

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

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

CASE NO. 24123
ORDER NO. R-22869-A

**GOODNIGHT'S RESPONSE IN OPPOSITION TO
EMPIRE'S MOTION TO QUASH GOODNIGHT'S DEPOSITION SUBPOENA**

Goodnight Midstream Permian, LLC ("Goodnight"), by and through undersigned counsel, hereby files this response in opposition to Empire New Mexico, LLC's ("Empire")

Objections to and Motion to Quash Goodnight's Subpoena Duces Tecum, filed on July 26, 2024 (the "Motion" and the "Deposition Subpoena").¹

ARGUMENT

Empire's Motion should be denied because Goodnight has established good cause based on extraordinary circumstances meriting the deposition in its Motion to Issue a Deposition Subpoena and Showing Good Cause to Depose Empire New Mexico, LLC (the "Deposition Motion"), filed on July 16, 2024. To avoid duplication, Goodnight incorporates those arguments and authorities cited in its Deposition Motion. *See* NMRA 1-010(C) (permitting incorporation by reference of other pleadings).

A. Goodnight's Showing of Extraordinary Circumstances Merited Issuance of the Deposition Subpoena.

The crux of the issue is that Empire's position in these disputed cases centrally rests on the claim that *economically* recoverable hydrocarbons (i.e. a residual oil zone) exists in the San Andres Formation within the Eunice Monument South Unit ("EMSU"), that Goodnight's injection activities increase the cost to recover those hydrocarbons, and thus, wastes recoverable hydrocarbons and impairs Empire's correlative rights in the San Andres formation. On this basis, *inter alia*, Empire asks the Commission to deny Goodnight's applications (Case Nos. 23614-23617), to revoke Goodnight's existing permits to operate EMSU SWD wells (Case Nos. 24018-20 and 24025), and to affirm the Order No. R-22689-A in Goodnight's Piazza SWD NO. 1 application (Case No. 24123).

Empire's entire argument about a purported residual oil zone ("ROZ") in the San Andres that requires the Commission to preclude Goodnight's injection activities because they impair Empire's correlative rights is premised upon the idea that Empire has the secret sauce to produce

¹ Empire's motion actually pertains to Goodnight's Subpoena for a *deposition* and production of documents at said deposition, which was issued by the Commission on July 19, 2024.

hydrocarbons from that San Andres ROZ. Empire asserts this point repeatedly. Empire App. in Case No. 24018 (Andre Dawson SWD No. 1) at p. 2, ¶¶ 5 and 6, respectively (“Goodnight misrepresented that the San Andres is a non-productive zone” and “residual oil zones (“ROZ”) are found within the San Andres, and Empire has the right to recover hydrocarbons therein.”); *see also* Empire Apps. in Case Nos. 24019-20 and 24025 (Ernie Banks SWD No. 1, Ryno SWD #001, and Sosa SA 17 SWD Well No. 2, respectively) at pp. 2, ¶¶ 5 and 6, respectively. Goodnight has asked for that plan. Empire has never produced such a plan. Goodnight ought to be permitted to depose Empire’s representative about that plan, or the absence of a plan, if one does not exist.

Empire represented to the Division and this Commission that “residual oil zones (“ROZ”) are found within the San Andres, and Empire has the right to recover hydrocarbons therein.” Empire App. in Case No. 24018 (Andre Dawson SWD No. 1) at p. 2, ¶ 5. Empire also states:

Empire plans to further develop the EMSU through CO2 injection to enhance recovery in the Grayburg & San Andres formation and to recover oil within residual oil zones (“ROZ”) in the San Andres formation. By CO2 flooding this San Andres ROZ interval it is estimated that 270 million barrels or more of this residual oil can be recovered. . . . [and Goodnight’s injection of produced water into the San Andres] increase[es] Empire’s operating cost for reinjection of the produced water. . . .

Empire Pre-Hearing Statement in Case Nos. 23614-17 (filed October 26, 2023) (emphasis added). As noted in Goodnight’s Deposition Motion, Empire has repeatedly referred to a San Andres ROZ plan. *See* Goodnight’s Deposition Mot. at 2-4. If Empire has a plan to develop the San Andres formation at the interval where Goodnight’s injection activities occur, Empire has never shared that plan. How can Empire show that “recoverable hydrocarbons” exist in the San Andres formation, and that Goodnight’s activities increase costs of recovery in that ROZ, if Empire provides no economically practicable plan for recovery (in the absence of Goodnight’s injection activities)? Goodnight impairs no correlative right of Empire’s if hydrocarbons from a San Andres ROZ cannot be “practicably obtained.” *See* NMSA 1978, § 70-2-33 (defining “correlative rights”).

Empire's contention that it need not prove economically recoverable hydrocarbons exist in the San Andres formation (*see* Mot. at 2-3), and that the issues of its "business plan" are outside the scope of the Commission's jurisdiction (*see* Mot. at 7), are poor arguments against Goodnight's showing of extraordinary circumstances. Empire's plan to recover o hydrocarbons from the alleged San Andres ROZ is the *primary dispute* at issue because it weighs on the determination of whether *any* San Andres hydrocarbons are "recoverable" at all. As Empire puts it:

The core disputed facts are: (1) whether *recoverable* hydrocarbons exist in the San Andres and (2) whether the disposal of saltwater as proposed by Goodnight impairs the ability of Empire. . . . *to recover the hydrocarbons* found within the unitized interval of the EMSU.

Empire Pre-Hearing Statement in Case Nos. 23614-17 (filed October 26, 2023) at p. 5.

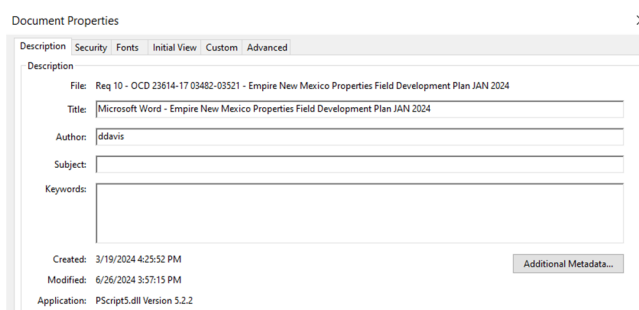
Empire also argues no extraordinary circumstances exist that would justify Goodnight deposing Empire because, in response to Goodnight's repeated requests for Empire's plan of recovery, Empire has provided the plans it has "regarding the ROZ and tertiary recovery plans within the EMSU." Mot. at 7. Even so, Empire admits that it intends to present multiple experts who will testify that Empire plans to recover hydrocarbons in the EMSU and that Goodnight's injection activities impair Empire's right to do so. Mot. at pp. 7-8.

As an objective matter, Empire must show it is *possible*—that at least one plan exists that makes recovery of those San Andres hydrocarbons "practicable." If Empire cannot make this showing, *no recoverable hydrocarbons exist in the San Andres formation for purposes of the Oil and Gas Act*, and thus, Goodnight's injection activities in the San Andres formation *cannot* impair any correlative right of Empire's to recover those hydrocarbons. Unless Empire wishes to concede that no San Andres ROZ hydrocarbons are economically recoverable, and that it has no plan to accomplish a "practicable recovery," then Empire must establish how such recovery is "practicable." Empire fails to address this point, which was squarely raised in Goodnight's Deposition Motion. *See* Mot. at 2-3. It is, thus, an extraordinary circumstance that Empire asserts

the San Andres ROZ *is recoverable* but fails to provide Goodnight the factual basis for that claim—i.e., a plan of recovery—despite Goodnight’s numerous efforts to learn how Empire plans to accomplish that feat.

Empire asserts that it has provided such plans, and points to a few recently produced documents, but no document produced is a complete plan for developing the San Andres ROZ. *See* Mot. at 3-4, 7. A cursory review of Empire’s 2024 Plan of Development submitted to the Bureau of Land Management on February 27, 2024, shows that it does not address any CO₂ flooding plan for the San Andres ROZ interval at all. *See* **Exhibit 1**. Empire’s 3,230 pages of other documents do not address any CO₂ flooding plan for the San Andres ROZ interval. *See* Mot. at 4.² Even the alleged plan that Empire finally produced on June 28, 2028, still does not address a CO₂ flooding plan for the San Andres ROZ interval. *See* Goodnight’s Deposition Motion at Exh. 2 (the “Davis Memo”).

On its face, the Davis Memo is suspect—purportedly dated January 15, 2024, but metadata suggests that it was created March 19, 2024:



Screenshot of metadata from “Document Properties” for the Davis Memo. While there could be alternative explanations, it appears that the Davis Memo was created for the purpose of creating the appearance of a CO₂ flooding plan for the San Andres ROZ interval *after* Goodnight repeatedly

² Though completely irrelevant, here, Empire’s subpoena response in *DASCO Cattle Company, LLC v. Goodnight Midstream Permian, LLC* (Case No. D-506-CV-2023-00122) does not address any CO₂ flooding plan for the San Andres ROZ interval, in large part because that subpoena did not seek such a document, given the issues in that litigation are completely different.

asked for one and Empire could not provide the plan referenced in Empire's Piazza testimony. If it had actually been created in January 2024, it was responsive to prior discovery requests and should have been produced months ago. Even so, the Davis Memo, too, does not address a CO₂ flooding plan for the San Andres ROZ interval. The memo indicates that what Empire calls the San Andres formation is just an interval at the bottom of the Grayburg formation, well above Goodnight's injection interval, separated from it by a perm barrier, and thus, not a CO₂ flooding plan for the San Andres ROZ interval. *See* Depo. Mot. at Exh. 2. In essence, Empire's Davis Memo is only a Grayburg plan, and is incomplete, nonetheless.

An extraordinary circumstance thus remains: Empire asserts the San Andres ROZ is recoverable but fails to provide Goodnight the documentation establishing how Empire intends to recover it, despite Goodnight's numerous efforts to confirm the existence of that plan. If no such written plan exists, as Empire's Motion suggests, Goodnight should be permitted to discover what Empire's plans are through a deposition. *See* Mot. at p. 8 ("Empire can only produce those documents within its possession . . ." and "[Empire] is not required to create a document for the purpose of producing it in discovery"). Empire must be made to explain *how* it plans to recover hydrocarbons from an alleged ROZ in the San Andres as it has represented to Goodnight, the Division, and the Commission that it plans to do.

B. Goodnight Has Good Cause to Depose Empire's Corporate Representative.

Empire suggests that Goodnight failed to demonstrate good cause to depose Empire about its CO₂ flooding plan for the San Andres ROZ for two additional infirm reasons: (1) Goodnight could have sought to depose one of Empire's expert witnesses on their expert testimony; and (2) a corporate representative deposition is not contemplated by Section 19.15.4.16(A) NMAC. Neither reason contravenes Goodnight's showing of good cause in the Deposition Motion.

First, despite Empire's invitation, Goodnight is not interested in deposing Jack Wheeler about what his anticipated testimony will be, which testimony will be filed on August 26, 2024, in

written form. Had Goodnight asked for such a deposition, it could not have demonstrated good cause. *See* Goodnight’s Motion to Quash Empire’s Expert Deposition Subpoenas, filed August 2, 2024 (setting forth argument about lack of good cause to depose witnesses on direct written testimony). The issue in Goodnight’s Deposition Motion is very different: Mr. Wheeler will testify about “[d]evelopment plans by current and former operators within the EMSU” (*see* Empire’s Witness Disclosure, filed July 8, 2024); Goodnight has asked for Empire’s CO₂ flooding plan for the San Andres ROZ, specifically, over and over. Goodnight is entitled to discovery of *that* specific plan. This is factual information underlying testimony—not expert testimony being developed for the hearing. Mr. Wheeler is going to refer to a plan that Empire currently has to develop the EMSU—Goodnight does not want Mr. Wheeler’s testimony based on that plan—it wants Empire’s plan. Goodnight wants, now, to depose *Empire* to discover that plan. Empire’s failure to provide that document or information containing the plan for development, despite its repeated representations such a plan exists, coupled with the indication that Mr. Wheeler’s testimony will be *derived from that plan*, makes a deposition necessary and appropriate.

Empire suggests that Goodnight cannot show “good cause” for the deposition unless it can show “clearly defined and serious injury.” *See* Mot. at 6 (quoting *Pincheira v. Allstate Insurance Co.*, 2007-NMCA-094, ¶ 46, 164 P.3d 982). While the ‘good cause’ standard discussed in *Pincheira* does not directly apply, the “clearly defined and serious injury” is exactly the sort of prejudice Goodnight’s Deposition Motion establishes if Goodnight is not permitted to depose Empire’s corporate representative on the narrow topics related to Empire’s plan to develop the San Andres ROZ.

Goodnight cannot meaningfully evaluate Empire’s purported plan of development without a copy of that plan. Given no written plan has been provided, Goodnight has good cause to depose Empire on the aspects of that plan that may be retained by Empire as outlined above. Because

Goodnight has, and can, specifically articulate the nature of its need to depose Empire about Empire's alleged plan for development of the San Andres ROZ and has explained why it cannot obtain equivalent information by other means, Goodnight has reasonably shown good cause for the deposition. *c.f. Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 54, 175 P.3d 309 (finding burden to produce work product met upon such a showing). The absence of the deposition will result in an unfair surprise to Goodnight at the September hearing and will undercut the Commission's obligation to promote a full and fair opportunity to litigate this issue.

Second, Empire's argument that the Commission lacks authority to require the deposition of a corporate representative because Section 19.15.4.16(A) NMAC includes the word "witness" is specious. A deponent, whether an expert, a lay witness, or a corporate representative, is a "witness" at deposition and may then also be a "witness" at a hearing or trial *See* Rule 1-045 NMRA (using "witness"); *cf.* Rule 1-030(B)(6) ("The persons so designated shall testify as to matters known or reasonably available to the organization"). The idea that a corporate representative cannot be a "witness" is absurd and is contradicted by Empire's own authorities. *See Valerio v. San Mateo Enters.*, 2017-NMCA-059, ¶ 41, 400 P.3d 275 ("an adverse party may use the deposition of a corporate party's Rule 1-030(B)(6) designee for any purpose and 'as though the witness were then present and testifying'").

Alternatively, if Empire is suggesting that Goodnight cannot depose Empire's designated representative because that person was not listed as a witness in Empire's witness list or Goodnight's, such an argument is similarly specious. *See* Mot. at 5. Goodnight's witness list stated that "[d]iscovery is ongoing and Goodnight reserves the right to supplement this expert witness disclosure and the scope of opinions as additional information becomes available. . . . Goodnight reserves the right to identify and call rebuttal experts in response to expert witness testimony that Empire discloses or elicits." Goodnight Witness Disclosure, filed July 8, 2024. Certainly,

Goodnight is entitled to depose a potential rebuttal witness within the meaning of Section 19.15.4.16(A) NMAC. Empire's argument, in this respect, is standing on its own failure to fully respond to valid discovery requests. Empire failed to provide a plan. Empire now argues Goodnight cannot ask Empire to provide a corporate representative to speak for Empire about its plan because Goodnight and Empire did not identify that person on witness disclosures. Empire seeks to benefit from its own failure to participate in discovery under Section 19.15.4.16(A) NMAC.

Empire cites to no authority for the legal proposition that Section 19.15.4.16(A) NMAC excludes the deposition of a corporate representative--it is an argument that advocates form over function and should be ignored. *Tafoya v. Morrison*, 2017-NMCA-025, ¶ 46, 389 P.3d 1098, 1110 ("We will not consider propositions that are unsupported by citation to authority."). In this case a corporate representative deposition witness is appropriate and necessary—there is no legal reason the Commission cannot order such a deposition to protect a full and fair opportunity to litigate.

C. **Empire Fails to Make Any Independent Argument Under Rule 1-046 NMRA That Merits Quashing the Deposition Subpoena.**

Empire's Motion seeks to quash Goodnight's Deposition Subpoena solely by addressing the issues of whether Goodnight's Deposition Motion established the requisite "extraordinary circumstances" and "good cause." NMAC 19.15.4.16.A. Empire does not address any basis to quash under Rule 1-045 NMRA, and thus, the Commission should ignore any further argument on that basis if raised in a reply filed by Empire. Cf. *Socorro Elec. Coop., Inc. v. N.M. Pub. Regul. Comm'n*, No. S-1-SC-37948, 2024 N.M. LEXIS 131, at *43 (N.M. June 10, 2024) ("It is well established that we will not address issues raised for the first time in the reply brief.").

CONCLUSION

For this reason, Goodnight respectfully requests that the Commission deny Empire's Motion, and require Empire to provide a corporate representative as a deposition witness pursuant to NMAC 19.15.4.16.A.

DATED: August 8, 2024

Respectfully submitted,

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