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

REPLY IN SUPPORT OF MOTION TO DISMISS EMPIRE CASE NOS. 24021-24024, 24026, 24027

Empire repeatedly argues that Goodnight wants the Commission to impose a heightened pleading standard on Empire's applications. That is inaccurate. The parties, in fact, appear to agree that, at the application stage, Empire needed only to allege generalized facts showing standing—i.e., (1) that produced water from Goodnight's six wells outside the EMSU is migrating or will migrate to the EMSU and is impairing or will Empire's recovery operations (injury-in-fact); (2) that the produced water within the EMSU is fairly traceable to these six wells (causation); and (3) that revoking the permits for these wells will redress Empire's purported injury (redressability). In its response, Empire essentially concedes that its applications contain no factual allegations establishing any of these elements. The best it can do is point to a conclusory single sentence in its applications—based on "information and belief"—without any supporting factual allegations. That one-liner simply doesn't cut it.

Seeming to acknowledge as much, Empire urges the Commission to rifle through engineering and geological facts and evidence it has submitted in other proceedings, hoping the Commission will find there the facts and evidence it is missing here. Happily, the Commission need not and should not undertake that exercise. All those facts and evidence were available to Empire before it filed its applications, so it has no excuse for failing to include at least some generalized form of them in its applications. And in any event, because Goodnight's motion is a facial attack on Empire's standing allegations, neither Empire nor the Commission is free to venture outside the four concerns of Empire's applications. Confined to the allegations in its applications, Empire cannot escape the conclusion that it has failed to allege even generalized facts showing that it has standing to challenge Goodnight's six SWD wells outside the EMSU. The Commission should thus dismiss these applications.

1. Goodnight is not insisting on a heightened pleading standard; it is insisting on Empire's applications containing at least some generalized facts suggesting that produced water from Goodnight's six wells outside the EMSU is migrating or will migrate to the EMSU—something Empire's applications do not do.

Empire argues that Goodnight seeks to test Empire's applications against "non-existent heightened pleading standards." Resp. at 3; *id.* at 5–7.[1] No, it doesn't. Goodnight does not insist on Empire's alleging every "detail" or "conclusive evidentiary support" for the notion that produced water from Goodnight's six wells outside the EMSU is migrating or will migrate to the EMSU. *Id.* at 9. In fact, Empire and Goodnight appear to agree on the standard. At the application stage, even "*general factual allegations* of injury-in-fact resulting from an adverse party's conduct may suffice to establish standing." *Id.* at 6 (emphasis in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Because of that standard, Empire argues that it "need not demonstrate in its *applications* the exact mechanics of how" produced water is migrating. Resp. at 3 (emphasis in original). Goodnight agrees there, too.

The problem is that, contrary to Empire's assertions, *id.* at 8–9, Empire's applications do not contain even "general factual allegations" showing that produced water from Goodnight's six SWD wells outside the EMSU is migrating or will migrate over to the EMSU. Instead, as Empire concedes, its applications contain a single conclusory one-liner—hedged based on "information and belief"—that produced water injected into Goodnight's SWDs is migrating and will migrate into the Unitized Interval within the EMSU, thereby impairing Empire's ability to extract

[1] Empire also makes a convoluted burden-shifting argument, contending that Goodnight has failed to carry its burden to show that Empire failed to carry its burden to allege facts establishing standing. Resp. at 4, 14–15. Yet Empire recognizes that Goodnight should prevail if it shows that "Empire's applications fail to allege facts that, even if true, give rise to a cognizable claim of standing." *Id.* at 4. As Goodnight has explained, in its motion and this reply, that is precisely what Empire's applications fail to do.

hydrocarbons. Mot. at 4–6; Resp. at 8. Empire promises that the "evidence presented at hearing" will ultimately reveal what lies behind this mysterious "information and belief" allegation. Resp. at 8. But just as conclusory allegations do "not unlock the doors of discovery," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), they also do not unlock the doors to an evidentiary hearing. Empire's burden at the application stage was nothing more than to allege some—*any, even generalized*—facts showing that Empire has some factual basis, not simply a subjective hunch based on "information and belief," that water injected into Goodnight's SWD wells outside the EMSU is migrating or will migrate into the EMSU. That much Empire failed to do.

Recognizing that even these generalized facts are nowhere to be found in its applications, Empire tries to fill in the deficiency by arguing that, in other proceedings, it has produced "engineering and geological evidence." Resp. at 2. This effort to salvage Empire's applications by venturing outside the four corners of the applications fails for two reasons.

First, Empire submitted this engineering and geological evidence *before* it filed its applications to revoke Goodnight's injection authority. Because these facts and evidence were available to Empire before it filed its applications, its failure to include at least some generalized engineering and geological facts in its applications is inexcusable.

Second, Goodnight has mounted a facial attack on the applications' standing allegations. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995); Mot. at 7 (explaining that "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.* at 8 ("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 of the Unitized Interval that is allegedly interfering with Empire's recovery operations."). When evaluating a facial attack, only the

allegations in the complaint are considered. *Holt*, 46 F.3d at 1002. Empire cannot shore up its standing deficiencies by pointing to facts from another proceeding that are not included in its applications.

2. Under *Gandy*, Empire lacks standing to challenge Goodnight's SWD wells that are more than a half-mile from the EMSU.

Goodnight has explained that for the five wells that are more than a half-mile from the EMSU (Case Nos. 24021, 24022, 24023, 24024, and 24026), the Division's *Gandy* decision supplies another independent reason to dismiss these applications. Mot. at 7–8. In *Gandy*, the Division held that a party lacks standing when, as here, the party's property is more than a half-mile from the SWD well. Mot. Ex. 2, ¶ 12(b). Trying to get out from under that decision, Empire highlights that this rule emerged after an evidentiary hearing,[2] not at the motion-to-dismiss stage. Resp. at 9. But rules are rules. The procedural stage at which the *Gandy* rule emerged is immaterial. Empire also emphasizes factual distinctions between *Gandy* and this case. But these are distinctions without a difference. The one key similarity is that, just as the applicant's proposed SWD well in *Gandy* was more than a half-mile from the competitor's well, these five Goodnight wells are more than a half-mile from Empire's EMSU. In *Gandy*, that half-mile distance was determinative on standing. The same should be said here.

[2] To be clear, the Division in *Gandy* held an evidentiary hearing to determine the competitor's standing; it did not allow the competitor to participate in the evidentiary hearing on the merits of the applicant's application for a SWD well. Ex. 1, Case No. 13962, Hrg. Tr. 23:5-9 (requiring DKD to show standing at a preliminary evidentiary hearing); Tr. 36:4-23; 38:15-21 (finding DKD has failed to meet the requirements to show standing and denying intervention before a hearing on the merits).

3. Empire has failed to allege facts establishing a "high likelihood" that Empire will suffer imminent injury from two SWD wells that Goodnight has not even drilled yet.

Empire's applications in Case Nos. 24021 and 24023 suffer from still another deficiency: Goodnight has not yet drilled the challenged Rocket 1 or the Verlander wells, and "Empire has not alleged facts shedding any light on if or when" produced water from these future wells will migrate to the EMSU and impair Empire's recovery operations. Mot. at 8. In response, Empire again resorts to mischaracterization. Resp. at 12.

Empire characterizes Goodnight's position as being that an applicant can never establish standing to challenge a permit for a SWD well that has not yet been drilled. *Id.* at 12. That is not Goodnight's position. Of course, an applicant can bring that challenge—*provided that* the applicant's application establishes standing to do so by alleging facts showing a high likelihood that the applicant will suffer imminent future injury from the challenged SWD well. 19.15.4.8(A) NMAC; *ACLU of N.M. v. City of Albuquerque*, 2008-NM-45, ¶ 24, 188 P.3d 1222.

Yet as Empire acknowledges, its applications contain no facts on that score. The applications allege no facts about *when* Goodnight will begin drilling and injecting produced water into these wells. They allege no facts about *how much* produced water Goodnight will inject. They allege no facts about *how* produced water will somehow travel 6,019 feet (Rocket) and 2,671 feet (Verlander) to the EMSU. And they allege no facts about *why* produced water from these wells will impair Empire's recovery operations. Without those factual allegations, the Commission simply has no facts to work with to conclude that Empire has a "high likelihood" of suffering imminent future injury from the Rocket and Verlander wells.

Trying to bridge that gap, Empire falls back on a now-familiar maneuver: it departs from the four corners of its applications and points to facts and evidence from separate proceedings. Resp. at 13. But as explained above, that maneuver doesn't work, both because the facts Empire wishes

to rely on were available to it when it filed its applications, and because the Commission must confine itself to the allegations in Empire's applications. *See Holt*, 46 F.3d at 1002.

4. Empire has failed to allege facts establishing the causation and redressability elements of standing.

Empire's applications not only fail to allege facts showing injury-in-fact but also contain no allegations establishing that the produced water within the EMSU is fairly traceable to Goodnight's six SWD wells outside the EMSU (causation) and that compelling Goodnight to stop injecting produced water into these wells will remove the alleged impairment on Empire's recovery operations (redressability). Mot. at 8–10.

On causation, Empire's initial response is that Goodnight cannot "challenge causation under the guise of standing." Resp. at 4; *id.* at 3 (arguing that Goodnight has conflated "standing and causation"). That argument is wrong because causation is one of the three elements necessary to establish standing. *ACLU of N.M.*, 2008-NM-45, ¶ 1.[3]

Empire's next causation argument is a refrain on its heightened-pleading-standard argument. Empire says that at the application stage, it need not "marshal evidence definitively resolving" the question whether produced water is migrating or will migrate from Goodnight's six wells outside the EMSU to the EMSU. Resp. at 10. That is true. But again, that is not Goodnight's position. Empire needed only to allege some generalized facts suggesting that this migration is happening

[3] Contrary to Empire's argument, Goodnight does not argue that Empire must prove at the application stage that the produced water from Goodnight's six wells outside the EMSU is the *sole* source of produced water within the EMSU interfering with Empire's recovery operations. *See* Resp. at 11–12. Rather, Goodnight's position is simply that Empire must allege facts in its applications showing that produced water within the EMSU is fairly traceable to those six wells—i.e., that these wells "are *a* cause of" Empire's alleged injury. Resp. at 11 (emphasis in original). Empire's applications do not contain those factual allegations.

and will happen. But Empire did not do that. Instead, it supplied a single conclusory one-liner based on "information and belief" without alleging any factual basis for that belief.

Yet again, Empire tries to fill the void with facts that are nowhere in its applications. It says, for example, that Goodnight's six wells amount to "significant injection surrounding the unit" that is "pressuring the reservoir and causing water to migrate into the unitized interval." Resp. at 11; *accord id.* at 12 (asserting that—in a different proceeding—Empire "filed several hundred pages of geology and engineering testimony and exhibits that explain how Goodnight's injection is impairing Empire's correlative rights"). It also says 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." *Id.* at 2 (emphases added). Here, too, Empire's attempts to resuscitate its deficient applications fail because these facts were available to Empire before it submitted its applications, and because the Commission cannot consider facts and evidence outside the four corners of Empire's applications. *See Holt*, 46 F.3d at 1002.

On redressability, Empire offers no response to Goodnight's point that Empire's applications include no factual allegations about how revoking Goodnight's injection authority for these six wells would stop produced water from accumulating within the San Andres formation of the EMSU and alleviate the impairment on Empire's future recovery operations. This shortcoming alone dooms Empire's applications on standing.

What Empire does say in its response only makes matters worse for it. Once again venturing beyond the four corners of its applications, Empire alleges 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." Resp. at 2 (emphasis omitted). In other words, Empire contends that Goodnight's SWD wells within the EMSU will inject about *four times* more produced water into the EMSU

than Goodnight's wells outside the EMSU. Given that allegation, it is exceedingly hard to see how Empire can establish a "substantial likelihood" that revoking the permits for these six wells would solve the problem of produced water accumulating within the San Andres formation of the EMSU. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45–46 (1976). Put another way, even if the Commission were to revoke the permits for Goodnight's six SWD wells outside the EMSU, Empire has not alleged facts showing that this would redress its injury, because there would still be produced water coming from SWD wells within the EMSU—including Empire's own SWD well—and potentially produced water coming from other SWD wells near the EMSU operated by other companies. Mot. at 9–10.

CONCLUSION

For all the reasons set out in Goodnight's motion and this reply, the Commission should dismiss Case Nos. 24021–24024 and 24026–24027.

Respectfully submitted,

HOLLAND & HART LLP

By: _____

Michael H. Feldewert
Adam G. Rankin
Paula M. Vance
Post Office Box 2208
Santa Fe, NM 87504
Phone: (505) 998-4421
Fax: (505) 983-6043
mfeldewert@hollandhart.com
agrankin@hollandhart.com
pmvance@hollandhart.com

Attorneys for Goodnight Midstream Permian

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2024, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

Ernest L. Padilla
Padilla Law Firm, P.A.
Post Office Box 2523
Santa Fe, New Mexico 87504
(505) 988-7577
padillalawnm@outlook.com

Dana S. Hardy
Jaclyn M. McLean
HINKLE SHANOR LLP
P.O. Box 2068
Santa Fe, NM 87504-2068
(505) 982-4554
dhardy@hinklelawfirm.com
jmclean@hinklelawfirm.com

Sharon T. Shaheen
Daniel B. Goldberg
Montgomery & Andrews, P.A.
Post Office Box 2307
Santa Fe, NM 87504-2307
(505) 986-2678
sshaheen@montand.com
dgoldberg@montand.com
cc: *wmcginnis@montand.com*

Attorneys for Empire New Mexico, LLC

Jesse Tremaine
Chris Moander
Assistant General Counsels
New Mexico Energy, Minerals, and
Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
(505) 741-1231
(505) 231-9312
jessek.tremaine@emnrd.nm.gov
chris.moander@emnrd.nm.gov

Attorneys for New Mexico Oil Conservation Division

Adam G. Rankin

EXHIBIT 1

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	
APPLICATION OF GANDY CORPORATION FOR AUTHORIZATION TO INJECT	CASE NO. 13,962

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: WILLIAM V. JONES, Jr., Hearing Examiner

July 26th, 2007

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, WILLIAM V. JONES, Jr., Hearing Examiner, on Thursday, July 26th, 2007, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

MR. DOMENICI: Then he filed late.

MR. BRUCE: And that's because I didn't even speak with my client until -- other than on the phone, until this morning.

MR. DOMENICI: And it just highlights the prejudice. Mr. Watson needed to get an attorney, get involved, give us notice so we're not prejudiced. Otherwise, we don't think you should exercise your discretion. And that's our request.

EXAMINER JONES: Okay. You guys both have really good points.

Off the record.

(Off the record)

EXAMINER JONES: Okay, let's go back on the record here, and -- Okay, what we've -- we're going to do here is, we're going to allow DKD to intervene as an intervenor, and -- but if they fail to show standing during the course of this hearing, then they're -- basically they're --

MR. THOMAS: What you presented as evidence will just be considered as if you allowed just to submit that as a statement without it being evidence in the first place.

MR. DOMENICI: Well, we would propose to have them show standing now. I mean, let's put on a short hearing and let them show standing.

MR. THOMAS: We talked about that, but I think it's kind of part of the case.

MR. DOMENICI: Well, it's not really, because what you're going to have is cross-examination of all the witnesses, based on party status --

MR. THOMAS: Right.

MR. DOMENICI: -- that then becomes part of the record, and I think you should establish standing first. I think that's a central question. That's a preliminary issue, that they have standing.

MR. BRUCE: Well, I disagree. It depends on what they're going to do with their subject well and how it might harm DKD.

EXAMINER JONES: So you're not going to know your argument for standing until you hear the other case?

MR. BRUCE: That's the way I see it.

MR. DOMENICI: I think that's totally improper. You get to sit through a case, cross-examine everyone, and then decide standing after the case has been shaped by that participation.

Standing is a preliminary legal question which they should be -- particularly when they come in this late, I think they should have to show it. I mean, it would be different if we were on notice and we were able to -- and we knew what their issues were, and -- But I think to be

fair to us, standing should be determined right now. Let's have them show standing.

EXAMINER JONES: Okay, are you --

MR. THOMAS: That's fine.

EXAMINER JONES: Let's go ahead and do that, then. Let's have you guys make a case for standing, and then you can argue against it. As far as how your wells would be affected by their wells, that kind of thing. So basically they put on their case first.

(Off the record)

MR. BRUCE: Suppose he needs to be sworn in.

EXAMINER JONES: Okay, could all the witnesses please stand to be sworn, if -- at least for the standing part of it?

(Thereupon, the witnesses were sworn.)

DANNY R. WATSON,

the witness herein, after having been first duly sworn upon his oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRUCE:

Q. Would you please state your name for the record?

A. My name is Danny R. Watson.

Q. Where do you reside?

A. I live in Tatum, New Mexico.

Q. What is your relationship to DKD, LLC?

MR. THOMAS: We'll take a little break.

(Off the record at 1:40 p.m.)

(The following proceedings had at 1:57 p.m.)

EXAMINER JONES: We've got Ted Apodaca here. Mike had to take off to another meeting. And I think we can go back on the record.

Ted didn't get a chance to hear the standing argument that DKD made, but we've talked about it.

And what we've decided to do, because we're aware that there is some rotten casing and some problems with the casing down at 6000 feet in this Julia Culp well that will have to be repaired and cased off, scab liner or something, before any injection. And there will have to be an injection packer set below that, with monitoring the back side and everything.

And because your well is only 6000 feet, their injection well is 13,000 feet, and your well is a mile and -- about a mile and a half away, we don't feel that it would -- enabling you to make a statement at the end, we feel like that is the way to go in this case.

So we're going to deny the standing, and you can listen to the case that's presented. If you don't -- whatever is presented.

You can make a statement at the end, and -- or through your attorney if you want to, and then you can be

re-examined by the Applicant for the statement that you make at the end.

And have I said that right?

(Off the record)

EXAMINER JONES: But you can't cross-examine any witnesses. That's the difference.

So that's the way we want to go here on this one.

MR. BRUCE: But I can't cross-examine any witnesses?

MR. APODACA: Correct.

EXAMINER JONES: Correct.

MR. BRUCE: Any of their witnesses, or could I question Mr. Carlisle about his statement?

EXAMINER JONES: Mr. Carlisle has entered -- Mr. Carlisle has showed up with a -- representing some people from Arizona and himself, and two parties from Arkansas.

(Off the record)

MR. BRUCE: Now, what was --

EXAMINER JONES: Yeah, that's -- See, Mr. Carlisle will not be a witness for Mr. Lakins and Mr. Domenici.

(Off the record)

EXAMINER JONES: Okay, your witnesses, no cross-examining of even Mr. Carlisle. So...

MR. BRUCE: Well, are you denying intervention or

merely denying cross-examination?

(Off the record)

EXAMINER JONES: Intervening is the third step on the list, and it has to be by somebody that has standing.

(Off the record)

MR. BRUCE: And I would merely state, Mr. Examiner, standing isn't the only reason to allow intervention under the Division Rules.

EXAMINER JONES: But it's the last of the three on the list, and the first two were -- basically you had to enter the entry of appearance and the prehearing statement on the Thursday before the hearing was going to be held. And the last one on the list is --

(Off the record)

EXAMINER JONES: Yeah, we just -- Based on what was presented and the distance away and the depth difference, Mr. Watson is free to bring a compliance case against Gandy if they don't comply with the requirements in any resulting order in this case.

But based on the arguments you made, we don't believe that there is standing.

So let's go ahead and get started.

MR. DOMENICI: We're ready to proceed. Mr. Lakins is going to call our first witness.

MR. LAKINS: Call Dale Gandy.