

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

**APPLICATIONS OF GOODNIGHT MIDSTREAM
PERMIAN, LLC FOR APPROVAL OF A
SALTWATER DISPOSAL WELL,
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. 24018-24027

**GOODNIGHT MIDSTREAM'S RESPONSE *PARTIALLY* OPPOSING EMPIRE'S
MOTION TO REFER CASES TO THE COMMISSION**

Goodnight Midstream Permian, LLC (“Goodnight Midstream”) files this response *partially opposing* Empire New Mexico LLC’s (“Empire”) motion to refer the above-referenced cases to the Commission for hearing.

INTRODUCTION

Goodnight Midstream agrees the cases involving produced water disposal wells located within the Eunice Monument South Unit (“EMSU”) should be referred to the Commission and heard together with Goodnight Midstream’s forthcoming applications to amend Commission Order Nos. R-7765 and R-7767 along with Case No. 24123 currently pending before the Commission for de novo review of Division Order No. R-22869-A. However, Empire Case Nos.

24021-24024 and 24026-24027 (the “non-EMSU cases”) should be retained by the Division and stayed pending resolution of the EMSU cases by the Commission.

Argument

I. The Factual and Legal Issues in the EMSU Cases Are Substantially Different than the Non-EMSU Cases.

Empire’s contention that the same facts and evidence will govern evaluation of EMSU and non-EMSU cases is misplaced and misleading. Beyond substantial variations in the facts between the cases, there is a significant difference in the applicable legal framework and legal issues being challenged.

A. Facts and Evidence Will Vary Substantially.

Not only will the facts and evidence adduced at hearing vary substantially between the EMSU and non-EMSU cases, but the analyses and evaluations with respect to each non-EMSU injection well will also vary from well to well based on the distance from the EMSU boundary and other geologic and engineering factors that influence injection radius and areas of influence. See Empire Unit Area SWDs, attached as **Exhibit A** (depicting active San Andres produced water disposal wells in the EMSU and within one mile by operator, including first injection date and cumulative injection volumes).

Empire grossly oversimplifies the factual and evidentiary record necessary to properly assess their claims, especially with respect to non-EMSU disposal wells. For example, as part of its burden as applicant, Empire will have to proffer individualized evidence with respect to each of Goodnight Midstream’s disposal wells outside the EMSU. Likewise, Goodnight Midstream will present individualized evidence in its case-in-chief and on rebuttal contesting Empire’s claims as to each well. For example, engineering factors, such as cones of depletion from the Arrowhead Grayburg Unit and other San Andres water production wells in the area, as well as

offsetting disposal wells, have a differing effect on each disposal well and their respective injection radius and area of influence depending on location. And geologic variations across an approximately 25-square-mile area will need to be addressed for each disposal well location.

As a result, a hearing with all cases combined will necessarily be presented as a series of hearings within a hearing to address these individualized issues, undermining the purported efficiency of consolidation.

B. The Legal Framework and Issues Are Distinct within the EMSU.

In addition, the legal framework governing the EMSU pool and unitized interval is significantly different compared to the pool and formations outside the EMSU, requiring a different legal analysis for the EMSU cases that is inapplicable to the non-EMSU cases. Goodnight Midstream will be raising legal issues in its forthcoming applications to amend Commission Order Nos. R-7765 and R-7767 that are unique to this legal framework and inapplicable to the non-EMSU cases.

First, the EMSU—unlike the surrounding acreage—is subject to Commission Order No. R-7765, issued pursuant to the Statutory Unitization Act, NMSA 1978, Sections 70-7-1 through 70-7-21. The Statutory Unitization Act has certain required conditions precedent that were not established in the record or were found to exist despite uncontested evidence to the contrary at the time Order No. R-7765 was issued. These legally significant infirmities make the Order’s inclusion of the San Andres aquifer in the unitized interval void ab initio. Goodnight Midstream’s legal challenges arising from Order No. R-7765 and the Statutory Unitization Act are implicated only within the EMSU, affect only the EMSU cases, and will be addressed in Goodnight Midstream’s forthcoming application to amend Commission Order No. R-7765.

Second, the Commission created a special pool under Order No. R-7767 comprised of the Lower Penrose, Grayburg, and San Andres formations applicable only within EMSU. That means the pool in this area governing the Grayburg-San Andres and its vertical limits is different inside the EMSU than outside it. As a consequence, different operators and affected parties exist outside the EMSU in the Grayburg-San Andres pool than within the EMSU pool, where Empire is the only operator. In creating the EMSU pool under Order No. R-7767, however, the Commission erroneously retained the San Andres aquifer within the EMSU pool in contravention of the Oil and Gas Act, the Statutory Unitization Act, and the Commission's regulations. *See* NMSA 1978, § 70-2-33(B); NMSA 1978, § 70-2-1 through 70-7-21; 19.15.2.7.P(5) NMAC. Similar to the unit order, these legal challenges and others arising from Order No. R-7767 are implicated only within the EMSU, affect only the EMSU cases, and are addressed in Goodnight Midstream's forthcoming application to amend Commission Order No. R-7767.

Commission Order Nos. R-7765 and R-7767 create a discrete legal framework giving rise to legal challenges applicable only within the EMSU and to the EMSU cases. These are also legal issues created by the Commission when it formed the EMSU as a statutory unit and created the special EMSU pool. It makes no sense to lump the non-EMSU cases, which are not subject to the same Commission-created legal framework and EMSU-specific legal challenges, into the same consolidated hearing. That would allow the non-EMSU cases to unfairly bypass Division-level hearings by essentially riding the coattails of the EMSU-specific cases, which are properly before the Commission in the first instance. As with the factual differences, if all the cases were referred to the Commission, these legal distinctions necessitate segregating the EMSU cases within a consolidated hearing from the non-EMSU cases, defeating the purpose of consolidation.

C. Including Non-EMSU Cases Unnecessarily Complicates Resolution of the Core Issues and Raises Concerns About Agency Action that is Arbitrary and Capricious.

In its applications, Empire has arbitrarily excluded from its attack numerous active wells disposing substantial volumes of produced water into the San Andres within the Unit Area and within a one-mile radius of the EMSU boundary. *See Exhibit A.* Empire has made no effort to articulate a basis for distinguishing between Goodnight Midstream's injection—either inside the EMSU or outside it—and injection by these other operators, nor is there is a valid basis for doing so. However, grouping Goodnight Midstream's disposal wells into a consolidated set of cases for referral to the Commission—to the exclusion of other equally positioned disposal wells operated by others—raises substantial concerns about arbitrary and capricious agency action.

The arbitrariness is made clear by simply reviewing the other wells and operators within and around the EMSU that will be excluded from the proposed consolidated cases. For example, Rice Operating Company's (OGRID 19174) E M E SWD #021 (API No. 30-025-21852) has injected more than 40 million barrels of produced water into the San Andres within the Unit Area since 1966—almost two decades before the EMSU was created. *See Exhibit A.* Similarly, Rice Operating also operates the E M E SWD #033M (API No. 30-025-12786), which is located just 165 feet north of the EMSU boundary in Section 33, Township 20 South, Range 37 East.¹ It has injected nearly 60 million barrels of produced water into the E M E SWD #033M since 1960. *See Exhibit A.* In fact, disposal from other operators into the San Andres within the EMSU and within one mile of the Unit boundary—including Empire's own disposal injection—totals more than 111 million barrels over 60 years. *See id.* Empire raises no objection to this injection within

¹ *See* <https://wwwapps.emnrd.nm.gov/OCD/OCDPermitting/Data/WellDetails.aspx?api=30-025-12786>.

or immediately around the EMSU. Empire instead targets only Goodnight Midstream's authorized injection in its applications.

Outside the EMSU, Goodnight Midstream's closest disposal well is the Yaz 28 SWD #001 (API No. 30-025-46382). Contrary to Empire's repeated assertions, it is not 200 feet from the EMSU boundary; it is approximately 1,570 feet outside the EMSU, and it has injected approximately 16 million barrels of water into the San Andres. To put that in perspective, Rice Operating's E M E SWD #033M is about 1/10th the distance from the EMSU boundary and has injected almost four times as much produced water into the San Andres as the Yaz well.

Targeting Goodnight Midstream's disposal within the EMSU to the exclusion of other active disposal wells inside the Unit Area is unfairly arbitrary, but at least it is arbitrary within the confines of the EMSU where the facts and legal issues will be uniform. It is also something the Commission can rectify by including as parties the additional disposal operators affected by Empire's claims within the EMSU—OWL SWD Operating, LLC (OGRID 308339 or 308256) and Rice Operating—to avoid an outcome that is arbitrary and capricious. This also will provide the Commission with the benefit of the input, data, and analyses of disposal operators with more than 60 years of injection experience into the San Andres within and around the EMSU.

In contrast, referring all cases to the Commission unnecessarily complicates resolution of the core issues within the EMSU. It will inject disparate legal and factual matters into the analysis on top of the need to include additional disposal wells and operators outside the EMSU to avoid compounding an arbitrary and capricious process. The Division should instead stay and retain the non-EMSU cases and allow the Commission to sort out the key legal and factual issues affecting the EMSU—preferably with the input of all disposal well operators affected within the EMSU. The Division can then apply the Commission's findings and rulings as guidance to the

non-EMSU cases on a case-by-case basis, as applicable. Hearing the non-EMSU cases separately will allow the Division to properly consider the individualized facts and evidence necessary to decide those cases.

II. Referring the Non-EMSU Cases to the Commission Will Not Result in Administrative Efficiencies and Is Not Justified.

Contrary to Empire's contention, referring all the cases to the Commission will not result in administrative efficiencies. Moreover, there is no sound, principled reason to bypass Division hearings and refer the non-EMSU cases to the Commission.

First, as outlined above, grouping the EMSU cases with non-EMSU cases into a single hearing—a total of 17 cases—will result in an unwieldy process requiring mini hearings within a hearing on disparate legal and factual issues. It will be difficult to keep track of the evidentiary record and transcript segments applicable to each case or group of cases depending on whether the case is inside the EMSU or should be considered on a case-by-case basis. And, given the number of individual factual and legal issues, combining all 17 cases into a single hearing will likely result in a long, drawn-out hearing that will span numerous hearing days.

Second, every order following a hearing before a Division examiner is subject to an application for de novo review by an adversely affected party. *See* 19.15.4.23.B NMAC. The fact that either Empire or Goodnight Midstream is likely to file a de novo application with the Commission following an adverse decision in the non-EMSU cases is not justification to bypass Division hearings and refer them directly to the Commission. A de novo application is a possibility—and right—following every Division hearing order.

Rule 19.15.4.20 NMAC provides two circumstances in which an adjudicatory hearing may be held before the Commission: (A) if there is a de novo appeal; or (B) if the Division

director directs the Commission to hear the matter. The only applicable provision here is Subpart B.

The justification for referring the EMSU cases to the Director for consideration about whether to direct the Commission to hear them is not that the underlying claims are hotly contested or involve serious allegations of waste and impairment of correlative rights. The Division adjudicates such disputes more often than the Commission and is more accustomed and well-suited to hearing and managing such contested matters. The justification for referring the EMSU cases to the Commission is that they directly involve a dispute over a Commission-created unit in a Commission-created pool and that there are legal challenges arising from the related Commission orders. For expediency and administrative efficiency, it would also allow them to be heard at the same time as the closely related de novo hearing on Division Order No. R-22869-A in Case No. 24123, which is an EMSU disposal case.

In contrast, the non-EMSU cases have only an attenuated connection to the EMSU and the Commission's orders based solely on Empire's bare allegations of harm and impairment. The validity of those allegations is negated, however, by the fact that Empire has taken no action to challenge the continued injection from seven other produced water disposal wells within and around the EMSU operated by others, including Empire, that together account for more than 111 million barrels of produced water injected into the San Andres since 1960. *See Exhibit A*. For this reason alone, the Division should refuse to refer the non-EMSU cases to the Division.

III. Staying the Non-EMSU Cases at the Division Will Not Impair Empire.

Notwithstanding its assertion to the contrary, Empire will not be harmed by a stay in the non-EMSU cases pending resolution of the EMSU cases at the Commission.

First, if disposal of produced water within the San Andres truly presented a dire threat, Empire would discontinue disposing in the San Andres formation itself and would file applications to revoke the injection authority for the Rice Operating and OWL SWD disposal wells within the EMSU. *See Exhibit A.* Empire has not even taken those steps to protect itself against disposal within the EMSU, let alone seek to revoke the injection authority of the Rice Operating and Parker Energy Support Services wells injecting within one mile of the EMSU boundary. The fact that Empire has not taken these actions confirms there is no risk of imminent harm and Empire is punitively singling out Goodnight Midstream's operations.

Second, Order R-22869-A does not provide sufficient basis to contend Empire will be harmed by injection outside the EMSU. In the Order, the Division did not find that the San Andres is a residual oil zone within the EMSU, nor did it find there is economically recoverable oil within the San Andres, or that there is even any oil in the San Andres at all. At best, Order R-22869-A denied Goodnight Midstream's application for injection within the EMSU on the basis that there is a "potential" for future recovery of additional hydrocarbons from the Unitized Interval—not even the specifically the San Andres. *See Order No. R-22869-A, ¶ 11.* In Order No. R-22869-A, the Division did not make any of the legally necessary findings under its own order governing the case: It did not expressly find that disposal in the San Andres within the EMSU would interfere with Unit Operations, cause waste, or impair correlative rights. *See Order on Motion to Dismiss, Case No. 22626, dated 8/24/22.* Nor did it find that disposal would violate the Oil and Gas Act. *Id.* Stated simply, "potential recovery" of additional hydrocarbons somewhere within the Unitized Interval generally is not a concrete-enough finding to determine Empire will be harmed by San Andres injection outside the EMSU.

Finally, Empire has no plan or strategy for how or when to conduct tertiary recovery in the San Andres within the EMSU. Goodnight Midstream has repeatedly requested Empire's plans through discovery only to be told it has no plans. It also has not articulated how tertiary recovery through a CO₂ flood is possible, let alone practical or economic, where the San Andres has been depleted by upwards of 330 million barrels of water within the EMSU. Nor has it articulated how, after allegedly becoming immobilized through "Nature's Waterflood," oil purportedly present in the San Andres for millions of years is suddenly at risk of adverse impact by injection that started more than two decades before EMSU was created. Empire also does not have the regulatory authorizations in place to inject CO₂ and will need to amend Commission Order No. R-7765 to authorize tertiary recovery and approve a new allocation formula. In sum, tertiary recovery in the San Andres is barely a concept let alone a potential.

CONCLUSION

For the reasons stated, the Division should refer the EMSU cases (Goodnight Midstream Case Nos. 23614-23617 and 23755, and Empire Case Nos. 24108-24020 and 24025) to the Commission to be heard by the Commission together with Goodnight Midstream's forthcoming applications to amend Commission Order Nos. R-7765 and R-7767 along with Case No. 24123, which is currently pending before the Commission for de novo review of Division Order No. R-22869-A. The non-EMSU cases (Empire Case Nos. 24021-24024 and 24026-24027) should be retained by the Division and stayed pending resolution of the EMSU cases by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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