

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

**APPLICATION OF GOODNIGHT
MIDSTREAM PERMIAN LLC FOR APPROVAL
OF A SALTWATER DISPOSAL WELL,
LEA COUNTY, NEW MEXICO.**

COMM. CASE NO. 24123

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

DIV. CASE NOS. 23614-23617

**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.**

DIV. CASE NO. 23775

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

DIV. CASE NOS. 24018-24020, 24025

**EMPIRE NEW MEXICO, LLC'S RESPONSE TO GOODNIGHT MIDSTREAM PERMIAN
LLC'S MOTION TO QUASH, IN PART, EMPIRE'S SUBPOENA DUCES TECUM**

Empire New Mexico, LLC ("Empire") respectfully submits this response to Goodnight Midstream Permian, LLC's ("Goodnight") Motion to Quash, In Part, Empire's Subpoena Duces Tecum Dated June 3, 2024 (the "Motion"). Contrary to Goodnight's argument, Empire's June 3, 2024, documents subpoena (the "June 3rd Subpoena") seeks documents and data that are targeted, narrow in scope, and reasonably calculated to lead to the discovery of admissible evidence. Additionally, as set forth below, Goodnight fails to meet its burden to justify quashing the June 3rd Subpoena, vaguely referencing a different Commission discovery order addressing different, considerably broader document requests. Accordingly, the Motion should be denied, and the Commission should compel Goodnight to fully respond to each outstanding Subpoena request.

INTRODUCTION

The misguided, central premise underlying Goodnight's Motion is that because the Commission previously held – with respect to *Empire's* motion to quash Goodnight's subpoena – that some of *Goodnight's* document requests were overbroad and should be limited to relevant “technical information,” the Commission created an absolute bar to discovering any non-technical information. This argument ignores that *Empire* and *Goodnight* are not similarly situated, misconstrues the Commission's July 2, 2024, Order Partially Granting *Empire's* Motion to Quash (the “*Empire Discovery Order*”), and frustrates *Empire's* attempt to obtain relevant, discoverable materials. Accordingly, the Motion should be denied.

Preliminarily, *Goodnight* fails to identify the rulings in the *Empire Discovery Order* that it claims apply to specific requests in the June 3rd Subpoena. That is, *Goodnight* broadly claims that the June 3rd Subpoena seeks the “same categories of information” and the “same sort of non-technical information” that the Commission previously disallowed, but leaves *Empire* and the Commission to guess at which particular rulings in the *Empire Discovery Order* preclude which particular requests in the June 3rd Subpoena. *Goodnight's* argument is insufficient to meet its burden of showing why the June 3rd Subpoena should be quashed.

Even a cursory glance at the *Empire Discovery Order* shows that the information sought in the *Goodnight* subpoena substantially differs from the materials sought in the June 3rd Subpoena. For instance, a primary basis for quashing the *Goodnight* subpoena was that *Goodnight* improperly sought to obtain irrelevant, non-technical documents and materials related to *Empire's financial reasons* for obtaining working interests within the EMSU; *i.e.*, *Empire's* business reasons for pursuing tertiary recovery within the San Andres formation. *See, e.g.*, *Empire Discovery Order* at 2 (“These requests do not appear reasonably calculated to provide discovery on the technical issues in these cases, but on *Empire's financial considerations* for acquiring its working interest in the EMSU.”) (emphasis added).

None of Empire's document requests seek documents evidencing Goodnight's business reasons for acquiring injection rights within the EMSU.

Rather, the documents and materials that Empire seeks are relevant to whether a residual oil zone ("ROZ") exists within the San Andres formation, and whether Goodnight's injection operations impair Empire's correlative rights within the EMSU. For instance, Empire requests specified surface use agreements that may define the lawful geographic boundaries of Goodnight's injection operations. These agreements are reasonably calculated to lead to the discovery of admissible evidence, and squarely implicate the Commission's authority over oil and gas and produced water disposal operations under the Oil and Gas Act (NMSA 1978, 70-1-1, *et seq.*), the Statutory Unitization Act (NMSA 1978, Sections 70-7-1 through -21), the Produced Water Act (NMSA 1978, Sections 70-13-1 through -5) and its delegated authority over the UIC Program under the Safe Drinking Water Act. They are nothing like the kind of *ex ante* business projections sought in the Goodnight subpoena, on which the Commission disallowed discovery. Nevertheless, Goodnight objects to producing these agreements, purportedly because they do not constitute "technical information" within the meaning of the Empire Discovery Order. *See, e.g.*, Objections and Responses to June 3rd Subpoena at 17 (objecting to document request number 23). This is not reasonable.

Goodnight's remaining arguments are similarly unavailing. While it is true that the Commission limited the scope of the September evidentiary hearing in this matter to applications within the EMSU, *see* Joint Order on Goodnight's Motion to Limit Scope of Hearing, ¶ 3, it is also true that the Commission stayed the remaining, non-EMSU proceedings. In other words, the Commission stayed and did not dismiss the non-EMSU cases. Therefore, discovery relevant to the non-EMSU cases should proceed or, at most, be stayed. The appropriate remedy is not to quash all discovery on the non-EMSU cases as overbroad and unduly burdensome.

Nor does Empire seek to appeal from the Empire Discovery Order, a straw man position that Goodnight attributes to Empire. *See* Motion at 7 (appealing to “fundamental fairness”). For these reasons, and those set forth below, the Motion should be denied, and the Commission should issue an order compelling Goodnight to comply with any remaining, unanswered document requests in the June 3rd Subpoena.

ARGUMENT

A. While discovery is more limited in Commission proceedings, when authorized, it is still subject to New Mexico’s liberal discovery principles.

Commission Rule 19.15.4.16(A) directs the Commission, “upon a party’s request, [to] issue a subpoena for production of books, papers, records, other tangible things or electronic data in advance of the hearing.” 19.15.4.16(A) NMAC (emphasis added); *see also* NMSA 1978, § 70-2-8 (empowering Commission to issue document subpoenas “relative to matters within the jurisdiction of [the] Commission”). Thus, if a Commission-issued subpoena seeks discoverable materials, then the responding party must produce those materials unless they are privileged or not within the party’s possession, custody, or control. Rule 1-026(B)(1) NMRA. Importantly, a document need not be admissible to be “discoverable”. As long as a discovery request “appears *reasonably calculated* to lead to the discovery of admissible evidence,” the responding party must comply with it. *Id.* (emphasis added); *see also Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, ¶ 21, 144 N.M. 601 (“[T]he purpose of our discovery rules is to allow liberal *pretrial* discovery, such that the trial itself is a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”) (internal quotations omitted) (emphasis in original).

Commission Rule 19.15.4.16(A) and Rule 1-045 of the New Mexico Rules of Civil Procedure – permitting motions to quash discovery subpoenas – reflect two narrow exceptions to the obligation to produce responsive materials; namely, that a subpoena may be quashed if it (1) requires privileged or protected materials, like trade secrets, or (2) subjects the responding party to “undue burden.” *See* Rule

1-045(C)(3)(a) NMRA. As set forth below, neither of these narrow exceptions applies to the materials sought in Empire's June 3, 2024, Subpoena.

Further, it is well established that "general objections to a request for production are insufficient and will be overruled." *United States v. High Plains Livestock, LLC*, 2016 WL 10100734, at *1 (D.N.M. July 12, 2016). Thus, to the extent that Goodnight relies on general objections, including objecting to producing any and all "non-technical information" [*see* Motion at 3-6 (asserting "general objections")], these objections should be overruled. For these reasons, and those set forth below, Goodnight's Motion to Quash should be denied.

B. The materials Empire seeks in the subpoena are discoverable and Goodnight has failed to establish privilege or undue burden.

The following document requests in the June 3rd Subpoena seek relevant materials, and Goodnight's objections as to these requests should be overruled.

Document Request No. 2: "All economic projections for the proposed injection operations underlying the Unit and all disposal wells operated by Goodnight."

Goodnight objects to this request on the grounds that, *inter alia*, the request purportedly does not seek "technical" documents related to whether a ROZ exists within the San Andres or whether Goodnight's injection operations are impairing Empire's correlative rights in the EMSU. *See* Motion at 8-9. As noted above, however, the Empire Discovery Order addressed specific document requests in Goodnight's subpoena to Empire. It did not address the materials sought in the June 3rd Subpoena, including in Document Request No. 2. *See Beale v. D.C.*, 545 F. Supp. 2d 8, 16-17 (D.D.C. 2008) (holding that a discovery order did not constitute binding law of the case and that in discovery disputes, "the exact same legal issue is rarely presented twice").¹

¹ Goodnight appeals to notions of "fundamental fairness" to justify this objection [Motion at 2], but it is not clear what legal theory underlies this objection.

Further, Goodnight has repeatedly asserted that its Applications should be granted because it invested “hundreds of millions of dollars” to construct pipelines “in reliance on the long history of the San Andres as a produced water disposal zone.” *See, e.g.*, Goodnight’s Opp. to Mtn. to Dismiss Applications to Amend Order Nos. R-7765 and R-7767, at 13-14. In response to this assertion, Document Request No. 2 seeks documents and materials that could establish a financial motive for Goodnight to continue its injection operations at Empire’s expense, and for disregarding the resulting impacts on Empire’s correlative rights in the EMSU – a central issue in this proceeding. This request does not seek documents related to Goodnight’s business considerations for acquiring injection rights in the EMSU in the first place. *Compare to* Empire Discovery Order at 3-4 (quashing Goodnight’s requests for non-technical information related to “Empire’s financial considerations for acquiring its working interest in the EMSU”).

Document Request Nos. 6 through 8

- Document Request No. 6:** “Summaries, including but not limited to internal and external correspondence and emails, memoranda, assessments, and projections that address, and justification for installation of the Llano Produced Water Pipeline System constructed in Lea County, NM.”
- Document Request No. 7:** “Summaries, including but not limited to internal and external correspondence and emails, memoranda, and assessments, that address justification for the purchase of the following well: Penroc State E Tr 27 SWD #2 (30-025-26491)”
- Document Request No. 8:** “Summaries, including but not limited to internal and external correspondence and emails, memoranda, and assessments, that address, justification for the drilling of the following wells: Andre Dawson SWD #1 (30-025-50634); Ernie Banks SWD #1 (30-025-60633); Nolan Ryan SWD #1 (30-025-45349); Pedro SWD #1 (30-025-50079); Snyder SWD #1 with name change to Ryno SWD #1 (30-025-43901); Scully State SWD #1 (30-025-46398); Sosa SA 17 SWD #2 (30-025-47947); Ted 28 SWD #1 (30-025-44386); Yaz 28 SWD #1 (30-025-46382)”

Goodnight objects to each of these requests on the grounds that they do not seek relevant “technical” documents – purportedly violating the Empire Discovery Order – and on general relevance and vagueness grounds. *See* Motion at 10. Additionally, as to Document Requests No. 7 and 8, Goodnight claims that the wells at issue in those requests lie outside of the EMSU and that the Requests are therefore outside the scope of the evidentiary hearing. As to Document Request No. 8, Goodnight objects on the grounds that some responsive materials may be publicly available on the Division’s website. *Id.* at 11.

As to Goodnight’s “non-technical” information objection, the Empire Discovery Order’s ruling on “non-technical information” does not apply to Document Requests No. 6 through 8 for the same reasons it does not apply to Empire’s other document requests. That is, the materials requested in Requests 6-8 are reasonably calculated to lead to the discovery of admissible evidence by defining the scope, structure, and mechanics of Goodnight’s Llano Produced Water Pipeline System and injection wells and, specifically, whether Goodnight’s operations at these facilities is likely to affect Empire’s correlative rights within the EMSU. Additionally, the materials in Document Requests No. 6 through 8 respond to Empire’s contention that Applications should be granted because it invested “hundreds of millions of dollars” to construct pipelines “in reliance on the long history of the San Andres as a produced water disposal zone.” *See, e.g.*, Goodnight’s Opp. to Mtn. to Dismiss Applications to Amend Order Nos. R-7765 and R-7767, at 13-14.

That the wells at issue in Requests No. 6-8 are located outside of the EMSU and therefore no longer part of the September 2024 evidentiary hearing does not justify quashing the requests. Rather, Goodnight should respond to the requests, as they may yield documents or materials that are relevant to the Commission’s evidentiary hearing on the EMSU wells and Empire’s correlative rights within the EMSU. Alternatively, the requests should be stayed alongside the non-EMSU cases pending resolution of the September 2024 hearing.

As to Goodnight's objection that the materials sought in Request No. 8 may be publicly available, it is well established that "parties cannot avoid their discovery obligations by stating that the discovery sought ... can be obtained from some other source." *S2 Automation LLC v. Micron Tech., Inc.*, 2012 WL 3656454, at *37 (D.N.M. Aug. 9, 2012) (unpublished) (internal citations omitted); *see also Am. Civil Liberties Union of N.M. v. Duran*, 2016-NMCA-063, ¶ 39, 392 P.3d 181 (holding that a governmental agency may not "refuse to produce records because such records are available from another or a more 'appropriate' source"). Thus, if Goodnight has materials that are responsive to Document Request No. 8, Goodnight should not withhold them simply because some of them may be available from some other source. Goodnight's objections to Document Requests No. 6 through 8 should be overruled.

Document Requests Nos. 19 through 21

- Document Request No. 19:** "List of chemicals and monthly chemical bill for Wrigley SWD facility."
- Document Request No. 20:** "Facility drawing with list of equipment at Wrigley SWD facility."
- Document Request No. 21:** "All records of separator or tank cleanouts at Wrigley SWD facility."

Goodnight partially complies with each of these requests, but also partially objects to each of them on the grounds that they do not seek relevant, "technical" documents – thereby purportedly violating the Empire Discovery Order – and on general relevance and vagueness grounds. *See* Motion at 15. As to Goodnight's "non-technical" information objection, the Empire Discovery Order does not apply to Document Requests No. 19 through 21 for the same reasons it does not apply to Empire's other document requests. That is, the materials sought in Requests 19 through 21 are reasonably calculated to lead to the discovery of admissible evidence. Namely, the layout, operations, and safety mechanisms at Goodnight's Wrigley SWD facility directly relate to whether Goodnight's operations at the facility appropriately treat produced water for injection, which impacts water chemistry and Empire's correlative rights within the

EMSU. Moreover, the migration of water injected by Goodnight can be traced through the chemicals present therein. Document Request No. 19 is also relevant to Goodnight's claim that it has invested millions of dollars in its injection operations. Accordingly, the Commission should overrule Goodnight's objection to Document Requests 19 through 21.

Document Request No. 23: All correspondence, emails, contracts, or any other written materials by and between the Millard Deck Estate and its representatives, managers or employees, and Goodnight.

Goodnight objects to this request on relevance grounds, *see* Motion at 17, but this Request seeks relevant materials. Surface use agreements between the Millard Deck Estate and Goodnight that authorize Goodnight to engage in pore space injection are relevant because they may define the geographic boundaries of Goodnight's subsurface injection, and whether Goodnight's operations are violating the terms of the surface use agreement, in addition to Empire's correlative rights. In contrast, Empire's surface use agreements were not relevant because these cases do not involve Empire's injection of wastewater into pore space as authorized by the surface owner. Accordingly, the Commission should overrule Goodnight's objection to Document Request No. 23.

Document Request No. 29: All San Andres formation top picks and or proof of seal from cross-sections or other calculated method.

Goodnight objects to this request as vague, *see* Motion at 18, but the request is clear. The San Andres formation picks are the footages where Goodnight believes the formation exists, and proof of seal is relevant to establishing a geological barrier that would keep the water from migrating outside of the formation. Accordingly, this Request seeks a geological cross section that supports Goodnight's position that no wastewater from Goodnight's operations is affecting Empire's operations within the San Andres. This request is not vague and is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, Goodnight's objection to Document Request No. 29 should be overruled.

CONCLUSION

For the reasons discussed above, Goodnight's motion should be denied, and Goodnight should be compelled to respond to all outstanding document requests under the subpoena to ensure Empire is afforded a full opportunity to present evidence and examine witnesses.

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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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