

**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 INTERVAL 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

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

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**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’S OBJECTIONS TO AND MOTION TO QUASH
GOODNIGHT’S SUBPOENA DUCES TECUM**

Empire New Mexico, LLC (“Empire”) submits the following Objections to and Motion to Quash Goodnight Midstream Permian, LLC’s (“Goodnight”) Subpoena seeking to depose a

corporate witness of Empire under Rule 1-030(B)(6) NMRA. For the reasons discussed below, the Oil Conservation Commission (“Commission”) should issue an order quashing the subpoena.¹

I. INTRODUCTION

These applications arise from Goodnight’s current and proposed injection of produced water into the San Andres formation within and surrounding the 14,189.84-acre Eunice Monument South Unit (“EMSU”) operated by Empire, and Goodnight’s effort to unilaterally amend the unitized interval that was approved by the Division, Commission, New Mexico State Land Office, and Bureau of Land Management. The EMSU has existed since 1984, when it was approved by the Commission via Order Nos. R-7765, R-7766, and R-7767. Empire also operates the Arrowhead Grayburg Unit (“AGU”), which is located approximately 1 mile to the southeast of the EMSU, under Order No. R-9482. Chevron and XTO operated the units before Empire’s acquisition in 2021.

Goodnight’s Motion to Issue a Deposition Subpoena and Showing Good Cause to Depose Empire New Mexico, LLC (“Goodnight’s Motion”) seeks to depose a corporate representative of Empire regarding Empire’s business plan for tertiary recovery within the EMSU. In addition to the fact that the Commission’s regulations do not adopt Rule 1-030(B)(6) NMRA or contemplate corporate representative depositions, Goodnight misstates the scope of the Commission’s inquiry in these matters and falsely claims that Empire has failed to provide a plan for tertiary recovery development within the EMSU. The crux of Goodnight’s Motion is that Empire cannot prevail at the hearing in September unless it presents a business plan to economically recover hydrocarbons in the San Andres formation within the EMSU. *See* Goodnight’s Motion at 5. But no such plan is required for the Commission to determine that Goodnight’s injection operation results in waste of

¹ For the reasons discussed herein, Empire is filing a Notice of Non-Appearance contemporaneously with this motion.

hydrocarbons and impairs correlative rights under the Oil and Gas Act, and Empire has produced numerous documents regarding tertiary recovery within the EMSU in any event. Further, this issue will be the subject of expert testimony at the hearing. It seems Goodnight is actually seeking to dispute the sufficiency of Empire's *business* plan – an issue that is not within the Commission's jurisdiction – and that no plan will satisfy Goodnight's endless demands. Goodnight even goes so far as to complain that Empire has “suddenly” produced a document that resembles a “plan” but still does not meet Goodnight's standard of what a “plan” should encompass. *See* Goodnight's Motion at 2. Goodnight claims that the lack of a formal, written “plan” constitutes extraordinary circumstances that justify a deposition of a corporate representative before the September hearing. *Id.*

Goodnight's Motion primarily lodges unfounded accusations that Empire must be concealing its plans to develop the San Andres Residual Oil Zone (“ROZ”), which will lead to Goodnight being “prejudicially surprised” at the September hearing. Goodnight must cease its harassing and baseless accusations regarding Empire. For example, Goodnight claims that Empire's counsel failed to respond to e-mails about the “plan” Goodnight believes should exist, *see* Goodnight's Motion at 8, when Empire's counsel had numerous telephone conversations with Goodnight's counsel about the document requests during that time period, and Empire supplemented its discovery responses on February 1, 2024, in response to Goodnight's January 30, 2024 e-mail. *See* Empire's Second Supplemental Subpoena Response, attached to Goodnight's Motion as Exh. 4.

Further, Empire has produced numerous documents regarding development plans within the EMSU, including the 2024 Plan of Development it submitted to the Bureau of Land Management on February 27, 2024, which Goodnight's Motion falsely claims was not produced.

Empire has produced approximately 3,230 pages of documents in response to Goodnight's multiple subpoenas and has also responded to a subpoena issued by Goodnight in the unrelated case of *DASCO Cattle Company, LLC v. Goodnight Midstream Permian, LLC* (Case No. D-506-CV-2023-00122). It appears that Goodnight's main reasons for continuing to file motions accusing Empire of bad faith is to prejudice Empire before the Commission and to harass Empire with needless discovery. It is not fair to Empire or the Commission, and wastes resources, for Goodnight to engage in these tactics.

Finally, Goodnight has obtained a subpoena seeking a deposition of a corporate representative to testify on topics that have already been identified as the areas of testimony for several of Empire's witnesses. *See* Subpoena, attached as Exh. A; Empire's Witness Disclosure (filed July 8, 2024). The Division should not allow Goodnight to utilize a Commission subpoena for this purpose. The subpoena should be quashed.

I. ARGUMENT

Goodnight's subpoena should be quashed because it does not comply with the Commission's Rules and there is no extraordinary circumstance that necessitates the deposition of a corporate representative.

Moving to quash a subpoena is among the "appropriate avenues for redress" when a subpoena constitutes an abuse of process. *See Poorbaugh v. Mullen*, 1982-NMCA-141, ¶ 18, 99 N.M. 11. A subpoena that is unreasonable or oppressive should be quashed. *See Blake v. Blake*, 1985-NMCA-009, ¶ 21, 102 N.M. 354. Under the New Mexico Rules of Civil Procedure, a party is only entitled to seek information that is not privileged and is reasonably calculated to lead to the discovery of admissible evidence in the pending action. Rule 1-026(B)(1) NMRA. Goodnight's subpoena should be quashed because it fails to comply with the Division Rules, and with the New

Mexico Rules of Civil Procedure's requirements, is unreasonable, oppressive, and amounts to an abuse of process.

A. The Commission's Rules do not allow depositions of corporate representatives.

The Oil and Gas Act delegates to the Division authority to prevent waste and protect correlative rights. NMSA 1978, §§ 70-2-6; 70-2-11. While this grant of authority is broad, it is limited in scope. Discovery is an exception in Commission and Division proceedings rather than the rule. Unlike in district court, "[t]he commission and director or the director's authorized representative shall issue subpoenas for witness depositions in advance of [a] hearing *only in extraordinary circumstances for good cause shown.*" 19.15.4.16(A) NMAC (emphasis added). 19.15.4.16(A) NMAC contemplates depositions of fact or expert witnesses only and does not make any mention of or allow corporate representative depositions.

Corporate representative depositions are governed by Rule 1-030(B)(6) of the New Mexico Rules of Civil Procedure, which has not been incorporated into the Commission's rules. This omission is logical given the extremely limited scope of depositions in Commission proceedings. Corporate representatives differ from fact witnesses or expert witnesses in that a fact or expert witness provides testimony based on personal knowledge, observations, and opinions, while a corporate representative acts as a spokesperson for the corporate entity. *See* Rule 1-030(B)(6) NMRA; *Valerio v. San Mateo Enterprises, Inc.*, 2017-NMCA-059, 400 P.3d 275. The Commission's rules provide that subpoenas can be issued for *witness* depositions, but no party has identified a corporate representative as a witness. Goodnight's subpoena for a corporate representative deposition is outside the scope of 19.15.4.16(A) NMAC and should be quashed.

B. Goodnight fails to demonstrate any “extraordinary circumstances” or “good cause” that necessitate the deposition of an Empire corporate representative.

In addition to Rule 19.15.4.16(A) NMAC’s omission of corporate representative depositions, the Rule provides that subpoenas for witness depositions may only be issued “*in extraordinary circumstances for good cause shown.*” 19.15.4.16(A) NMAC (emphasis added). The term “extraordinary circumstances for good cause shown” generally requires a showing that the circumstances are beyond the normal scope of discovery and that not making an exception could result in unfairness or prejudice. *See Pincheira v. Allstate Insurance Co.* 2007-NMCA-094, ¶ 46, 164 P.3d 982 (“good cause is established by showing . . . a ‘clearly defined and serious injury’”).

Here, there is no need to go beyond the scope of the discovery contemplated in the Commission’s rules. Goodnight argues that Empire’s failure to provide a detailed, written “economic plan to recover hydrocarbons from the San Andres formation” is an “extraordinary circumstance” necessitating the issuance of a subpoena for the deposition of a corporate representative. *See* Goodnight’s Motion at 9-10. Goodnight’s argument hinges on allegations of impropriety on the part of Empire and claims that Goodnight must take a corporate representative deposition because “Empire has not produced [a] complete plan” about the economic viability of hydrocarbon recovery from the San Andres formation. Goodnight goes on to argue that the “complete plan” “is centrally necessary information for Goodnight to test Empire’s allegations that the San Andres has an economically recoverable ROZ, and Goodnight has no other source for Empire’s plan than from the documents or testimony of Empire.” Goodnight’s Motion at 13. Goodnight’s arguments have no merit and should be rejected.

First, Goodnight argues that exceptional circumstances for a deposition exist based on the false premise that Empire cannot prevail at hearing unless it presents a written business plan to

economically develop the San Andres ROZ. Goodnight's Motion at 6, 9-12. Neither the Oil and Gas Act nor the Commission's regulations support Goodnight's claim. Rather, the Oil and Gas Act delegates to the Commission broad authority to prevent waste and protect correlative rights. *See* NMSA 1978, § 70-2-11(A). The Commission is not charged with evaluating companies' business plans to determine whether they are economic and does not have experts available to do so. The Commission's role is to determine whether Goodnight's injection is causing waste and impairing correlative rights – not whether Empire has an economically viable business plan. *See id.* Further, Empire's duly disclosed expert witnesses will present extensive testimony and exhibits to establish that a producible ROZ exists within the San Andres. *See* Empire's Expert Disclosure (July 8, 2024). Empire is not required to possess or prepare a business plan for development of the San Andres ROZ to prevail at hearing.

Second, contrary to Goodnight's claims, Empire has, in fact, produced numerous documents regarding the ROZ and tertiary recovery plans within the EMSU. *See* Empire's Second Supplemental Response to Goodnight's Subpoena, attached to Goodnight's Motion as Exhibit 4. Goodnight even claims Empire refused to produce its plans of development for the EMSU that were submitted to the New Mexico State Land Office, when Empire produced its 2023 Summary of Operations and 2024 Plan of Development on April 4, 2024. *See* Goodnight's Motion at 12-13; Empire's Response to Goodnight Midstream Permian LLC's March 5, 2024 Subpoena Duces Tecum, attached as Exh. B.² Goodnight concedes that Empire produced its Eunice Monument and Arrowhead Field CO2 Development Plan, attached to Goodnight's Motion as Exhibit 2, and then proceeds to attack the plan as insufficient. It seems Empire will never produce a "plan" that might satisfy Goodnight. At hearing, the Commission will evaluate witness testimony and exhibits to

² As stated in Empire's Motion to Quash filed on April 5, 2024, Empire agreed to produce development plans in its possession that were submitted to the State Land Office or BLM, and it has done so.

determine whether a San Andres ROZ exists. Goodnight's apparent desire to berate Empire regarding the alleged insufficiencies in a tertiary recovery business plan – which is not required by any statute, regulation, or Commission decision – does not create exceptional circumstances that justify a corporate representative deposition.

Third, Empire can only produce those documents within its possession, custody, or control. There is no requirement for a party to create a document for the purpose of producing it in discovery. Empire continues to supplement its production with documents it finds in its possession, custody and control to fulfill its duty to seasonably supplement discovery responses and production. *See* Rule 1-026(E). It is not required to prepare a business plan to satisfy Goodnight.

Finally, there is no good cause for the deposition of a corporate representative because Goodnight could have sought to depose Empire's witness who was designated to testify at hearing about development plans within the EMSU. *See* Empire New Mexico LLC's Witness Disclosure at 1-2 (July 8, 2024) (identifying Jack Wheeler who will testify about development plans, *inter alia*). Further, Empire has eight other witnesses to testify about the topics specifically identified by the Commission for hearing, that is, "the existence, extent of and possible interference with a residual oil zone [in] the Eunice Monument South Unit . . . by produced water injection activities undertaken by Goodnight." Joint Order on Goodnight's Motion to Limit Scope of Hearing on Cases Within the EMSU and the Oil Conservation [Division] Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024 at 2, ¶ 2. Goodnight could have sought to depose any of the witnesses identified by Empire to offer testimony within the scope of the hearing determined by the Commission, including on the following topics:

- Dr. Robert Lindsay, who will testify about the existence of a ROZ within the San Andres formation underlying the EMSU, the Eunice Monument South Unit Expansion Area B, and the Arrowhead Grayburg Unit;

- Laurence Melzer, who will testify about the history and process of Residual Oil Zone mapping, exploration, and hydrocarbon recovery, including relevant diagnostic tools;
- Frank Marek, who will testify regarding evidence that water is being injected into the San Andres interval and the documented ROZ along with its resulting impairment of Empire's correlative rights to hydrocarbon retrieval;
- Galen Dillewyn, who will testify about analysis of data relating to characterizations for the San Andres and Grayburg formations;
- Joe McShane, who will testify about evidence of a ROZ within the San Andres Reservoir;
- William West, who will testify about historical evidence of communication between the San Andres and Grayburg intervals;
- Dr. James. L. Buchwalter, who will testify about his simulation model detailing projections for the EMSU according to production and injection rates; and
- Dr. Robert Trentham, who will testify about the history of development and successful recovery from Residual Oil Zones as well as the impact of Goodnight's continued injection and resulting impairment to the economics of enhanced oil recovery in the San Andres and Grayburg within the EMSU.

Clearly, based on Empire's detailed Witness List, it does not intend to surprise Goodnight at the hearing. Although Goodnight could have sought subpoenas for the depositions of these witnesses – as Empire has done for Goodnight's witnesses – it instead elected to seek a corporate representative deposition that is not authorized by the Commission's rules for the purpose of exploring a subject outside of the scope of the hearing set by the Commission and for which there is no good cause. If Goodnight wanted to take a Rule 1-030(B)(6) deposition of an Empire corporate representative, it should have done so in the ongoing district court litigation. Instead, Goodnight obtained a stay of discovery in that litigation and now seeks to conduct improper discovery here, presumably to obtain some sort of tactical advantage.

The parties' testimony and exhibits for the hearing are not yet due. However, just like every other hearing, Goodnight will have the ability to review the witness's testimony and develop

rebuttal exhibits. There will be no “surprises” and Goodnight will not be prejudiced if it is not permitted to depose a corporate representative about the “plan” it believes is so important to these proceedings.

III. CONCLUSION

The Commission’s rules do not authorize Rule 1-030(B)(6) depositions of corporate representatives, and Goodnight has failed to demonstrate that extraordinary circumstances for good cause necessitate such a deposition. Accordingly, the subpoena should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel by electronic mail on July 26, 2024:

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