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

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN, LLC TO AMEND ORDER NO. R-7765, AS AMENDED, TO EXCLUDE THE SAN ANDRES FORMATION FROM THE UNITIZED IINTERVAL OF THE EUNICE MONUMENT SOUTH UNIT, LEA COUNTY, NEW MEXICO.

CASE NO. 24278

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN, LLC TO AMEND ORDER NO. R-7767 TO EXCLUDE THE SAN ANDRES FORMATION FROM THE EUNICE MONUMENT OIL POOL WITHIN THE EUNICE MONUMENT SOUTH UNIT AREA, LEA COUNTY, NEW MEXICO.

CASE NO. 24277

EMPIRE NEW MEXICO, LLC'S
REPLY TO GOODNIGHT PERMIAN, LLC'S
RESPONSE IN OPPOSITION TO
MOTION TO DISMISS APPLICATIONS TO AMEND

Empire New Mexico, LLC, by and through its undersigned counsel of record, hereby submits its Reply to Goodnight Permian, LLC's Response in Opposition to Empire's Motion to Dismiss Applications to Amend.

Argument and Authorities

I. Goodnight has no claim for injury arising from the inclusion of the San Andres in the Eunice Monument South Unit.

Goodnight's statement that "The Commission's mistaken inclusion of the San Andres in the Eunice Monument South Unit ("EMSU") special pool and unitized interval jeopardizes Goodnight Midstream's constitutionally protected property interest, its existing regulatory

authorizations for produced water disposal, and its pending applications" (Response, page 1) is nonsensical for several reasons.

Goodnight has not presented any evidence that the Commission was "mistaken" when it included the San Andres in the EMSU. As Empire noted in its Motion to Dismiss, numerous units and pools in New Mexico include multiple formations. (Motion to Dismiss, page 6)

At the time the Commission approved the inclusion of the San Andres in the EMSU – back in 1984 – Goodnight had no constitutionally protected interest, regulatory authorizations for produced water disposal, or pending applications for produced water disposal in the area. By its own admission, Goodnight did not even exist in 1984. Goodnight was not established until 2011 and did not begin operating in New Mexico until 2018. (Response, page 2) And, Goodnight is not claiming privity with any entity that had an interest in the San Andres in 1984. Goodnight has no viable claim for injury arising out of the inclusion of the San Andres in the EMSU. Rather, Goodnight entered into a surface use agreement within the EMSU with prior notice of the existing order, and now claims standing to redress the harm that it willingly created with full knowledge of a preexisting unit.

The Commission has the duty to prevent waste and protect Empire's correlative rights, not Goodnight's claimed interest in pore space. The Legislature, in promulgating the Statutory Unitization Act, specifically stated, at NMSA 1978 Section 70-7-1, Purpose of act:

> The legislature finds and determines that it is desirable and necessary under the circumstances and for the purposes hereinafter set out to authorize and provide for the unitized management, operation and further development of the oil and gas properties to which the Statutory Unitization Act is applicable, to the end that greater ultimate recovery may be had therefrom, waste prevented, and correlative rights protected of all owners of mineral interests in each unitized area. It is the intention of the legislature that the Statutory Unitization Act apply to any type of operation that will substantially increase the recovery of oil above the amount that would be recovered by primary recovery alone and not to what the industry understands as exploratory units.
> (Emphasis added.)

Contrary to Goodnight's claims, the Division is obligated to comply with the Legislature's mandate.

II. Whether the San Andres is pore space is a legal issue to be determined by the district court in Lea County.

Goodnight's pore space argument is not properly before the Commission. This argument involves two property rights issues -- whether the San Andres is pore space, and whether it is part of the surface estate. These legal issues are outside the jurisdiction of the Commission and can only be decided by the district court sitting in the county where the subject property is located, in this case, Lea County.

"[T]he district courts of this state are courts of general jurisdiction, and have jurisdiction to try and adjudicate the title to personal and real property." *McClendon v. Dean*, 1941-NMSC-047, ¶ 5, 45 N.M. 496, 117 P.2d 250, 253. *See also*, New Mexico Constitution, art. 6, § 13.

Unlike district courts, the Commission is a creature of statute and lacks general jurisdiction to adjudicate private disputes. Rather, its powers are set forth in the Oil and Gas Act and the Statutory Unitization Act. Under the Oil and Gas Act, the Commission has authority to prevent waste of hydrocarbons and protect correlative rights and under the Statutory Unitization Act, the Commission has the power to "do such things as may be necessary or proper to carry out and effectuate the purposes of the Statutory Unitization Act." NMSA 1978 § 70-7-3. In accordance with these limitations, the Division has already determined that "the rights of a surface owner do not constitute 'correlative rights' [as defined by the New Mexico Oil and Gas Act]." *See* Order No. R-12754 at 6, ¶ 24.

The United States District Court reviewed the powers and authority of the Commission in *Harvey E. Yates Co. v. Cimarex Energy Co.*, 2014 WL 11512599, at *7 (D.N.M. Mar. 5, 2014):

> The New Mexico Oil and Gas Act, N.M. Stat. Ann. §§ 70-2-1 et seq., among other things, establishes the powers and duties of the Oil Conservation Commission (the "Commission") and Oil Conservation Division (the "Division"). *See* N.M. Stat. Ann. § 70-2-6. According to the Oil and Gas Act, the Oil Conservation Division has "jurisdiction and authority over all matters relating to the conservation of oil and gas," and it has "jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas." *Id.* The basis of the Oil Conservation Commission's powers is founded on the duty to prevent waste and to protect correlative rights. *See id.* § 70-2-11; *Sims v. Mechem*, 72 N.M. 186, 189, 382 P.2d 183, 185 (1963). Among other enumerated powers, the Oil Conservation Division has the authority "to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties," N.M. Stat. Ann. § 70-2-12(B)(7), and to "fix the spacing of wells," *id.* § 70-2-12(B)(10).

Neither the Oil and Gas Act nor the Statutory Unitization Act give the Commission authority to adjudicate real property rights.

Accordingly, tn Case No. 22626, which involved Goodnight's application for authorization to inject produced water into the Piazza SWD, Hearing Officer Brancard correctly recognized that property rights were not properly at issue:

> The order establishes a unit. It establishes what the horizontal limits of the unit is and then it names -- this a statutory unit. We're not talking about property rights. It's a statutory unit, it names an operator of that unit. And that operator, once upon a time Gulf, seems today to be Empire, operates that entire unit.
>
> (See, Goodnight Response to Motion to Dismiss, Ex. J; Case No. 22626, June 16, 2022 Hearing Transcript page 28, lines 11-16)

Despite diligent search, Empire has not found any New Mexico case law on the issue of ownership of pore spaces, subsurface reservoir storage spaces, or subsurface matrix. Whether pore space is part of the surface estate is, therefore, an issue to be determined by a court of law, not by the Commission.

III. Goodnight's argument that it has standing on the basis of a surface use agreement does not hold water.

The fact that Goodnight has a surface use agreement does not convert the agreement into a leasehold interest in the unit. Even assuming *arguendo* that Goodnight has a leasehold interest in the surface, that interest does not give Goodnight any legal interest in the unit itself.

The unit is governed by the Act and by the Unit Agreement, and Goodnight's interest is not protected by the Act or included in the Agreement. There is absolutely no basis in New Mexico oil and gas law for Goodnight's argument that it has a leasehold interest in the unit. Having no leasehold interest in the unit, Goodnight cannot extrapolate that argument into some version of standing to seek amendment of the Unit.

Additionally, as noted in Empire's Motion (page 6) Goodnight's attempt to label the San Andres formation as a water aquifer has no merit. "No water right shall be established by the disposition of produced water, recycled water or treated water." NMSA 1978 § 72-12-25.

It is axiomatic that in order to have standing, a party must be "imminently threatened with injury, or, put another way, that he is faced with 'a real risk of future injury,' as a result of the challenged action or statute." *ACLU of N.M. v. City of Albuquerque,* 2008-NMSC-045, ¶ 11, 144 N.M. 471, 476, 188 P.3d 1222, 1227. In averring that its injury must only be "slight," Goodnight misreads the holding of *ACLU*. The Supreme Court actually stated that, "once the plaintiff has alleged that he is among those who are directly injured or imminently threatened with injury, the alleged injury itself need only be slight." *Id.,* ¶ 18. Goodnight's problem is that it is not imminently threatened with injury nor is it faced with a real risk of future injury "because of the challenged action." The challenged action – in this case, the Commission's approval of the Unit Agreement – took place almost forty years before Goodnight came on the scene. Therefore, it cannot claim to

be injured by the challenged action, and thus it has no standing vis-à-vis the Agreement or the EMSU.

IV. Goodnight's "substantial reliance" is not a basis for granting its Application.

Goodnight argues that its Applications should be granted because it invested "hundreds of millions of dollars" to construct pipelines "in reliance on the long history of the San Andres as a produced water disposal zone." This type of equitable argument has no place in an administrative proceeding, which is based solely on the agency's enabling statute.

Goodnight's investment in miles of pipeline construction has nothing to do with injection into the San Andres or whether the location of the EMSU should be used for injection in conjunction with Goodnight's pipeline system. The fact that Goodnight constructed its pipelines based on a surface use agreement within an existing, longstanding unit and prior to filing its applications does not entitle it to equitable relief. In fact, just the opposite. "A fundamental principle of equity is the frequently stated maxim that 'he who comes into equity must come with clean hands.'" *Romero v. Bank of the Southwest.*, 2003-NMCA-124, ¶ 37, 135 N.M. 1, 10, 83 P.3d 288, 297. Having set up this situation, Goodnight cannot now be allowed to prosper from it.

V. Goodnight's surface use agreement does not convert into a leasehold interest in the unit.

Goodnight arguably has a leasehold estate in the surface. It may – or may not – have a property interest in the pore space within the San Andres. That is for the district court to decide. But even if it does have an interest in the pore space, that does not mean that it has a leasehold interest in the unit. There is no provision in the Statutory Unitization Act, or in any of the New Mexico statutes pertaining to water, water rights and water disposal, that would allow such an interest.

Conclusion

The stated purpose of the Statutory Unitization Act is to protect the rights "of all owners of mineral interests in each unitized area." NMSA 1978 § 70-7-1. Goodnight's proposed water disposal would infringe on Empire's rights as owner of the mineral interest in the unitized area. Empire does not agree to the contraction of the Unit Area, and none of the working interest owners agree to the contraction of the Unit Area. As more fully demonstrated in Empire's Motion to Dismiss, without that agreement, the Unit Agreement cannot be amended. Empire has shown the fallacy of Goodnight's arguments regarding equitable relief and standing.

WHEREFORE, Empire requests that the Commission enter an Order dismissing Goodnight's Applications and for any other relief to which the Commission may deem Empire to be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to counsel of record by electronic mail this 18th day of April, 2024, as follows:

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