

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

**APPLICATION OF GOODNIGHT MIDSTREAM
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TO INCREASE THE APPROVED INJECTION RATE
IN ITS ANDRE DAWSON SWD #1,
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CASE NO. 23775

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

CASE NOS. 24018-24027

**EMPIRE NEW MEXICO LLC'S RESPONSE IN OPPOSITION TO GOODNIGHT'S
MOTION TO QUASH EMPIRE'S
EXPERT DEPOSITION SUBPOENAS**

Empire New Mexico, LLC ("Empire") submits the following response to Goodnight Midstream Permian, LLC's ("Goodnight") Motion to Quash Empire's July 19, 2024, Expert Deposition Subpoenas (the "Deposition Subpoenas"). As discussed below, Goodnight has failed to meet its burden of proving that the Deposition Subpoenas are "unreasonable or oppressive" and should be quashed. Accordingly, the New Mexico Oil Conservation Commission ("Commission") should deny Goodnight's motion (the "Motion").

INTRODUCTION

Goodnight's Motion represents the latest in Goodnight's series of attempts to avoid providing Empire with timely and complete expert discovery, in accordance with the Commission's clear directives, on issues including: (1) whether an economically viable residual oil zone ("ROZ") exists in the portion of the San Andres formation that lies within the Eunice Monument South Unit ("EMSU"); 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.

More than two months ago, on June 3, 2024, the Commission issued Goodnight a subpoena *duces tecum* directing Goodnight to produce many of the same materials to which Goodnight now, again, objects to producing. These materials included, *inter alia*:

- the identity of each expert Goodnight may call to testify at the hearing, and the subject matter of each expert's expected testimony;
- the substance of the facts and opinions on which each expert is expected to testify, and the grounds for each opinion;

- any reports prepared by the expert related to these consolidated proceedings; and
- a list of all publications published by the expert in the last ten (10) years and of any other cases in which the expert has testified.

See June 3, 2024, Subpoena (the “Documents Subpoena”), ¶ 31. As noted in prior filings, Goodnight has moved to quash the Documents Subpoena and objected to nearly every request in it. See Goodnight’s Motion to Quash, In Part, Empire’s Subpoena Duces Tecum Dated June 3, 2024 (July 8, 2024); Goodnight’s Objections and Responses to Empire’s Subpoena Duces Tecum Dated June 3, 2024 (July 8, 2024), at 19 (refusing to provide the substance of Goodnight’s expert opinions).

In early July, rather than simply complying with the Documents Subpoena, Goodnight produced a threadbare “Witness Disclosure” containing the names of Goodnight’s experts and a short, bulleted list describing the general subject matter of each expert’s expected testimony. See Goodnight’s Witness Disclosure (July 8, 2024). For example, the disclosure states that one witness will testify regarding an “Overview of Goodnight’s administrative applications” and “Well corrosion issues in the EMSU.” See July 8, 2024, Witness Disclosure.¹ Goodnight’s “Witness Disclosure” fails to provide any specific positions that Goodnight’s experts might advance at hearing, leaving Empire to guess at what it should include in its pre-filed direct testimony.

Because Goodnight both (1) objected to and moved to quash the key portions of the Documents Subpoena concerning expert discovery, *and* (2) failed to provide meaningful expert

¹ The Pre-Hearing Order directs the parties to identify “their witnesses, each witness’s particular area of expertise... and the subject matter of each witness’s anticipated testimony.” See June 3, 2024, Pre-Hearing Order, ¶ 4 (the “Pre-Hearing Order”). Unlike Goodnight, Empire provided robust expert witness disclosures.

witness disclosures, the Commission issued the Deposition Subpoenas. The Deposition Subpoenas direct Goodnight to produce its experts for deposition, and to provide:

- Any documents [the expert] reviewed or relied upon to develop opinions on the subject matter set forth in the Goodnight Witness Disclosure; and
- Any reports or analyses prepared by [the expert], or at [her] direction, regarding [the expert's] opinions on the subject matter set forth in the Goodnight Witness Disclosure.

Once again, Goodnight objects to providing these materials and moves to quash the Deposition Subpoenas. For the reasons set forth below, Goodnight's motion should be denied.

First, good cause supports subpoenaing Goodnight's experts for deposition. As noted in Empire's motion, the complex and highly technical issues in this case would benefit from early exploration through depositions, which would allow Empire to address Goodnight's specific positions in Empire's direct testimony. *See* July 18, 2024, Motion for Issuance of Witness Deposition Subpoenas and Subpoena of Documents at 5. Goodnight does not seriously dispute that the parties would benefit from early and meaningful expert discovery, "to allow both sides in a case to prepare their cases adequately and to prevent surprise." *Williamson v. First Choice Ins. Co.*, 2022 WL 18777464, at *2 (N.D. Ga. Dec. 12, 2022).²

Second, allowing Empire to depose Goodnight's testifying experts ahead of the formal deadline to submit direct testimony would not unfairly prejudice Goodnight. Empire simply seeks

² Additionally, given the substantial public and private interests at stake in this proceeding, the Commission should allow fulsome and comprehensive discovery, including pre-hearing depositions. Empire's investment in the EMSU is significant, and the public has a legitimate interest in protecting correlative rights. The Oil and Gas Act requires the Commission to conserve oil and gas and prevent the drowning of strata by water. *See* NMSA 1978, Sections 70-2-11 and 70-2-12(B)(4). If Goodnight's injection practices are causing the waste of oil and gas, Empire has the right to explore how and why.

to obtain, through depositions, information that the Commission ordered Goodnight to produce months ago. That is, had Goodnight simply responded to the Documents Subpoena and/or provided complete expert witness disclosures at the outset, Empire would not have had to seek expert depositions. Goodnight cannot object to providing expert discovery, for months, then reasonably argue that expert depositions would be inconvenient or cutting it too close to the hearing.³ Further, Goodnight concedes that its pre-filed expert testimony will overlap, to some degree, with its expert deposition testimony. If this is true, then deposing Goodnight's experts should not create much more work for Goodnight.

Third, expert depositions are not redundant of pre-filed direct testimony. Depositions are generally a more fruitful discovery mechanism than written discovery, because they allow parties to engage with witnesses in real time. *See, e.g., In re Office of the Utah Attorney Gen.*, 56 F.4th 1254, 1263 (10th Cir. 2022) (“Unlike an oral deposition, written questions do not enable a party to ask follow-up or clarification questions if the deponent’s response is evasive or unclear.”). That Goodnight might, a few weeks before the evidentiary hearing, provide pre-filed testimony that overlaps with Goodnight’s deposition testimony does not render depositions redundant. Rather, as noted in Empire’s motion, depositions will allow Empire to avoid any last-minute surprises before the hearing and address Goodnight’s specific, technical positions in Empire’s direct testimony. This likely will also reduce the risk of pre-hearing motions *in limine* regarding the proper scope of expert testimony.

³ Nor can Goodnight use the Motion as an avenue to belatedly raise new objections to the expert materials sought in the Documents Subpoena, which was already the subject of a Motion to Quash and nearly 20-pages of objections. *See, e.g.,* Motion at 8 (arguing that the materials sought in Document Request No. 31 are “unripe” for production or otherwise inappropriate).

For these reasons, and those set forth below, Goodnight has failed to meet its burden of showing why the Deposition Subpoenas should be quashed, and the Motion should be denied.

ARGUMENT

I. Goodnight bears the burden of showing why the Deposition Subpoenas should be quashed.

Preliminarily, Goodnight improperly seeks to shift the burden of proof on the Motion to Empire. *See, e.g.*, Motion at 2 (“*Empire* cannot show an extraordinary circumstance that justifies imposing the burden of making five of Goodnight’s witnesses available for depositions...”)(emphasis added). This is misguided. It is well established that the burden of proving that a subpoena is “unreasonable or oppressive” rests upon party seeking to quash it. *See, e.g., Blake v. Blake*, 1985-NMCA-009, ¶ 21, 102 N.M. 354 (reversing district court order quashing a subpoena); *see also S.E.C. v. Goldstone*, 301 F.R.D. 593, 645 (D.N.M. 2014) (holding that the party seeking a protective order has the burden to show good cause for the order, and must submit a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements). This is consistent with the principle that, as the moving party, Goodnight bears the burden of demonstrating its entitlement to the relief sought in the Motion.

Additionally, Empire’s motion seeking the deposition subpoenas demonstrated that “extraordinary circumstances” exist that justify the depositions. *See* Deposition Subpoenas at 2 (citing 19.15.4.16(A) (authorizing deposition subpoenas in “extraordinary circumstances for good cause shown”); Empire’s Motion for Issuance of Witness Deposition Subpoenas (July 18, 2024), at 4-6 (arguing that extraordinary circumstances warranted the Deposition Subpoenas). Goodnight’s caselaw analyzing “extraordinary circumstances” in the context of deposing non-testifying experts [*see* Motion at 5] does not apply here, as all of Goodnight’s subpoenaed experts

are expected to testify. *Compare* Rule 1-026(6)(b) NMRA *with* Rule 1-026(6)(c) NMRA (distinguishing depositions of testifying and non-testifying experts)

II. Goodnight has failed to show that expert depositions would be unduly burdensome or oppressive.

1. Good cause supports the Deposition Subpoenas.

As noted in *Empire's* motion, good cause exists to depose Goodnight's experts because: (1) the complex technical and geological issues in this case concerning the migration of produced water from different areas within the EMSU would benefit from early examination through pre-hearing depositions; (2) the substantial public and private interests at state that weigh in favor of fulsome and comprehensive discovery; and (3) Goodnight's own failure to provide sufficient information about their expected expert testimony has caused the "prejudice" of which Goodnight now complains. *See* Mtn. for Issuance of Witness Deposition Subpoenas at 4-5.

Goodnight argues that Deposition Subpoenas are oppressive and unduly burdensome because the Pre-Hearing Order requires the parties to file pre-filed expert testimony on August 26, 2024, and Empire has the option of obtaining the documents that Goodnight's experts relied on in preparing their pre-filed testimony. *See* Motion at 3-4 (arguing that the Deposition Subpoenas are "redundant" of the production required in the Pre-Hearing Order). Empire further asserts that Goodnight "agreed to" this discovery procedure, and that therefore the Commission should disallow expert depositions. *Id.* at 5-6. These arguments lack merit.

As noted above, depositions afford parties a greater degree of flexibility in questioning witnesses and clarifying answers than do static, written questions or pre-filed testimony. Thus, it is not reasonable to equate depositions of Goodnight's experts, which allow for dynamic follow-up questions and cross-examination, with pre-filed testimony. Additionally, the Documents Subpoena already directed Goodnight to produce the substance of its experts' conclusions, and

any related reports. Goodnight objected to this. Goodnight cannot meet its burden of demonstrating that the Deposition Subpoenas are “unduly burdensome” or “oppressive” by promising to provide documents that it was ordered to produce months ago.

Nor does Goodnight dispute that the case involves complex geological issues that would benefit from early exploration. Instead, Goodnight argues that Empire will have “ample” time to prepare for the hearing,⁴ and that “the Commission’s normal deadline for witness disclosures and testimony is one week.” *See* Motion at 4. Goodnight fails to address the fact that this is not an “normal” case. Further, Empire has no way of assessing whether two weeks, from the August 26, 2024, direct testimony deadline to the September 9, 2024, rebuttal testimony deadline, would be “ample time.” This seems unlikely, given the volume and complexity of the issues, and Goodnight’s intransigence so far in providing documents supporting its experts’ opinions. Simply stated, Empire should not have to wait until less than three weeks before the hearing to obtain written materials it requested months ago. For these reasons, the Motion should be denied.

2. Expert depositions will not unfairly burden Goodnight.

Finally, Goodnight argues that because Goodnight believes that its Witness Disclosure complied with the Pre-Hearing Order, it should not have to comply with the Commission’s Documents Subpoena or Deposition Subpoenas. *See* Motion at 6-7. This is clearly wrong. Putting aside that Goodnight’s Witness Disclosure provided no insight into any specific opinion Goodnight’s experts might assert at hearing, Goodnight still must comply with Commission-issued subpoenas.

Here, Goodnight could have specifically objected to Request No. 31 of the Documents Subpoena, which sought “the substance of the facts and opinions to which the expert is expected

⁴ The deadline to file pre-filed testimony, August 26, 2024, falls approximately four weeks before the September evidentiary hearing.

to testify and a summary of the grounds for each opinion,” and “any reports prepared by the expert regarding the pending action”. Goodnight did not do so. Now that the time to object has passed, Goodnight belatedly seeks to shoehorn substantive objections to Document Request No. 31 into its motion to quash a *different* subpoena, seeking expert depositions. Specifically, Goodnight argues that the time to produce its expert reports has “not yet ripened” [*see* Motion at 8], and that the request for the “grounds for each” expert opinion sought an “interrogatory answer” outside the scope of discovery. That Goodnight continues to object to producing the same documents and information that Empire would seek to elicit by deposing Goodnight’s experts further underscores the need to depose Goodnight’s experts.

In sum, Empire should not have to wait until rebuttal, just two weeks before the evidentiary hearing, to address Goodnight’s expert’s contentions. To try to analyze and address complex expert opinions developed over the course of a hard fought, years-long litigation in the few weeks immediately before hearing would significantly decrease administrative efficiency and increase the risk of additional motion practice on the eve of trial. Accordingly, the simpler solution is to deny Goodnight’s Motion and allow Empire to proceed with pre-hearing expert depositions. For the foregoing reasons, Empire requests that the Commission deny Goodnight’s Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record by electronic mail on this 15th day of August, 2024.

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