the expert]'s report need not have been provided to" the other party under Rule 1-026). If this were ordinary litigation, to which the Rules of Civil Procedure would apply, Goodnight would have conducted discovery into Dr. Lindsay's report by requesting the underlying materials and deposing Dr. Lindsay. However, Division rules do not anticipate such discovery. *See, e.g.*, 19.15.4.16 NMAC ("The commission and director or the director's authorized representative shall issue subpoenas for witness depositions in advance of the hearing only in

extraordinary circumstances for good cause shown.”) Goodnight’s efforts to misuse the Division’s limited subpoena authority is improper and should not be permitted.

NMSA 1978, Section 70-2-7 provides that the Division “shall prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the Oil and Gas Act.” Notably, Division rules do *not* incorporate the New Mexico Rules of Civil Procedure. *See generally* 19.15.4 NMAC. The only court rules referenced by the Division are the “rules of evidence in a trial before a court without a jury,” which “shall not control” but may be used by the examiners “as guidance in conducting adjudicatory hearings.”

The Division has authority to issue a subpoena under NMSA 1978, Section 70-2-8, and “require the production of books, papers and records in any proceeding before the . . . division.” However, neither the statutes nor Division rules authorize the Division to issue sanctions, such as the exclusion of evidence, in relation to a subpoena response. Rather, the Division may request that a district court compel a response to the subpoena. NMSA 1978, Section 70-2-9 (providing that “such court or judge shall have the power to punish for contempt as in case of disobedience of a like subpoena issued by or from such court”).

Even if the Rules of Civil Procedure were applied here, Goodnight has no basis for its contention that documents relied on by Empire’s expert witnesses must be produced in response to the subpoena. Rule 1-026(B)(6) NMRA establishes a process for discovery relating to an expert witness prior to hearing. *See id.* (providing that a party may—through interrogatories, requests for production, and deposition—discover certain information relating to expert witnesses). The Division has no comparable rule. Rather, a party is simply entitled to cross-examine the witness at hearing. 19.15.4.14 (B) NMAC; *see* Pre-Hearing Order, ¶¶ 4-6 (July 6, 2023) (providing the process for submission of direct testimony, evidentiary objections, and cross-examination).

Further, Rule 1-26(B)(6) does not apply because Goodnight is requesting far more information than is discoverable under the rule. Thus, it is improper for Goodnight to demand that Empire produce information regarding its witnesses' testimony that was not previously in Empire's possession, custody, or control; information that is publicly available, or documents protected as work product.

For example, Goodnight argues that Empire's pick of the top of the San Andres was contained in Dr. Lindsay's statement and should have been provided in response to the subpoena. *See* Exhibit B at 1 (third bullet), attached to Motion. However, Empire did not make that pick and could not have responded to the request on September 19. Since its purchase of the Unit in 2021, Empire had no reason to pick the top of the San Andres formation. In evaluating its purchase of the Unit, Empire considered the materials of XTO, and its parent affiliate, ExxonMobil, for the ROZ potential in the San Andres component of the vertical limits of the Unit, which were the same as the Eunice Monument South Pool.

As noted, in the ordinary course of litigation, Goodnight would have had an opportunity to depose Empire's expert witnesses and conduct follow-up discovery. After having received Empire's expert witness testimony and exhibits on October 26, Goodnight now has an opportunity to prepare its case to refute the analysis of Dr. Lindsay, and indeed, all of Empire's experts, as provided by the Division rules and Pre-Hearing Order.

Goodnight's argument takes the final work product of Empire's expert witnesses and relates it back to a time that may have occurred before Empire, in coordination with its attorneys, retained experts. At that time, Empire did not have information that was then being formulated by its witnesses in anticipation of the hearing. As discussed above, the draft testimony and exhibits Goodnight's witnesses were preparing for the hearing are subject to the work product doctrine, and

neither the testimony nor the exhibits were final at the time Empire responded to the subpoena. Further, Goodnight has not demonstrated a “substantial need of the materials in preparation” of its own case. *See* Rule 1-026(B)(5). Moreover, Dr. Lindsay’s dissertation, and other articles relied on by Empire’s experts, are publicly available.

Goodnight knew the general nature of Empire’s case based on the hearing in OCD Case 22642 (Piazza well) and could have obtained the substantial equivalent of the materials that it seeks from Empire without undue hardship. Goodnight is not a neophyte in regulatory matters before the Oil Conservation Division. Goodnight knew that it needed to retain experts that would be able to rebut Empire’s arguments and yet it did not. Empire should not be required to expend time and resources to provide Goodnight with resources equally available to Goodnight. *See* Rule 1-026(B)(2)(a).

Nonetheless, Empire is providing the following documents to Goodnight in addition to the documents previously produced:²

DOCUMENT	BATES# w/prefix ENM OCD 26314-17
EMSU-649 Core Analysis	00234 – 00252
EMSU-679 Core Analysis	00253 – 00280
EMSU-679 Grayburg Fracture Study Core Analysis	00281 – 00314
EMSU HighWaterCutWells	00315
EMSU RR Bell #4 Core Analysis (1)	00316
EMSU RR Bell #4 Core Analysis (2)	00317

² Empire has Bates-numbered all of the documents that it previously produced and will reproduce them as Bates-numbers ENM OCD 26314-17 00001 - 00233. Bates numbers for this supplemental production of documents begin where the Bates numbers for the previously produced documents ended.

EMSU RR Bell #4 Core Analysis (3)	00318
EMSU RR Bell #4 Core Analysis (4)	00319
EMSU RR Bell #4 Core Analysis (5)	00320
EMSU RR Bell #4 Core Analysis (6)	00321
EMSU RR Bell #4 Core Analysis (7)	00322
EMSU RR Bell #4 Core Analysis (8)	00323
EMSU RR Bell #4 Core Analysis (9)	00324
EMSU RR Bell #4 Core Analysis (10)	00325

2. Galen Dillewyn statement.

Goodnight states that the 8 calculated well logs previously prepared by NUTECH for XTO should have been produced. Exhibit B at 2, attached to Motion. However, Empire did not become aware of the NUTECH logs until Mr. Dillewyn began to prepare his statement and exhibits. The NUTECH calculated well logs relating to the EMSU will be produced contemporaneously with the filing of this response:

DOCUMENT	BATES# w/prefix ENM OCD 26314-17
Nutech EMSU-142	00326 – 00331
Nutech EMSU-577	00332 – 00337
Nutech EMSU-628 vf	00338 – 00343
Nutech EMSU-658	00344 – 00349
Nutech EMSU-660	00350 – 00355
Nutech EMSU-673	00356 – 00361
Nutech EMSU-713	00362 – 00367
Nutech EMSU-746	00368 – 00375

Nutech Eunice Monument South 614	00376 – 00381
Nutech Goodnight Ryno 1	00382 - 00390

3. Nicholas Cestari statement.

Goodnight argues that mudlogs should have been produced, *see* Exhibit B at 2, attached to Motion; but mudlogs are generally filed with the Oil Conservation Division and are publicly available. The parties agreed that production of publicly available documents would not be required. However, it appears these mudlogs were in Empire’s possession and were not filed in public records. The mudlogs were contained in a data bank of materials transferred from XTO to Empire and were not discovered until after Empire responded to the subpoena. As a result, Empire is now producing the mudlogs.

Goodnight argues that Empire should have produced the “reports, data, analyses, and documents supporting” Mr. Cestari’s testimony about “outcrop and in core” work showing “the presence of dissolution features and fractures near the top San Andres.” Exhibit B at 4, attached to Motion. The studies relied on by Mr. Cestari were identified in the course of his research in preparation for his report. These studies are public record and can be easily found on the internet.

Goodnight further complains that the geochemical analysis of EMSU-679 should have been produced. *See* Exhibit B at 2, attached to Motion. The geochemical analysis was brought to Empire’s attention in the course of conferring with Dr. Lindsay about his report. The geochemical analysis is part of the fracture study that is now being produced in relation to Dr. Lindsay’s statement. *See supra* at 7.

Empire is providing the following documents to Goodnight in addition to the documents previously produced:

DOCUMENT	BATES# w/prefix
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	ENM OCD 26314-17
EMSU-628 Mudlog	00391
EMSU-658 Mudlog	00392
EMSU-577 Mudlog	00393
EMSU-660 Mudlog	00394
EMSU-673 Mudlog	00395
EMSU-713 Mudlog	00396
EMSU-746 Mudlog	00397
Anatomy of Offlap: Upper San Andres Formation	00398 - 00409
San Andres Formation: Outcrop to Subsurface Stratigraphic Framework	00410
Sequence Hierarchy and Facies Architecture of a Carbonate-Ramp System: San Andres Formation of Algerita Escarpment and Western Guadalupe Mountains, West Texas and New Mexico	00411 – 00503

4. William West statement.

In effect, Goodnight argues that Empire should have produced the work product it was preparing in anticipation of hearing. For example, Goodnight contends that “Empire’s geologic picks for the top of the San Andres should have been produced.” Exhibit B at 5 (last bullet), attached to Motion. However, Empire had not identified geologic picks prior to preparing its case in this matter. Empire had relied on the vertical limits of the Unit and the Eunice Monument South Pool. Empire, from the time it purchased the Unit in 2021, has had no need to determine the geologic pick for the top of the San Andres. Now in anticipation of hearing, Empire’s experts have made that pick in preparation of their respective studies, and that pick is evident in Empire’s exhibits.

Goodnight also contends that Empire should have produced “[a]ll data and information regarding sulfur content of EMSU produced water over time.” Exhibit B at 3 (regarding Mr. West), attached to Motion. Mr. West’s review of materials regarding sulfur analysis was undertaken in response to Goodnight’s applications. Empire previously had no need to study sulfur migration from the lower San Andres to the Grayburg and had not done so.

Now, Goodnight also seeks to compel production of researched materials, in particular, the 1996 NACE Paper No. 181, which Goodnight, with due diligence, may have obtained for itself. . A quick internet search would have found this paper available for purchase. *See* Utilization of Geological Mapping Techniques to Tract Scaling Tendencies in the Eunice Monument South Unit Waterflood, Lea County, New Mexico (1996), *available at* <https://www.osti.gov/biblio/268224> (last visited Nov. 9, 2023) (discussing water analysis data, including sulfate concentrations, for EMSU wells). The paper references the Unit. Moreover, the EMSU Injection Well Data Sheets were easily found through an internet search. *See* https://ocdimage.emnrd.nm.gov/imaging/filestore/SantaFeAdmin/CF/ADA-03-00592%20Case%20Files%20Part%2010/08397_4644.pdf (last visited Nov. 9, 2023). Lack of diligence on Goodnight’s part is clearly apparent. Other articles upon which experts such as Empire’s witnesses rely are readily available on the internet. Goodnight simply failed to do its own research.

Nonetheless, Empire is providing the following documents to Goodnight in addition to the documents previously produced:

DOCUMENT	BATES# w/prefix ENM OCD 26314-17
EMSU Injection Well Data Sheets	00504 – 00529
New Mexico Eunice Monument Repeat Formation Test	00530

Reporting – Well Summary Report Data	00531
Utilization of Geological Mapping Techniques to Track Scaling Tendencies in the EMSU Waterflood, Lea County, New Mexico	00532 - 00551
WellView attachment – EMSU 660	00552
WellView attachment – EMSU 660 HIT PUR 3-28-19	00553 – 00555
WellView attachment – EMSU 660 tubing inspection March 2019	00556 - 00560
WellView attachment – EMSU 660.rtf	00561

C. Conclusion.

Goodnight argues that Empire, after having retained its expert witnesses, should have produced their research and conclusions, and provided draft documents to Goodnight’s counsel. Goodnight offers no persuasive authority that it could not have found the equivalent information to refute Empire’s Residual Oil Zone assertions without undue hardship.

Once Goodnight received the testimony and exhibits of Empire’s expert witnesses, in accordance with the Division’s prehearing order, the motion to compel was moot. Goodnight then knew Empire’s case and theories and could prepare for cross-examination of Empire’s witness in the manner provided by Division rule and the Pre-Hearing Order.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that the following counsel were served with the foregoing by email on November 10, 2023 as follows:

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