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 JOINT RESPONSE IN OPPOSITION TO MOTIONS TO LIMIT SCOPE OF EVIDENTIARY HEARING

Empire New Mexico, LLC, ("Empire"), by and through its undersigned counsel of record, hereby submits this joint response in opposition to the following motions: (1) Goodnight Midstream Permian, LLC's ("Goodnight") Motion to Limit the Scope of the Commission Hearing to Cases Within the Eunice Monument South Unit (the "Goodnight Scope Motion"); and (2) the New Mexico Oil Conservation Division's (the "Division") Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024 (the "Division Scope Motion," and together with the Goodnight Scope Motion, the "Scope Motions"). For the reasons that follow, both Scope Motions should be denied, and Case Nos. 23614-23617, 24018-24027, and 23775 should proceed to hearing.[1]

INTRODUCTION

In its Scope Motion, Goodnight seeks to both expand the scope of this proceeding, and artificially reduce it. The sweeping relief sought in the Scope Motions includes:

- Consolidating this proceeding with at least three additional cases pending before the Division that involve wells inside the EMSU, each of which involves third-party operators who have not asked for consolidation or sought to intervene in this proceeding; [2]
- Severing and staying the six (6) cases in this proceeding that seek to revoke Goodnight's injection authority at saltwater disposal wells

[1] Empire has filed a motion to dismiss Goodnight's Case Nos. 24277 and 24278, which seek to contract the depth of the Eunice Monument South Unit ("EMSU") and amend the applicable pool.

[2] Case Nos. 24432, 24434, and 24436.

("SWDs") located *outside* of the Eunice Monument South Unit ("EMSU"), which cases are also the subject of Goodnight's motion to dismiss;[3] and

- Consolidating an additional five (5) cases pending before the Division that involve SWDs located outside of the EMSU and third-party operators who have not requested consolidation or intervention.[4]

To justify this unorthodox relief, Goodnight draws an artificial distinction between cases challenging an operator's injection authority at SWDs located inside the EMSU, and those challenging injection authority outside the EMSU. This contrived grievance fails to support the relief sought in the Scope Motions, which should be denied.

First, despite Goodnight's best efforts to inject myriad factual issues into this case, Goodnight concedes that "at bottom, the factual issues to be decided [at a hearing] are relatively narrow in scope." *See* Goodnight Scope Motion at 13; *see also id.* at 1 (arguing that "the core issues" in this proceeding are limited). That is, the salient issues requiring an evidentiary hearing are straightforward. They include: (1) whether a residual oil zone ("ROZ") exists in the San Andres formation; and (2) whether injection of produced water into that formation "will cause waste, impair correlative rights, or otherwise interfere with the operations in the EMSU." *See id.* At hearing, Empire will present evidence that Goodnight's injection inside and outside the EMSU is increasing pressure in the reservoir and causing water to migrate into the Grayburg formation. These dispositive issues are the same across all of the consolidated matters that involve Goodnight. They do not depend on the location of SWDs relative to the EMSU. Thus, it would not promote

[3] Cases 24021-24027.

[4] Cases 24433, 24435, 24437, 24438, and 24439.

administrative economy to sever some of the matters based on the superficial and ancillary factual distinctions set forth in the Scope Motions.

Second, Goodnight admits that *resolving* these two foundational issues "is likely to substantially resolve the disputed issues in all the cases…". *Id.* at 13. For instance, if it turns out there is *not* a viable ROZ within the San Andres – notwithstanding the overwhelming evidence to the contrary – then resolving this question would impact all of the cases. On the other hand, the existence of an economic ROZ would have the same impact in all cases and uniformly frame the remaining issues moving forward. The same is true of the second issue – whether the injection of produced water is resulting in waste or impairing Empire's correlative rights. Notably, litigating these two principal issues will involve the same or similar evidence in every case. Goodnight's parade of horribles on secondary fact questions is overstated and can be hashed out at the hearing.

True enough, there are some differences between SWDs located within the EMSU and those located outside of the EMSU. But these differences do not justify the relief and delay sought in the Scope Motions. For one thing, the Scope Motions ask the Commission to consolidate into this proceeding Empire's applications pending before the *Division* to revoke the injection authority of third-parties OWL SWD Operating, LLC ("OWL"), Rice Operating Company ("Rice"), and Permian Line Service ("Permian"), all of whom operate wells inside the EMSU. Aside from the fact that these applications are not before the Commission, OWL, Rice, and Permian themselves have not sought to intervene in this proceeding. All three companies are represented by experienced counsel and are more than capable of asserting their rights to intervene, if warranted. It is unclear why Goodnight believes it has the prerogative to forcibly join the OWL, Rice, and Permian matters to this hearing. In addition, that other operators may inject into approximately seven (7) SWDs in and near the EMSU does nothing to ameliorate Goodnight's existing and

proposed injection of millions of barrels of water per day into sixteen (16) wells within and surrounding the unit.

Further, the outcome of this case will not unfairly impair or determine any of OWL, Rice, and Permian's substantive rights. These operators are not indispensable parties, and principles of offensive collateral estoppel do not mandate that the Commission consolidate the OWL, Rice, and Permian matters for hearing. If OWL, Rice, and Permian are not parties to this matter, then they cannot be collaterally estopped by any final decision in it. It does not matter that OWL, Rice, and Permian could be contributing to the produced water migrating into the EMSU. This proceeding concerns *Goodnight's* operations, which dwarf those of OWL, Rice, and Permian, and the resulting wastewater migration. Goodnight admits it has capacity to inject approximately 400,000 barrels of water *per day* into the San Andres formation.[5] If Goodnight is contributing to any of the wastewater migration into Empire's unitized interval, then it is violating Empire's correlative rights. There is nothing unfair about Empire separately pursuing its allegations against Goodnight, as Goodnight is injecting far more water than any other operator in this area. OWL, Rice, and Permian do not need to be joined, or their matters consolidated.

Finally, it is of no moment that the SWDs in the EMSU are subject to the Statutory Unitization Act or a special pool, while SWDs outside the unit are not. As set forth above, the primary issue here is whether Goodnight's injection into its SWDs is impacting Empire's correlative rights. On this issue, there is no imaginary line between EMSU and non-EMSU SWDs – including one (Yaz) that is less than a half-mile away – beyond which wastewater cannot migrate. Thus, the distinction that Goodnight draws between the "legal framework" governing SWDs within and outside the EMSU is one without a difference. It certainly does not justify further

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

delaying adjudication of these matters, as the hearing date has already been delayed for nearly a year, during which Goodnight has continued to inject massive volumes of water into the San Andres formation within and surrounding the EMSU. For these reasons, and those set forth below, the Scope Motions should be denied.

ARGUMENT

1. The core factual issues in all the matters currently pending before the Commission are straightforward, substantially overlap, and are capable of case-wide resolution.

Preliminarily, it's not clear what procedural standards govern the Scope Motions, and Goodnight has not cited any. The Division cites Rule 1-042 of the New Mexico Rule of Civil Procedure, governing consolidation of cases in state district court,[6] as well as the hearing officer's inherent powers under Rule 19.15.4.19 NMAC. But the Scope Motions ask the Commission to *sever* the majority of the cases pending before the Commission, not consolidate them. Further, as to the fifteen (15) cases that the Scope Motions seek to consolidate – *i.e.*, the so-called EMSU cases – three of them involve operators who are not even parties to this proceeding (Division Case Nos. 24432, 24434, and 24436). These third-parties have not requested consolidation or sought to intervene in the proceeding. Empire also has not asked to consolidate any of the third-party proceedings, despite Goodnight repeatedly referencing them as a basis for the Scope Motions.

The Scope Motions' muddled procedural underpinnings derail their substance. In arguing that a consolidated hearing involving all of the EMSU and non-EMSU cases would be "unwieldy," Goodnight lumps every single EMSU-related matter currently pending before the Commission or Division together. As already noted, Empire has not asked to consolidate any of these third-party cases. In these cases, Empire is focused on Goodnight's conduct because it is undisputedly

[6] It is unclear whether this rule applies to Commission proceedings.

injecting far more produced water into the San Andres than any other operator, or even all of the other operators combined. The Commission need not consider these third-party cases for the purposes of determining whether to hear the existing cases in this matter together.

Additionally, as discussed above, the core issues in this proceeding are consistent across all of the cases that involve Goodnight. The Scope Motions identify few, if any, legitimate factual differences between the EMSU and non-EMSU cases that *do not also exist between the EMSU cases that Goodnight seeks to hear together*. For instance, it is not clear how fact questions related to the migration of wastewater – the principal, claimed basis for the Scope Motions – would meaningfully differ as to SWDs inside the EMSU, and SWDs situated outside the EMSU. Goodnight claims that the distances from the EMSU and other, unspecified "geologic and engineering factors" will "influence injection radius and areas of influence." Goodnight Scope Motion at 7. But it is unclear how these "geologic and engineering factors" cease to exist when analyzing migration from SWDs inside the EMSU. Goodnight's conclusory statement that the "facts and evidence" will substantially differ as between EMSU and non-EMSU SWDs does little to support the relief sought in the Scope Motions.

Goodnight then devotes an entire section of its Scope Motion to explaining why resolving the salient issues in the EMSU cases – *i.e.*, whether an economically viable ROZ remains in the San Andres, and whether wastewater from SWDs is impairing Empire's correlative rights – would also resolve those issues in the non-EMSU cases. It is not clear, then, why these same issues are not capable of case-wide resolution. As noted above, determining whether an economically viable ROZ exists in the San Andres does not depend on whether the SWD in question is located inside or outside of the EMSU. Similarly, the Commission can determine whether wastewater from Goodnight's SWDs is impairing Empire's correlative rights without determining the origin of *all*

of the wastewater. Because the core factual issues in all the matters currently pending before the Commission are straightforward, substantially overlap, and are capable of case-wide resolution, the Scope Motions should be denied.

Goodnight contends that there would be "no benefit" to hearing the EMSU and non-EMSU cases against Goodnight together. But the benefits are obvious: limiting the evidentiary hearing to cases involving Goodnight is simpler and more efficient than bringing in additional cases involving OWL, Rice, and Permian. Further, hearing the Goodnight cases together conserves resources and avoids further delay. For these reasons, granting the Scope Motions would not streamline these proceedings or lead to any increased administrative efficiencies. The Scope Motions should be denied.

2. Nothing obligates Empire to join every single SWD operator to a proceeding against an individual SWD operator.

Goodnight's suggestion that Empire must join every SWD operator in or around the EMSU in this proceeding is likewise fundamentally flawed. There is nothing unfair about Empire separately pursuing its allegations against Goodnight, as Goodnight is injecting far more water than any other operator in this area. And New Mexico law does not 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 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.

Under New Mexico law, there is no requirement for Empire to include all SWD operators in its litigation against a single operator. The three-part test for determining the necessity of joining a party, as outlined in *Little v. Gill*, 2003-NMCA-103, ¶ 4, supports this position. The test considers: (1) whether the party is necessary to the litigation; (2) whether the necessary party can be joined; and (3) whether the litigation can proceed without the necessary party if they cannot be joined. In *La Madera Community Ditch Association v. Sandia Peak Ski Co.*, the plaintiff, La Madera, sought an injunction against Sandia Peak for trespassing on its water rights. 1995-NMCA-025, ¶ 4, 119 N.M. 591. The New Mexico Court of Appeals specifically rejected the contention that all claimants of the water needed to be joined. *Id.* ¶ 6.

Here, forcing OWL, Rice, and Permian to participate in this proceeding would not protect them in any future litigation or safeguard their rights. They are not necessary parties within the meaning of Rule 1-019(B) to the extent that provision could apply.[7] Nor would the doctrine of collateral estoppel, which prevents the relitigation of issues already decided, apply to future litigation with OWL, Rice, or Permian. As established in *The Bank of New York v. Romero*, 2016-NMCA-091, ¶ 23, and *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, ¶ 9, for collateral estoppel to apply, the issue must have been necessarily determined in prior litigation involving the same parties. This is not the case here, as Rice, OWL, and Permian, if not joined to this proceeding, would not be bound by it in any future or collateral proceeding.

[7] The factors a court should consider are the extent a judgment rendered in the person's absence might be prejudicial to him or current parties, the extent to which prejudice can be lessened or avoided by shaping the relief or other measures, whether a judgment rendered in the person's absence would be adequate, and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. NMRA, Rule 1-019(B); *Kaywal, Inc. v. Avangrid Renewables, LLC*, 2021-NMCA-037, ¶ 50.

In addition, certain of Empire's counsel, Hinkle Shanor, has a conflict with respect to Empire's applications that involve Rice and is not participating in those matters. Consolidating all of the matters for hearing would require Hinkle Shanor LLP to withdraw as counsel and thereby deprive Empire of its chosen counsel. For that reason, as well as the reasons discussed above, consolidation of the matters that involve Rice and OWL is inappropriate.

3. Any differences in the legal framework governing EMSU- and Non-EMSU SWDs do not impact the key factual issues for hearing.

Goodnight then engages in some meandering discursions on purported differences in the legal framework governing EMSU and non-EMSU SWDs. These arguments are unavailing and do not justify the drastic relief sought in the Scope Motions. For instance, Goodnight points to minor differences in the vertical limits governing EMSU SWDs, and to vague, unspecified impacts of the Statutory Unitization Act. These differences, however, do not affect the core factual issues, which are consistent across all cases: whether there is an economically viable residual oil zone (ROZ) within the San Andres formation and whether Goodnight's injection is impairing Empire's correlative rights.

Goodnight then attempts to relitigate the Commission's inclusion of the San Andres in the EMSU in Commission Order No. R-7765, and its creation of a special pool for the EMSU in Commission Order No. R-7767. Goodnight Scope Motion at 11. These issues go to the merits of Cases 24277 and 24278, which Empire seeks to dismiss due to Goodnight's lack of standing. They are not relevant to Goodnight's contention that differing legal frameworks govern EMSU and non-EMSU cases.

4. Goodnight fails to articulate any legal basis for a stay of the non-ESMU cases.

Finally, a stay of the non-EMSU cases would substantially prejudice Empire. 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 ROZ 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 be 1.08 billion barrels inside the EMSU and another .28 billion barrels outside the unit.[8] Given the 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. Accordingly, granting a stay would substantially harm Empire and the public interest by delaying the resolution of critical issues.

CONCLUSION

For the foregoing reasons, Empire respectfully requests that the Commission deny the Scope Motions.

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

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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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