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

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. 24018-24020, 24025**
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. 22869-A**

EMPIRE'S MOTION FOR CLARIFICATION ON SCOPE OF HEARING AND BURDEN OF PROOF

Empire New Mexico, LLC ("Empire") submits the following Motion for Clarification on Scope of Hearing and Burden of Proof. Although the Oil and Gas Act requires the Oil Conservation Commission ("Commission") to prevent waste and protect correlative rights and the Commission has already issued an order on the scope of the hearing, Goodnight Permian Midstream, LLC ("Goodnight") is now arguing that Empire cannot prevail in these cases unless it establishes: (1) that Empire can practicably produce the San Andres residual oil zone ("ROZ"); (2) that the San Andres ROZ is recoverable in paying quantities; and (3) that the production of whatever hydrocarbons may exist in that ROZ yields revenue in excess of operating expenses.[1] In this

[1] Goodnight's Motion to Compel Production of Documents at 5 (August 16, 2024).

regard, Goodnight seeks to circumscribe the Commission's jurisdiction under the Oil and Gas Act and disregards the *Joint Order on Goodnight Midstream Permian L.L.C.'s Motion to Limit Scope of Hearing on Cases within the Eunice Monument South Unit and the Oil Conservation Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024* ("Joint Order"). Goodnight also ignores that it bears the burden of proof on its injection applications and attempts to shift its burden of proof to Empire. As a result, to avoid unnecessary argument at hearing, Empire requests that the Commission issue an order clarifying the scope of the hearing and the burden of proof.

I. INTRODUCTION

These applications arise from Goodnight's current and proposed injection of produced water into the San Andres formation within the 14,189.84-acre Eunice Monument South Unit ("EMSU") operated by Empire. Both the San Andres and Grayburg formations are included within the unitized interval. 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.

The Commission entered its Joint Order on July 7, 2024, and limited the scope of the hearing to "the issue of the existence, extent of and possible interference with a residual oil zone the [EMSU] by produced water injection activities undertaken by Goodnight." *See* Joint Order at 2, ¶ 2. Despite this ruling by the Commission, Goodnight continues to attempt to narrow and misstate the scope of the proceedings with each motion it files. Most recently, Goodnight has claimed that Empire must prove "that the San Andres ROZ are recoverable *in paying quantities*." *See Goodnight's Motion to Compel Production of Documents* (filed 8/16/24) at 6 (emphasis in

original). However, no such showing is required for the Commission to determine that Goodnight's injection operations result in waste of hydrocarbons and impair correlative rights under the Oil and Gas Act. Goodnight also ignores that, with respect to its applications for new injection wells and application for an injection rate increase, it bears the burden of proving that produced water will be contained within the injection zone and that its injection operations will not result in waste or impair correlative rights. Empire will demonstrate at the hearing that there is a ROZ within the EMSU, that Goodnight's produced water injection activities are interfering with the ROZ, and that Goodnight's injection is interfering with production within the EMSU. Empire is not, however, required to prove production in paying quantities from the San Andres to prevail.

II. ARGUMENT

A. Neither the Oil and Gas Act nor any other authority requires Empire to prove production in paying quantities from the San Andres ROZ – the crux of the issue is whether Goodnight's current and proposed injection is resulting in waste or impairing correlative rights.

The Statutory Unitization Act was created by the legislature with the intention of providing for "greater ultimate recovery" from the "unitized management, operation and further development" of oil and gas properties to which the statute is applicable. NMSA 1978, § 70-7-1. Further, the statute was enacted with the goal of "substantially increas[ing] the recovery of oil above the amount that would be recovered by primary recovery alone…." *Id*. Empire's ability to recover from the ROZ within the EMSU is precisely the type of "greater ultimate recovery" contemplated by the statute.

In accordance with the legislature's stated goals, the Commission approved unitization of the EMSU in 1984 through Order Nos. R-7765, R-7766, and R-7767. Prior to issuing a unitization order, the Division must find, among other things, that "the estimated additional costs, if any, of conducting [unitized methods of operation] will not exceed the estimated value of the additional

oil and gas so recovered plus a reasonable profit." NMSA 1978, § 70-7-6(A)(3). Therefore, it has already been determined that unitized operations in the EMSU will lead to the recovery of oil and gas at a profitable level.[2]

However, even this required finding *at the unitization phase* does not require an operator to prove "production in paying quantities." "Production in paying quantities" was recently defined by the Division in its methane gas rule as "the production of a quantity of oil and gas that yields revenue in excess of operating expenses." 19.15.27.7(Q) NMAC. It is well established that whether a well has produced in paying quantities is determined in hindsight, by considering whether the well "pays a profit, even small, over operating expenses…though it may never repay its costs, and the enterprise as a whole may prove unprofitable." *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959); *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 9. This determination cannot be made at this stage of Empire's development of the EMSU. Empire purchased the Unit in 2020 and is planning to implement a tertiary recovery project but has not yet done so. How can Empire show production in paying quantities for a project that has not been implemented? Although Empire certainly expects its tertiary recovery project to be profitable and will provide evidence regarding the producible hydrocarbons and associated economics at hearing, it is not required to prove that a future project will result in production in paying quantities.

Goodnight uses NMSA 1978, Section 70-2-12(B)(4) to manufacture a burden of proof for Empire, claiming that Empire must prove "that the San Andres ROZ are recoverable in paying quantities." *See* Goodnight's Motion to Compel at 5. Goodnight claims that the Commission's jurisdiction is "'to prevent the drowning of water of any stratum or part thereof ***capable of***

[2] The Division recently echoed this finding when it denied Goodnight's Application for the proposed Piazza SWD Well No. 1, by concluding that Empire "provided sufficient evidence for continued assessment of the Unitized Interval for potential recovery of any additional hydrocarbon resources remaining in place." *See* Order No. R-22869-A at 8, ¶ 11.

producing oil or gas or both oil and gas <u>in paying quantities</u>[.]'" *Id*. (emphasis in original). However, Goodnight conveniently presents only a small excerpt of Section 70-2-12(B). The statute actually states that the Division "may make rules and orders for the purposes and with respect to the subject matter stated in this subsection," including:

> (4) to prevent the drowning by water of any stratum or part thereof capable of producing oil or gas or both oil and gas in paying quantities ***and to prevent the premature and irregular encroachment of water or any other kind of water encroachment that reduces or tends to reduce the total ultimate recovery of crude petroleum oil or gas or both oil and gas from any pool***;"
> [… and]
> (7) to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties…."

Section 70-2-12(B)(4), (7). Thus, the provision directly controverts Goodnight's argument. The Commission may preclude injection if water encroachment "tends to reduce the total ultimate recovery" of hydrocarbons – not only if injection reduces production in paying quantities.

Goodnight's misrepresentation of the scope of the Commission's jurisdiction likely results from Goodnight's desire to ignore Empire's actual case, which will show that Goodnight's injection into the San Andres is causing water to migrate into the producing Grayburg formation and pressuring up the formation as well as interfering with the San Andres ROZ. There is no dispute that the Grayburg is a producing formation, or that the Grayburg is part of the EMSU producing interval. Goodnight concedes this is an issue to be decided by the Commission. *See* Goodnight's Motion to Compel at 5. Empire can meet its burden at hearing by showing that Goodnight's injection "tends to reduce the total ultimate recovery of" oil from the Grayburg or the San Andres ROZ. *See* Section 70-2-12(B)(4), (7); NMSA 1978, § 70-2-11(A) ("[T]he division is empowered to make and enforce rules, regulations and orders, *and to do whatever may be reasonably necessary*" "to prevent waste prohibited by this act and to protect correlative rights[.]" (emphasis added)). Goodnight's claim that Empire cannot prevail unless it demonstrates

production in paying quantities from the San Andres ROZ misstates the applicable legal standard and ignores the operative facts.

B. Goodnight has the burden of proof on its applications to demonstrate that injection into its proposed SWDs will not result in waste or impair correlative rights.

Goodnight also incorrectly assigns the entire burden of proof in these proceedings to Empire. Goodnight disregards that it has submitted several applications for the approval of new Saltwater Disposal Wells ("SWD") and an application to increase an injection rate and will have to demonstrate that the proposed injection will not result in waste or impair correlative rights. *See* Section 70-2-11(A); *Int'l Minerals and Chemical Corp. v. N.M. Pub. Serv. Comm'n,* 1970-NMSC-032, ¶ 10, 81 N.M. 280 ("[C]ourts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof."); Order No. R-21420-A at 6 (stating that the applicant has the burden of proof). In its Order denying Goodnight's application for authority to inject produced water into the San Andres formation using the proposed Piazza SWD Well No. 1 as a UIC Class II disposal well, the Division already found that Goodnight was unable to meet this burden. *See* Order No. R-22869-A.

The Division made this finding on the grounds that approving the SWD "would contradict the responsibility of the OCD '*to prevent the drowning by water of any stratum or part thereof capable of producing oil or gas or both oil and gas in paying quantities and to prevent the premature and irregular encroachment of water or any other kind of water encroachment that reduces or tends to reduce the total ultimate recovery of crude petroleum oil or gas or both oil and gas from any pool*." Order No. R-22869-A at 8, ¶ 11 (quoting Section 70-2-12(B)(4)) (emphasis in the original). This is the same hurdle Goodnight will face at the Commission hearing on its *de novo* appeal in Case No. 24123 and on its applications in Case Nos. 23614-23617, and 23775.

Goodnight bears the burden of proof on its applications and its attempt to shift the burden of proof to Empire is contrary to law and should be rejected.

III. CONCLUSION

For the foregoing reasons, the Commission should issue an order clarifying that each party bears the burden of proving its respective applications will prevent waste and protect correlative rights, *i.e.,* whether Goodnight's injection tends to reduce the total ultimate recovery of hydrocarbons within the EMSU.

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 August 26, 2024:

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