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

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

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

CASE NO. 24278

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

CASE NOS. 23614-23617

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

CASE NOS. 24018-24027

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

EMPIRE NEW MEXICO, LLC'S RESPONSE IN OPPOSITION TO GOODNIGHT PERMIAN LLC'S MOTION TO DISMISS
CASE NOS. 24021-24024, 24026, 24027

Empire New Mexico, LLC, ("Empire"), by and through its undersigned counsel of record, submits the following response in opposition to Goodnight Midstream Permian, LLC's ("Goodnight") Motion to Dismiss Case Nos. 24021-24024, 24026, 24027 ("MTD" or "Motion"). For the reasons that follow, the Motion should be denied.

INTRODUCTION

In Case Nos. 24021-24024, 24026, and 24027, Empire seeks to revoke Goodnight's authority to inject produced water into the San Andres formation via six saltwater disposal wells ("SWDs") located in proximity to Empire's Eunice Monument South Unit ("EMSU"). The San Andres formation is included in Empire's unitized interval, and Goodnight admits it has capacity to inject approximately 400,000 barrels of water *per day* into the formation.[1] In Case Nos. 23614-23617, in which Goodnight seeks approval of new SWDs, Empire previously filed testimony and hearing exhibits that include extensive engineering and geological evidence that a Residual Oil Zone exists in the San Andres that will be developed through tertiary recovery and that Goodnight's massive injection enterprise will impair production within the EMSU. Those exhibits include testimony that by 2028, Goodnight's cumulative disposal volume will amount to 1.08 billion barrels inside the EMSU *and another .28 billion barrels outside the unit*.[2] These injection volumes dwarf injection by any other operators within and surrounding the EMSU. Given the

[1] *See* Goodnight's Response to Empire's Motion to Dismiss Case Nos. 24277 and 24278 at 2-3 (filed April 4, 2024).

[2] *See* Case Nos. 23614-23617, Self-Affirmed Statement of William West (Exhibit G), at 3 (filed November 3, 2023).

Commission's statutory obligation to prevent waste and protect correlative rights, these issues are highly concerning and must be expeditiously addressed. *See* NMSA 1978, § 70-2-11.

Despite the serious concerns raised by Empire's applications, Goodnight seeks to preclude the Commission from deciding these cases based on arguments that conflate standing and causation and rely on non-existent heightened pleading standards. Goodnight's MTD, though styled as a motion to dismiss for "lack of standing," demands far more specificity in a Commission application than anything the standing doctrine requires. What the Motion *really* seeks is a preemptive decision on the merits; namely, whether Empire has proven that Goodnight's injection into its SWDs located outside of the EMSU has impaired Empire's correlative rights within the EMSU. Goodnight's argument controverts extensive authority – including United States Supreme Court precedent on establishing standing at the pleading stage – and must be rejected.

First, Empire has met and exceeded the requirements for pleading standing in a Commission proceeding. All that is required to *plead* standing – as opposed to proving standing or injury at a hearing – are generalized allegations of harm. Here, Empire alleges that saltwater injected into Goodnight's SWDs – in some cases in excess of Goodnight's daily injection limit – migrates into the unitized interval within the EMSU, thereby impairing Empire's ability to extract hydrocarbons from areas that Goodnight previously misrepresented as non-productive. If true, these allegations give rise to standing. The MTD demands a degree of specificity in a Commission application beyond anything required in a state or federal court. Empire need not demonstrate in its *applications* the exact mechanics of how this migration occurs. That question must be resolved based on evidence presented at hearing.

Second, as noted above, the MTD does not address *standing* so much as *causation*, a fact question that must be resolved based on evidence. The MTD asserts two principal arguments: (1)

that Empire has failed to explain how produced water from SWDs located outside of the EMSU could potentially impact Empire's operations inside the EMSU, and (2) that if produced water is migrating into the San Andres formation and impacting Empire's operations, Empire has not ruled out the possibility that companies other than Goodnight might be responsible. Both of these contentions seek to challenge causation under the guise of standing: one attempts to negate the nexus between Goodnight's injection and over-injection and Empire's harm, and the other attempts to present alternative theories for how that harm might have occurred. Thus, the MTD is a standing challenge in name only. It actually seeks to circumvent the evidentiary hearing phase of this proceeding and obtain an immediate, premature ruling on disputed fact questions. Moreover, Goodnight's causation argument is unfounded because it incorrectly assumes Empire must prove Goodnight's injection is the only cause of harm, and it ignores Empire's extensive evidence that supports Empire's requests. That other operators may inject into approximately seven (7) SWDs in and around the EMSU does nothing to refute Empire's standing. Goodnight's existing and proposed injection of massive volumes of water into sixteen (16) wells within and surrounding the EMSU is causing harm.

Third, the MTD engages in confused and impermissible burden-shifting. It is well established that Goodnight, as the moving party seeking pre-hearing dismissal, bears the burden of showing why it is entitled to the relief it seeks in its motion; *i.e.*, of showing why Empire lacks standing. To meet this burden, Goodnight must either affirmatively disprove Empire's standing (*i.e.*, with evidence), or demonstrate that Empire's applications fail to allege facts that, even if true, give rise to a cognizable claim of standing. Goodnight does neither. Instead, Goodnight simply bemoans the fact that Empire has not presented what it deems to be sufficient evidence at the pleading stage, drawing an "imaginary line" between injection wells inside and outside of the

EMSU, beyond which it claims no produced water can migrate. This is insufficient to meet *Goodnight's* burden of showing why its motion should be granted.

For these reasons, and those set forth below, the MTD should be denied.

ARGUMENT

I. The Commission should reject Goodnight's attempt to impose heightened, inapplicable pleading requirements.

Goodnight's Motion misconstrues well-established standing requirements, particularly at the pleading stage. For example, Goodnight claims that Empire fails to "allege concrete, particularized facts showing that it has suffered injury, or will suffer imminent injury, from Goodnight's injection of produced water . . ."[3] and that "Empire has failed to allege facts showing that the produced water from Goodnight's six wells outside the EMSU is materially contributing to the produced water within the San Andres formation."[4] Goodnight's characterization of these pleading standards is inaccurate. Neither New Mexico law nor the United States Supreme Court decisions Goodnight cites support its exacting view of standing.

As is relevant here, Commission Rule 19.15.4.8(A) requires "standing" to bring an application for an adjudicatory proceeding before the Commission. *See* 19.15.4.8 NMAC ("…[A]n operator or producer or other person *with standing* may file an application with the division for an adjudicatory hearing.") (emphasis added). Although the Rule does not define "standing," the Commission has previously embraced the standing analysis applicable in civil court cases. *See, e.g.,* Commission Order No. R-10987-A(2), ¶¶ 13. Thus, to plead standing in an application for an adjudication, applicants need only allege facts that, if true, give rise to an inference that: "(1) they are directly injured as a result of the action they seek to challenge; (2) there is a causal

[3] Motion at 2.

[4] Motion at 8.

relationship between the injury and the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 188 P.3d 1222 (reciting traditional three-part test for standing).

Contrary to Goodnight's claims, Empire need not allege concrete, particularized facts showing that it has suffered injury, will suffer imminent injury, or that Goodnight is materially contributing to the produced water within the San Andres formation. None of the cases Goodnight cites support this draconian position. In *Simon v. East Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Supreme Court held that charitable organizations lacked standing to sue the Secretary of the Treasury and Commissioner of Internal Revenue for issuing a revenue ruling that "encouraged" hospitals to deny services to low-income individuals. The Court found that it was entirely speculative whether the revenue ruling actually encouraged hospitals to deny care and whether withdrawing the ruling would have any impact. The case has no bearing here, where it is undisputed that Goodnight is injecting millions of barrels of produced water into the San Andres formation via wells adjacent to the EMSU. In fact, the case only demonstrates that Empire's allegations establish standing. *Cf. Duke Power Co. v. Carolina Env't Study Group*, 438 U.S. 59 (1978) (plaintiffs had standing to challenge a statute that limited the liability of power companies for nuclear accidents based on concerns about nuclear radiation).

Further, the evidentiary showing required to establish each standing element – *i.e.*, injury-in-fact, causation, and redressability – is relaxed at the pleading stage. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992). At the pleading stage, even "*general factual allegations* of injury-in-fact resulting from an adverse party's conduct may suffice to establish standing." *Id.* (on a motion to dismiss, courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim") (emphasis added); *see also In re*

LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 459 (S.D.N.Y. 2018) (for standing purposes, "an injury-in-fact need not be capable of sustaining a valid cause of action," and a plaintiff may have standing even if his claim is later debunked for lack of causation).

Additionally, because Goodnight challenges Empire's standing at the pleading stage, New Mexico's liberal, "notice" pleading standard applies. Under that standard, which is even more favorable to Empire, a motion to dismiss hinges on the legal sufficiency of a pleading and not the facts supporting it. *Herrera v. Quality Pontiac,* 2003–NMSC–018, ¶ 2, 134 N.M. 43 (internal quotation marks and citation omitted).[5] That is, courts accept all factual allegations in a pleading as true and resolve all doubts in favor of its sufficiency. *Madrid v. Village of Chama*, 2012-NMCA-071, ¶¶ 17-18, 283 P.3d 871 (noting that "New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of his claims."); *see also* Rule 1-008 NMRA (requiring a short and plain state of the claim entitling the pleading party to relief). Unless the pleading party can neither recover nor obtain relief under any provable state of facts alleged, a motion to dismiss should be denied. *Village of Logan v. Eastern New Mexico Water Utility Authority*, 2015-NMCA 103 ¶ 8, 357 P.3d 433.46; *see also Healthsource, Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-97 ¶ 16, 138 N.M. 70 (holding that a complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought). New Mexico's pleading requirements that govern standing are far more lenient than Goodnight suggests.

[5] The same standard governing motions to dismiss for failure to state a claim applies to a motion to dismiss based on an alleged lack of standing. *Forest Guardians v. Powell,* 2001-NMCA-028, ¶ 5, 130 N.M. 368 (in reviewing a motion to dismiss for lack of standing, the court accepts as true all material allegations of the complaint and construes the complaint in favor of the complaining party); *Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶ 11, 369 P.3d 1046 ("As a general rule, "standing in our courts is not derived from the state constitution, and is not jurisdictional.").

II. Empire has adequately pled standing.

With these principles in mind, there is no question that Empire alleges facts that, if true, establish Empire's standing to bring the applications. As Goodnight concedes, "an *identifiable trifle* is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *See* Motion at 11-12 (Apr. 4, 2024) (citing *Ramirez v. City of Santa Fe*, 1993-NMCA-049, ¶ 9, 852 P.2d 690). First, Empire has plead injury-in-fact. Empire alleges that saltwater injected into Goodnight's SWDs – in some cases in excess of Goodnight's daily injection limit – migrates into the unitized interval within the EMSU, thereby impairing Empire's ability to extract hydrocarbons there. Although some of Empire's allegations are pled based on information and belief, they will be substantiated by evidence presented at hearing.

Accepting Empire's allegations as true, Empire raises more than an "identifiable trifle" giving rise to a potential injury-in-fact. *See, e.g.,* Case No. 24021, Application at ¶¶ 2 and 8 (stating that Goodnight's well will inject into the same depths as the unitized interval and that "disposal in the Well will impair the ability of Empire to recover hydrocarbons within the Unitized Interval and thereby adversely affects the correlative rights of Empire and other interest owners in the Unit and results in waste."); *see also S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013) ("Neither our court nor the Supreme Court has ever required an environmental plaintiff to show it has traversed each bit of land that will be affected by a challenged agency action."). It does not matter for standing purposes if Empire is ultimately proved wrong, because standing can exist even without a viable claim. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 459 (S.D.N.Y. 2018) (for standing purposes, "an injury-in-fact need not be capable of sustaining a valid cause of action").

In arguing that Empire failed to sufficiently allege an injury-in-fact, Goodnight contends that Empire should have included specific "facts and information" explaining how "produced water from [Goodnight's] wells is migrating or will migrate to the EMSU." *See* MTD at 7. But this argument goes to loss causation – *i.e.*, the causal link between Goodnight's injection and over-injection and harm to Empire's operations – not whether Empire has alleged a "concrete and particularized" injury-in-fact for standing purposes. *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1156 (10th Cir. 2013) (reversing district court's finding that plaintiffs had failed to allege injury-in-fact).[6] As already noted, establishing standing at the pleading stage requires only "generalized allegations" showing concrete and particularized injury. *Lujan*, 504 U.S. at 561. It does not require the applicant to detail and provide conclusive evidentiary support explaining every aspect of causation, particularly where doing so would require expert testimony on produced water migration.

Goodnight also relies on the Division's decision in *In re Application of Gandy Corp.*, Case No. 13962 (N.M. Oil Conservation Div. September 24, 2007) ("*Gandy*") to advocate a bright-line rule that if any SWD is located more than a half a mile away from the EMSU, Empire cannot have suffered an injury in fact from Goodnight's injection into that SWD. *See* MTD at 7, citing Division Rule 701(B)(2). *Gandy*, however, did not involve a motion to dismiss for lack of standing at the application stage, but rather after the Division held a full evidentiary hearing. *Gandy,* ¶¶ 4-6. And, the party whom the Division determined lacked standing belatedly sought to intervene in the proceeding, did not timely file an objection to the application, and operated a competing injection well located more than a mile away from the applicant's proposed well that would inject at a

[6] Similarly, Goodnight's last-ditch argument on the "redressability" element of standing is really a loss causation argument; *i.e.*, that because Empire can't prove that Goodnight is responsible for causing the produced water impairing Empire's operations, the impairment is not "redressable" or traceable to a particular actor. *See* MTD at 10.

shallower interval. *Id.* ¶ 12.[7] In fact, Goodnight mistakenly claims that Empire is "a competitor" like the party at issue in Gandy. *See* Motion at 12. Empire is not a competitor – it is the designated operator of the EMSU and owns correlative rights that are being violated. None of the facts at issue in *Gandy* exist here and the case is inapposite. Empire's applications sufficiently allege injury-in-fact, causation, and redressability.

III. The MTD conflates loss causation with standing, then proceeds to misstate causation standards.

As noted above, the MTD is primarily concerned with making a premature, causation argument on the merits. This argument has two parts: first, that Empire failed to demonstrate, at the pleading stage, exactly how produced water from Goodnight's SWDs could impair Empire's operations within the EMSU; and second, that Empire did not rule out the possibility that companies other than Goodnight – namely, Permian Line Service, LLC; Pilot Water Solutions; Rice Operating Company; Parker Energy – might have contributed to the migration into the productive portions of the San Andres. *See* MTD at 8-9. In Goodnight's own words, "[i]n standing parlance, Empire has failed to allege facts showing that the produced water within the San Andres formation of the EMSU is 'fairly traceable' to Goodnight's six SWD wells outside of the EMSU." MTD at 9.

For the reasons set forth above, Empire is not required to plead allegations that marshal evidence definitively resolving the causation issues raised in the MTD. All that is required for an injury to be "fairly traceable" to challenged conduct is a potential "causal relationship" between the two. *Hernandez v. Grisham*, 499 F. Supp. 3d 1013, 1047 (D.N.M. 2020) (Browning, J.). Empire

[7] The Division's half-mile guideline for providing notice of injection applications, even if relevant to standing, would not apply to Goodnight's Yaz SWD (Case No. 24027), which is located less than a half mile from the EMSU.

has alleged that by injecting, and over-injecting, produced water into the SWDs in question, including the Yaz well located approximately 1550 feet from the EMSU, Goodnight has caused produced water to migrate into the productive portions of the San Andres. Although Goodnight argues that Empire miscalculated the distances of the SWDs from the EMSU boundary,[8] the footage differences do not alter the fact that Goodnight's significant injection surrounding the unit is pressuring the reservoir and causing water to migrate into the unitized interval, resulting in waste and violating Empire's correlative rights.

Goodnight's causation arguments are intertwined with the merits of Empire's case, are premature, and should be rejected. *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014) ("We reject the court's rationale because it conflates standing with the merits.") ("For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing.").

Moreover, Goodnight's causation argument is unfounded because New Mexico law does not – as Goodnight seems to claim – require a party to demonstrate that a respondent's conduct is the *only* cause of an alleged injury to establish causation. Rather, an applicant need only establish that a respondent's actions are *a* cause of an alleged injury. *See, e.g., Herrera v. Quality Pontiac,* 2003-NMSC-018, ¶ 34, 134 N.M. 43 ("A proximate cause of an injury need not be the only cause . . . It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.") (internal citation omitted). That other operators are also

[8] *See* Motion at footnotes 2 through 8. As shown on Exhibit 3 to Goodnight's Motion, the EMSU map shows that the boundary includes the S/2 S/2 of Sections 21 and 22, Township 21 South, Range 36 East, but the tract descriptions on the exhibit do not include this acreage. As a result, it appears Goodnight is correct regarding the well location footages. However, many of the differences are minor, and one of the wells, the Nolan Ryan SWD Well No. 1, is closer to the EMSU than Empire had alleged. As discussed herein, Goodnight's injection is substantial, and Empire will present evidence at hearing to establish the injection is resulting in waste and violating correlative rights.

injecting produced water into the San Andres formation – albeit at far lower volumes than Goodnight – does not alleviate the fact that Goodnight's injection is impairing correlative rights and causing waste. As Goodnight has admitted and as discussed above, Goodnight has extensive capacity to inject produced water and is in fact doing so. Goodnight's persistent focus on injection by others and arguments regarding well location footages only constitute an attempt to evade the critical issue in these cases – whether Goodnight's injection of millions of barrels of produced water into the San Andres formation in close proximity to the EMSU violates Empire's correlative rights and results in waste.

Goodnight also ignores that prior to the transfer of these matters to the Commission, Empire filed several hundred pages of geology and engineering testimony and exhibits that explain how Goodnight's injection is impairing Empire's correlative rights. *See* Empire's Hearing Exhibits in Case Nos. 23614-23617 (filed October 27, 2023). Although Empire is not required to prove causation to establish standing as Goodnight claims, Empire's initial exhibits establish causation and it will provide further evidence on that issue at hearing.

IV. Goodnight's argument that Empire lacks standing to challenge permitted wells that have not yet been drilled controverts New Mexico law and ignores Goodnight's own claims.

Goodnight argues that because it has not begun drilling the Rocket 1 or Verlander wells, any injury-in-fact is "too speculative" to pass standing muster. MTD at 8. If true, Goodnight's argument would preclude parties from opposing permit applications because no injury has occurred. That is clearly not the case, as the Oil and Gas Act and Division rules allow parties to challenge permit applications. Indeed, that is the entire focus of the Commission's Adjudication Rule, set out in 19.15.4.1 through 19.15.4.26 NMAC.

Goodnight's claim that any harm resulting from these permitted wells would be speculative also ignores Goodnight's admission that it has constructed and operates extensive SWD infrastructure in this area. *See* Goodnight's Response to Empire's Motion to Dismiss Case Nos. 24277 and 24278 at 2-3 (filed April 4, 2024) (stating that Goodnight owns and operates 116 miles of pipeline with a projected capacity of approximately 400,000 barrels of water per day with 11 approved SWDs in this area). The notion that Empire (and presumably any other party) cannot challenge permitted wells directly controverts established New Mexico law and policy.

Further, this timing-based argument raises an issue of ripeness more than standing.[9] Whereas standing relates to whether a person is the proper party to bring suit, ripeness is intended to prevent courts from engaging in "premature adjudication" or "entangling themselves in abstract disagreements" before they have materialized. *See City of Sunland Park, Santa Teresa Services Co., Inc. v. Macias*, 2003-NMCA-098, ¶ 23, 134 N.M. 216 (reversing trial court decision dismissing, on ripeness grounds, petition for declaratory and injunctive relief).

Here, Goodnight has obtained injection permits for Rocket 1 and Verlander and can begin injecting into those wells at any time. The mere fact that Goodnight has so far opted not to do so does not render the harm alleged Empire's applications "abstract" or "hypothetical." In fact, the mere preparation to construct or operate a challenged facility may satisfy the ripeness test. *See, e.g., E. Navajo Dine Against Uranium Mining v. Martin*, No. 32,447, 2013 WL 597042 (N.M. Ct. App. Jan. 14, 2013) (unpublished) (in challenge to groundwater injection system, "triggering events" would make the challenge ripe for review included construction of system or ordering

[9] Although standing and ripeness often overlap, the two doctrines are distinct in that "[w]hen determining standing, a court asks whether [the challenged] persons are the proper *parties* to bring the suit, thus focusing on the qualitative sufficiency of the injury and whether the complainant has personally suffered the harm. When determining ripeness, a court asks whether this is the correct *time* for the complainant to bring the action." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1157 (10th Cir. 2013), citing Erwin Chemerinsky, *Federal Jurisdiction* § 2.4.1 (1989).

materials for the construction of the system). For these reasons, Empire has alleged an injury-in-fact sufficient to establish standing at the pleading stage.

V. The MTD should be denied because it impermissibly seeks to shift to Empire the burden of persuasion on Goodnight's MTD.

Goodnight repeatedly suggests in the MTD that it is Empire's burden, on Goodnight's motion, to show that Empire has standing. MTD at 6; *id.*at 7 ("Empire has not carried its burden to allege facts showing that Goodnight's injection activities have caused or will imminently cause Empire to suffer injury."); *id.* ([T]his bare-bones allegation does not satisfy Empire's burden under the rules to *show* that it has standing. Instead, to satisfy its burden, Empire must allege the facts and 'information' it is relying on…"). This argument conflates Empire's general burden of persuasion to establish the elements of its case – including standing – with Goodnight's burden, as the moving party, to demonstrate its entitlement to the relief sought in its motion.

No doubt, Empire, as the applicant, bears the burden of establishing standing to bring its applications. *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-45, ¶ 1. As discussed above, Empire has met that burden at this stage. Nevertheless, on a motion to dismiss for lack of standing, the moving party has the burden of establishing the relief sought in the motion. *See* 35B C.J.S. Federal Civil Procedure § 849 (on a motion to dismiss for failure to state a claim the moving party bears the burden of showing that no claim has been stated); *see also Golden Jubilee Realty, LLC v. Castro*, 196 A.D.3d 680, 682 (2021) ("On a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing.").

In this case, Goodnight has not met its burden, as the moving party, to demonstrate Empire's lack of standing. Goodnight does not provide any affirmative evidence rebutting Empire's standing, or showing how produced water injected into the six SWDs at issue could under

"no set of facts" migrate into the EMSU, or impact Empire's operations within the EMSU. *See Village of Logan*, 2015-NMCA-103, at ¶ 8 (unless the pleading party can neither recover nor obtain relief under any provable state of facts alleged, a motion to dismiss should be denied). Goodnight simply complains that Empire has not yet provided technical evidence explaining how this migration could occur. This is not enough to demonstrate a lack of standing.

Nor has Goodnight demonstrated that Empire's applications do not adequately *allege* standing, as the standard for pleading standing is relaxed at this early stage. Accordingly, Goodnight has not met its burden, as the moving party, to demonstrate its entitlement to the extraordinary relief sought in the MTD.

CONCLUSION

For the foregoing reasons, Goodnight's MTD should be denied and these matters should proceed to an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to the following counsel of record by electronic mail this 6th day of June, 2024:

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