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

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| **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**<br>**ORDER NO. R-22869-A** |

# GOODNIGHT'S RESPONSE IN OPPOSITION TO EMPIRE'S MOTION FOR CLARIFICATION ON SCOPE OF HEARING

Goodnight Midstream Permian, LLC ("Goodnight"), by and through undersigned counsel, respectfully submits this response opposing Empire New Mexico LLC's ("Empire")

Motion for Clarification on Scope of Hearing and Burden of Proof. For the reasons stated below, and to avoid introducing reversible error, the Commission should deny Empire's motion.

**Introduction**

Contrary to Empire's assertion, the Commission's order on the hearing scope (the "Scope Order") did not define the legal standards or burdens of proof; it merely ruled on what issues and cases were to be consolidated for hearing. It instead directed the parties to make such legal arguments at the hearing. Empire's articulation of the burdens, however, is incorrect and if adopted would invite reversible error.

As to the burden of proof, Goodnight and Empire each are the movant for a series of applications seeking affirmative relief. Under long-established case law, applicants have the initial burden of going forward with production of evidence sufficient in law to establish facts necessary for approval. One that burden is met by making out a prima facie case, the issue in question is established, and the burden shifts to the party opposing the application to rebut the presumption.

With respect to Goodnight's applications, it has adduced more than sufficient evidence to make out a prima facie case in support of granting its applications. For example, Goodnight has established that the San Andres is non-productive for hydrocarbons; does not meet the definition of a residual oil zone; and does not justify further economic evaluation. It has also conclusively demonstrated through multiple data sets that there is a substantial, areally extensive, and sustained pressure differential between the San Andres and Grayburg formations, confirming they are not in communication. The burden of going forward has therefore shifted to Empire to rebut the established presumptions that injection for disposal into the San Andres does not harm correlative rights, will not cause waste, and otherwise complies with the Oil and Gas Act.

With respect to Empire's own applications, and each of the claims affirmatively raised in its testimony or at hearing, Empire bears the burden of proof and the initial burden of production as to each element of proof. The legal elements for Empire's core claims that Empire must prove by a preponderance of the evidence are defined by relevant provisions in the Oil and Gas Act. Contrary to Empire's assertions, Empire must establish the San Andres is capable of producing oil or gas or both at a profit under both Sections 70-2-12(B)(4) and 70-7-6(A)(3). Empire, not Goodnight, also has the burden of proof and production to establish that Goodnight's injection is causing waste and impairing correlative rights.

While the fact that both Empire and Goodnight seek affirmative relief on inverse claims might suggest a split burden, a step back from the applications to the broad relief requested as between the parties confirms that Empire is the party seeking affirmative relief from the status quo—established for decades—and, therefore, is the party that bears and retains the ultimate burdens of proof and persuasion.

## Argument

### I. The Commission's Scope Order and Underlying Motions Addressed What Issues and Cases were to be Considered at the Hearing, Not the Applicable Legal Standards or Evidentiary Burdens.

Empire is incorrect in asserting that the Commission has already established a ruling on burden of proof—it has not. At no point in the Scope Order does the Commission define applicable legal standards or set out the parties' respective burdens of proof. *See, generally,* Scope Order (the "Scope Order"), attached as **Exhibit A**. Burden of proof was not addressed in any of the Commission's orders regarding the hearing: not in the pre-hearing order, not in the requested briefing on the scope of the hearing, and not in the Commission's Scope Order. Rather, the Commission directed the parties to address such legal arguments at the hearing.

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Goodnight and the Division each filed separate motions seeking to consolidate all cases and applications for hearing before the Commission that involve existing or proposed produced water disposal wells within the Eunice Monument South Unit ("EMSU"). *See* Goodnight's Motion to Limit Scope, filed May 23, 2024; Division's Motion Concerning Scope, filed May 23, 2024.

Both motions sought consolidation of all cases within the EMSU because doing so would allow the Commission to address a core set of disputed fact issues, including (1) whether the San Andres formation within the EMSU contains hydrocarbons that are economically recoverable through tertiary recovery, and (2) whether injection of produced water into the San Andres unreasonably impairs Empire's ability to produce hydrocarbons within the EMSU from the San Andres and/or from the overlying Grayburg formation thereby causing waste and harming correlative rights. *See* Goodnight's Motion to Limit Scope, filed May 23, 2024.

However, the briefing did not address applicable legal standards or the parties' respective burdens of proof. The Pre-Hearing Order issued in these cases limited the issue to be briefed to the scope of the hearing—i.e., what cases and issues should be addressed at the evidentiary hearing—not the applicable legal standards or burden of proof. *See* Order No. R-23208, ¶ 3 ("Goodnight shall file its motion regarding scope of the hearing no later than May 23, 2024[.]").

The Commission's order on the hearing scope, therefore, addressed only the cases and issues to be heard at the evidentiary hearing and directed the parties to raise legal arguments at the hearing. *See* **Exhibit A** (the "Scope Order"). Because it was not briefed, the Commission's order does not set out the applicable legal standards or evidentiary burdens; it merely identifies the factual issues to be addressed, the cases to be consolidated for hearing, and the cases to be stayed. *Id.* ¶¶ 2-3.



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The Order directs the parties to submit "evidence, testimony, and legal argument on the issue of the existence, extent of and possible interference with a residual oil zone" in the EMSU "by produced water injection activities undertaken by Goodnight." *Id.* ¶ 2 (the "Issue"). The Order limits consideration of the Issue "to applications and wells by Goodnight or by Empire . . . within the EMSU[.]" *Id.* ¶ 3.

In addition to limiting the Issue to be considered to certain cases filed by Goodnight and Empire within the EMSU, the Order also provides that "evidence, testimony, and legal argument" will include, without limitation, Case Nos. 24123, 23755, 23614-23617, and 24018-24020, and 24025. The Commission did not limit the issues to be addressed in the referenced cases. This makes sense because the relief requested in each case is subject to its own elements of proof, legal standards, and evidentiary burdens.

For example, in Case Nos. 24123 and 23614-23617, Goodnight seeks affirmative relief to authorize injection of produced water for disposal in five disposal wells. In Case No. 23755, Goodnight requests affirmative relief to increase the authorized injection rate under an existing injection order. The requested relief in these cases requires a prima facie showing that the proposed injection meets the elements necessary for approval under the Class II UIC injection requirements and otherwise complies with the mandates of the Oil and Gas Act. This approach closely follows the approach the Division Examiner took in the Piazza hearing in Case No. 22626 (de novo Case No. 24123).[1] *See* Order on Motion to Dismiss, Case No. 22626, attached as **Exhibit B**. Thus, in addition to evidence and testimony on the Issue for applications and wells within the EMSU, evidence, testimony, and legal argument also will be necessary around the

[1] We note that while we believe the Division Examiner correctly articulated the issues for determination in the Piazza case, the Division decided the case incorrectly.



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elements underlying each consolidated case, including the cases in which Empire seeks affirmative relief to undo more than six decades of produced water disposal in the San Andres formation.

Empire's Motion, thus, inaccurately describes the purpose and effect of the Order by conflating the issues subject to dispute with the burden and elements of proof. At no point in the Scope Order does the Commission define applicable legal standards or set out the parties' respective burdens of proof.

## II. After Making a Prima Facie Showing in Goodnight's Applications, the Burden of Going Forward Shifts to Empire.

While it is true that Goodnight, as the moving party under its own applications, has the burden of proof and <u>initial</u> burden of going forward with evidence[2] in each of its cases, it is also true that having made out a prima facie case in support of its applications the evidentiary burden shifts to Empire to rebut Goodnight's evidence. *See Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 1980-NMCA-160, ¶ 7, 622 P.2d 709 ("Once the party who bears the burden of proof has made a prima facie showing the burden of going forward with the evidence shifts to the opposing party.").

Goodnight's view—substantiated by the present record—is that the evidence and testimony it presented in these consolidated cases and filed with the Commission on August 26, 2024, makes out a prima facie case by a preponderance of the evidence in support of each of its applications. A prima facie showing is "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Id.*, ¶ 7.

[2] The burden of going forward or production is "a party's obligation to come forward with evidence to support its claim." *Dir. v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

Without going into the merits of the competing testimony, Goodnight's position is that it has adduced evidence sufficient in law to establish the presumption that its proposed injection and requested injection rate increase in Case Nos. 24123,[3] 23755, and 23614-23617 will neither cause waste nor impair Empire's correlative rights and otherwise meets the requirements for approval. For example, Goodnight has established that the San Andres is non-productive for hydrocarbons; does not meet the definition of a residual oil zone; and does not justify further economic evaluation. It has also conclusively demonstrated through multiple diverse data sets that there is a substantial, areally extensive and sustained pressure differential between the San Andres and Grayburg formations, confirming they are not in communication. The burden of going forward has therefore shifted to Empire to rebut the established presumptions that injection for disposal into the San Andres does not harm correlative rights, will not cause waste, and otherwise complies with the Oil and Gas Act.

Having reviewed Empire's testimony and exhibits, it is Goodnight's position that Empire has failed to proffer evidence to rebut those presumptions as the evidentiary record now stands. The evidentiary burden as to Goodnight's applications, therefore, stays with Empire going forward. And, as explained below, that burden and the ultimate burden of proof remains with Empire.

## III. As Applicant, Empire has the Burden of Proof and Initial Burden of Going Forward to Establish Each Element of its Claims as Defined by the Oil and Gas Act.

As with Goodnight, Empire also is an applicant in Case Nos. 24018-24020, and 24025, and, therefore, bears the burden of proof and the initial burden of going forward under the

[3] We note that Case No. 24123 involves Goodnight's proposed Piazza SWD #1 and is before the Commission on de novo review. The evidentiary burdens apply to this case as the others and Empire is not entitled to any deferential evidentiary standard.



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elements of each allegation contained in its applications. *Duke City Lumber Co.*, 1980-NMCA-160, ¶ 7.

**A. Empire's Factual Allegations**

Empire makes several factual allegations in each of its relevant applications. A non-exhaustive summary of the key allegation follows.

First, Empire alleges "Goodnight misrepresented that the San Andres is a non-productive zone known to be compatible with formation water from the Bone Spring, Delaware, and Wolfcamp formations ('Produced Water')." *See, e.g.*, Case No. 24018, ¶ 5.

Second, Empire alleges that "residual oil zones ('ROZ') are found within the San Andres, and Empire has the right to recover hydrocarbons therein." *Id.* ¶ 6.

Third, Empire alleges that Goodnight's "[d]isposal [into the San Andres] impairs the ability of Empire to recover hydrocarbons within the Unitized Interval and thereby adversely affects the correlative rights of Empire and other interest owners in the Unit and results in waste." *Id.* ¶ 9. And relatedly, Empire alleges "[r]evocation of the disposal authority granted by Order No. R- 22026 will prevent the waste of recoverable hydrocarbons and will protect correlative rights. *Id.* ¶ 11.

As to these claims, and each of the claims affirmatively raised in its applications or at hearing, Empire bears the burden of proof and the initial burden of going forward with evidence sufficient in law to raise a presumption of fact or to establish the fact in question.

The legal elements for Empire's core claims that Empire must prove by a preponderance of the evidence are defined by relevant provisions in the Oil and Gas Act, which are addressed, at least in part, in the following sections.

### B. Empire's Claim that Disposal is Watering Out the San Andres ROZ Requires Demonstrating the San Andres is Capable of Producing in Paying Quantities.

To establish the San Andres is being "drowned out" by water,[4] Empire must demonstrate the San Andres is "capable of producing oil or gas or both oil and gas in paying quantities[.]" *See* 1978, NMSA § 70-2-12(B)(4). Empire shrugs off this burden by asserting it does not need to prove the San Andres is capable of producing in paying quantities because the "crux of the issue is whether Goodnight's current and proposed injection is resulting in waste or impairing correlative rights." *See* Empire's Mot. at 3. Empire's evidentiary burden regarding waste and correlative rights will be addressed separately below, but its assertion that it is not required to demonstrate that the San Andres is capable of producing in paying quantities under either Section 70-2-12(B)(4) or Section 70-7-6(A)(3) entirely misses the mark.

#### 1. Section 70-2-12(B)(4) requires proof that a stratum being "watered out" is capable of producing in paying quantities.

As to Section 70-2-12(B)(4), Empire takes the unreasonable position that Oil and Gas Act's requirement to prove a stratum is capable of producing in paying quantities applies only to

[4] *See, e.g.*, Testimony of Jack E. Wheeler, Empire Exhibit A, at ¶ 22 ("Disposal of water into the San Andres is violating [] correlative rights[,]" and "pressuring up the reservoir to levels above original reservoir pressure . . . . [t]his will require the Empire operate the CO2 at a higher pressure than necessary . . . and will have to inject the produced water into another zone to make room for the CO2[.]"); Testimony of William West, Empire Exhibit I at p. 2 ("Of major concern is that the re-pressurization of the San Andres is increasing water influx into the Grayburg through natural fractures and this is pre-maturely watering out Grayburg producers. Reservoir modeling shows that water influx into the Grayburg could reach 50,000 BWPD over the next two years due to the increased pressure, even without the use of the five new proposed wells. Water disposal inside EMSU must be terminated so that correlative rights are protected."); *id.* at p. 3 ("The added volume of water into the unitized interval will pressure up the San Andres reservoir and require Empire to produce the water and inject it into the Grayburg as CO2 is injected."); Testimony of James L. Buchwalter, Empire Exhibit E at p. 5, ¶ 5 ("In both [reservoir modeling] cases, there is a high rate of water influx caused by the disposal volumes.").

claims a stratum is being drowned out by water and not to claims of premature and irregular encroachment of water. *See* Empire Mot. at 5. Empire is wrong for at least three reasons.

First, by using the conjunctive "and" the Legislature made clear that the requirement to prove a stratum is capable of producing in paying quantities applies to claims a prospective zone is being drowned out by water and to claims of premature and irregular water encroachment. *State v. Montano*, 2020-NMSC-009, ¶ 36, 468 P.3d 838 ("The conjunctive use of 'and' in a statute requires an interpretation that all elements must be present.") (internal citation and quotations omitted). Empire's argument might have had more force if the Legislature had used the disjunctive "or" to separate application of the "producing in paying quantities" requirement from the elements. But that is not how the provision reads. Indeed, Empire's construction effectively reads "capable of producing in paying quantities" from the provision altogether.

Second, it makes no sense to read Section 70-2-12(B)(4) as limiting the requirement to prove a stratum is capable of producing in paying quantities only to claims that the zone is being drowned out by water and not to claims of premature and irregular water encroachment. Statutes must be read to avoid a construction that would "render the statute's application absurd or unreasonable" or "lead to injustice or contradiction." *See State v. Nick R.*, 2009-NMSC-050, ¶ 11, 218 P.3d 868. Under Empire's approach, strata claimed to be subject to premature water encroachment would not need to be capable of producing in paying quantities, but strata alleged to be drowned out by water would need to be. Reading the provision as Empire urges is unreasonable, non-sensical, and would lead to an absurd result and clear contradictions. Every alleged prospective zone must be proven to be capable of producing in paying quantities as an element of proof that it is being watered out or subject to premature or irregular water encroachment.



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Third, Empire does not limit its claims to allegations that the San Andres is subject to premature and irregular water encroachment. Empire's witnesses clearly testify that an influx of water from Goodnight's injection is watering out the allegedly prospective ROZ in the San Andres. For example, Empire witnesses Jack E. Wheeler and William West both testify that Goodnight's disposal into the San Andres is causing an influx of water volumes that is pressuring up the San Andres and will require Empire to move the water to another zone to make room for its purported CO2 flood. *See* Testimony of Jack E. Wheeler, Empire Exhibit A, at ¶ 22; Testimony of William West, Empire Exhibit I at p. 3. Thus, even if the Commission accepted Empire's infirm statutory construction of Section 70-2-12(B)(4), that construction does not provide Empire any basis to contend it is immune from the requirement to prove the San Andres ROZ is capable of producing in paying quantities.

**2. The Statutory Unitization Act requires proof that Empire's proposed CO2 flood operations will be profitable.**

As to Section 70-7-6(A)(3), Empire again misreads the governing statute. Empire asserts that because, in respect to the EMSU, a prior operator, Gulf Oil, made a demonstration to the Commission in 1984 that the estimated "additional costs" of proposed waterflood operations in the Grayburg formation "will not exceed the estimated value of the additional oil and gas so recovered plus a reasonable profit[,]" that Empire now has blanket authorization 40 years later under the Statutory Unitization Act and the Commission's Order Nos. R-7765 and R-7766 to conduct a different type of enhanced oil recovery operation (tertiary recovery through CO2 flooding) anywhere within the EMSU's Unitized Interval, including within the San Andres formation—a zone that has not been reasonably defined by development.

Empire is dead wrong. To proceed with tertiary CO2 flood operations in the EMSU, Empire will first have to obtain new approvals from the Commission. For starters, under the

Statutory Unitization Act, it will have to prove, among other things, that the "estimated additional costs" of conducting the proposed CO2 flood operations "will not exceed the estimated value of the additional oil and gas so recovered plus a reasonable profit[.]" § 70-7-6(A)(3). This requirement is no different than the requirement in Section 70-2-12(B)(4) to establish that the San Andre is capable of producing in paying quantities. As the Statutory Unitization Act and the EMSU case record confirms, Empire will be required to make this new demonstration regardless of whether the proposed CO2 flood operations are limited to the Grayburg or include the San Andres. Indeed, the San Andres has never been reasonably defined by development, which is a pre-requisite under the Statutory Unitization Act. *See* § 70-7-5(B).

Under the Statutory Unitization Act, an operator must define "the type of operations contemplated for the unit area." § 70-7-5(C). In 1984, Gulf proposed only secondary recovery through waterflood operations. *See* Order No. R-7765, ¶ 14 ("Gulf proposes to institute a waterflood project for the secondary recovery of oil and associated gas, condensate, and all associated liquifiable hydrocarbons[.]").

To approve the proposed operations through statutory unitization, the Commission must make the following findings:

> (2) that one or more of the said unitized methods of operations as applied to such pool or portion thereof is feasible, will prevent waste and will result with reasonable probability in the increased recovery of substantially more oil and gas from the pool or unitized portion thereof than would otherwise be recovered;
>
> (3) that the estimated additional costs, if any, of conducting such operations will not exceed the estimated value of the additional oil and gas so recovered plus a reasonable profit; [and]
>
> (4) that such unitization and adoption of one or more of such unitized methods of operation will benefit the working interest owners and royalty owners of the oil and gas rights within the pool or portion thereof directly affected[.]



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§ 70-7-5(C) (emphasis added). Gulf presented evidence, and the Commission found, that the proposed unitized operation of the EMSU through "waterflood" is feasible, would recover substantially more oil than would otherwise be produced, and that the estimated additional costs of the waterflood will not exceed the estimated value of the additional oil and gas plus a reasonable profit. *See* Order No. R-7765, ¶¶ 15-22, 43.

An order approving statutory unitization is required to include "a statement of the nature of the operations contemplated[.]" § 70-7-7(B). The Commission approved the EMSU as a statutory unit only for secondary recovery operations through waterflooding:

> The applicant is hereby authorized to institute secondary recovery project for the recovery of oil and all associated and constituent liquid or liquified hydrocarbons within the unit area, pursuant to the provisions set forth in Commission Order No. R-7766.

Order No. R-7765, decretal ¶ 4. In authorizing the EMSU for statutory unitization, the Commission limited its approval to secondary recovery through waterflood operations by expressly referencing its approval for waterflood injection under Order No. R-7766.

Gulf did not propose tertiary recovery as a method of unit operations and did not propose a CO2 flood. It adduced no evidence and elicited no findings in support of tertiary recovery or CO2 flood operations in support of its statutory unitization order and presented no evidence on CO2 flood costs or profits. That means Empire must obtain new approvals from the Commission to conduct tertiary recovery through CO2 flood operations anywhere within the EMSU's unitized interval. Critically, Empire is going to have to demonstrate "that the estimated additional costs, if any, of conducting such operations will not exceed the estimated value of the additional oil and gas so recovered plus a reasonable profit[.]" § 70-7-6(A)(3). The notion that the Commission has already determined that tertiary recovery through CO2 flood operations within the EMSU will lead to the recovery of oil and gas at a profit is completely without merit.

Finally, Empire's contention that it cannot prove its proposed CO2 flood operations will be profitable at this stage of development is a remarkable concession. Empire Mot. at 4. It is a remarkable concession because while Empire apparently cannot make this showing, it is not true the other operators in a similar posture could not—indeed, as described above, operators must for purposes of statutory unitization. The concession also highlights several infirmities in Empire's position:

First, it emphasizes the fact that Empire is unable to point to <u>any</u> offsetting San Andres production to establish that the San Andres is capable of producing in paying quantities. The San Andres is non-productive in this area.

Second, the concession completely undermines Empire's contention that its proposed unitized operations in the EMSU "will lead to the recovery of oil and gas at a profitable level." Empire Mot. at 4. If that were the case, Empire should be able to adduce evidence to that effect.

Third, to conduct a CO2 flood operation in the EMSU, Empire *must* show that the San Andres ROZ is capable of producing in paying quantities <u>before</u> it initiates a CO2 flood. Under the Statutory Unitization Act, Empire will be required to demonstrate that the "estimated additional costs, if any, of conducting such operations will not exceed the estimated value of the additional oil" recovered "plus a reasonable profit" before it is authorized to conduct CO2 operations. *See* § 70-7-6(A)(3). To argue it is impossible to do so before the project is implemented is non-sensical. That is exactly what Gulf did—and was required to do—when it demonstrated its proposed waterflood operation would be profitable before it was implemented. Empire's assertion is without basis. Empire's position in opposition to Goodnight's proposed applications, here, is premised on this very issue, and requires exactly this sort of foregoing proof. If Empire cannot make such a showing there is simply no possibility under the language



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of Section 70-7-6(A)(3) that Goodnight's injection could water out an alleged ROZ because Empire cannot demonstrate the San Andres is capable of producing in paying quantities.

Fourth, Empire's reliance on private oil and gas lease termination cases for a wooden construction of the meaning of "production in paying quantities" is inapposite here in a regulatory context. Empire Mot. at 4. The cases cited involve termination of private oil and gas leases, a type of real property interest, for failure to produce oil or gas in paying quantities. *See Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959); *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, 76 P.3d 626. In contrast, Section 70-2-12(B)(4) is directed at protecting economically prospective strata for development. The Commission is not limited to such a stilted construction of its statutory powers, but it is required to determine whether the purported San Andres ROZ is capable of producing in paying quantities and, therefore, protectable. At a minimum, that requires Empire to make a showing that its proposed CO2 flood operations will be profitable.

**C. Impairment of Correlative Rights**

To prevail on its claim that Goodnight's disposal impairs correlative rights, Empire must show that its opportunity to produce its "just and equitable" share of the oil or gas from the Grayburg and San Andres formations is being impaired, but only to the extent it is practicable to produce oil or gas and only to the extent oil or gas can be practicably obtained from either formation without waste. *See* § 70-2-33(H). Moreover, Empire must show what portion of the quantity of recoverable oil or gas in each zone amounts to its just and equitable share in relation to the total recoverable oil or gas in both formations.

In other words, Empire must establish: (1) that it is practicable to produce from the Grayburg and San Andres; (2) that oil or gas can be practicably obtained from the Grayburg and San Andres without waste; and (3) what portion of the total quantity of recoverable oil or gas in

each zone equates to its just and equitable share relative to the total recoverable oil or gas in both formations. In this context, as demonstrated above, "practicably obtained" and "recoverable" oil and gas within the San Andre must be in paying quantities See §70-2-12(B)(4); § 70-7-6(A)(3). If Empire can establish each of these necessary predicate elements, Empire must then demonstrate that its opportunity to produce its share of recoverable oil and gas in paying quantities is impaired by Goodnight's injection.

In many circumstances, proof on every element of this claim may not always be necessary where the alleged harm is occurring within a reservoir known to be capable of producing in paying quantities. But here, Empire alleges impairment to a zone that has never been productive of hydrocarbons and has been managed for decades by the Office of the State Engineer as an aquifer and by the Division as a disposal zone. As a logical predicate—proof must be made the zone is producible in paying quantities if Empire is to show that Goodnight's operations reduce the "pay" from those "quantities"—whether because production is less or because it is more costly.

Empire also alleges disposal into the San Andres is watering out its Grayburg producers—which have been recording in excess of a 98% water cut years before Goodnight commenced its injection operations—when there is a documented sustained and substantial pressure differential across the EMSU area between the San Andres and Grayburg zones, confirming the formations are not in communication. Under these facts, Empire's allegations must be fully put to the proof.

**D. Waste**

Under the Oil and Gas Act, waste is

> the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or

> producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas[.]

NMSA 1978, § 70-2-33(A).

To establish that Goodnight's disposal operations cause waste, as alleged, Empire must demonstrate that the total quantity of oil or gas ultimately recovered from the Grayburg and San Andres formations will be reduced because of the pre-existing disposal into the San Andres. For the reasons explained, above, this is Empire's burden in its own cases, but also in Goodnight's applications, because Empire seeks to rebut Goodnight's prima facie demonstration, in part, on the basis of alleged waste.

## IV. Because Empire Seeks to Undo the Status Quo that has been in Place for Decades, it has the Ultimate Burden of Persuasion and Proof.

Empire ultimately bears the burden of proof and persuasion in all applications pending before the Commission because its seeks to undo the status quo that has been in place for decades, unwind numerous standing orders issued by the Division, and upend significant industry reliance on those orders and approval to inject into a well-established disposal zone.

As defined by judicial consensus, the term "burden of proof" means "the obligation which rests on one of the parties to an action to persuade the trier of the facts, generally the jury, of the truth of a proposition which he has affirmatively asserted by the pleadings." *See Dir., Office of Worker's Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (internal quotation marks and citation omitted). In its strict primary sense, "burden of proof" signifies "the duty or obligation of establishing in the mind of the trier of facts, conviction on the ultimate issue." *Id.* (internal quotation marks and citation omitted). In other words, the proper meaning of burden of proof is "the duty of the person alleging the case to prove it[.]" *Id.* (internal quotation marks and citation omitted).



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Since before it became a state, New Mexico's law has been the same. The general rule is that the party alleging the affirmative has the burden of proof. *See V.A. Silversmith, Inc. v. Marchiando*, 1965-NMSC-061, ¶ 10, 404 P.2d 122. And accordingly, it has long been the law that the burden of proof is on the party seeking affirmative relief to establish its case. *See Reagan v. El Paso & N.E. Ry. Co.*, 1910-NMSC-006, 106 P. 376.

While the fact that both Empire and Goodnight have affirmative applications might suggest a split burden, a step back from the applications to the broad relief sought as between the parties confirms that Empire is the party, here, seeking affirmative relief from the status quo. The test for deciding which party has the burden is "to determine which party would be successful if no evidence were given and then place the burden of proof on the adverse party. <u>In other words, the party seeking to change the status quo has the burden of proof</u>." *Atl. & Pac. Ins. Co. v. Barnes*, 666 P.2d 163, 165 (Colo. Ct. App. 1983) (emphasis added) (citation omitted; cited with approval and relied upon in *Farmington Police Officers Ass'n Commc'n Workers of Am. Local 791 v. City of Farmington*, 2006-NMCA-077, ¶ 16, 137 P.3d 1204). Here, Empire is seeking to upend the status quo that has been in place for more than 80 years. It, therefore, bears the ultimate burden of proof and persuasion.

Produced water disposal into the San Andres within and around the EMSU has been authorized by the Division since at least the 1950s—decades before the EMSU was created. Disposal of produced water in the San Andres within what would later become the EMSU has been authorized and ongoing since the 1960s. The EMSU was unitized in 1984 with millions of barrels having already been disposed into the San Andres by two Rice Operating/Permian Line Service wells. Operators of the EMSU, <u>including Empire</u>, continued to use the San Andres aquifer for disposal to support the production of the EMSU—<u>and do so to this day</u>.

At the time the EMSU was approved, Gulf presented evidence and testimony that the proposed waterflood operations within the EMSU target the oil column, which is limited to the Grayburg and Lower Penrose formations, and expressly excluded the San Andres from its proposed waterflood operations. The San Andres was determined to be non-prospective. In fact, Gulf made clear in its testimony that the targeted oil column includes only the Grayburg and Penrose formations and does not extend into the San Andres. *See* Case No. 8399, Hearing Tr. Vol. 1, 52:6-7 ("[T]he oil column in this area thins from the Grayburg up into the lower part of the Penrose."); 53:1-4 ("Q: When you look at the oil column in the unit area, that is included generally in the Grayburg and the lower portion of the Penrose, is that correct? A: That's correct.").

Gulf also presented evidence and testimony that the San Andres formation would be used to provide the massive quantities of water required in the waterflood zone in the Grayburg and Lower Penrose formations for the initial fill-up period and, if needed, for additional makeup water in the future. The San Andres was included in the unitized interval, not because it contains hydrocarbons, but because it was to be used as a source of water supply for the planned waterflood. *See* Goodnight Exhibit B-7 ("The bottom of the interval must be the base of the San Andres formations (sic) to include the area's most prolific water production zone[.]").

The San Andres has never been a hydrocarbon source; it has only ever been an aquifer. The New Mexico Office of the State Engineer ("OSE") declared the San Andres a groundwater source within the Capitan Underground Water Basin on September 27, 1965. *See* 19.27.26.8A NMAC (State Engineer declaring Basin). By declaring the Capitan Basin, the OSE has expressly identified the San Andres as a water source subject to appropriation and beneficial use, and

asserted jurisdiction over all waters within the Basin, including those within the San Andreas formation. *See* NMSA 1978, § 72-12-1.[5]

The San Andres disposal wells operated in the EMSU by Rice Operating/Permian Line Service and OWL/Pilot were authorized and approved before Empire acquired its interests in the Unit. Goodnight's four existing disposal wells in the EMSU were also authorized and approved for disposal into the San Andres before Empire acquired its interests in the Unit. In short, Empire acquired its interest in the EMSU in 2021 with eight active San Andres disposal wells operating within the EMSU boundary. An additional nine disposal wells were operating within just a few miles of the EMSU. Empire acquired the EMSU knowing that the San Andres aquifer was a disposal zone in and around the EMSU.

Through its applications and objections, Empire is seeking to completely upend more than 80 years of history and reliance on long-established practices, regulatory approvals, and agency determinations. Empire, not Goodnight, is seeking to change the status quo. Empire, not Goodnight, has the ultimate burden of proof and persuasion to convince the Commission that it must revoke numerous disposal well approvals after decades of injection and change its management of the San Andres in this area from a non-productive disposal aquifer. To accomplish that, Empire has ultimate the burden to prove every element of its claims by a preponderance of the evidence.

[5] We note that the Commission is without authority to unitize non-hydrocarbon-bearing formations that have not been reasonably defined by development or to unitize unappropriated waters of the state, making Order No. R-7765 void ab initio as to inclusion of the San Andres formation.

## Conclusion

Empire's present motion is infirm, is incomplete, ignores the history and law related to the EMSU, and fails to adequately inform the Commission of the legal standards related to the claims set of hearing. For all the reasons outlined above, Goodnight opposes Empire's Motion and urges the Commission to adopt Goodnight's elements of proof and burdens proposed herein. To the extent that the Commission would benefit from pre-hearing briefing on the standard of proof, standard of going forward with evidence, elements of the claims, and ultimate burden of proof, Goodnight requests that the Commission direct the parties to provide such briefing and in advance of the February 20, 2024, hearing.

DATED: September 12, 2024

Respectfully submitted,

**HOLLAND & HART LLP**

By: ______________________________

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2024, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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# EXHIBIT A

**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** |
| **APPLICATION OF GOODNIGHT PERMIAN MIDSTREAM, LLC FOR APPROVAL OF A SALTWATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO** | **CASE NO. 24123** |
| **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** |

## 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

These matters, having come before the Oil Conservation Commission ("Commission") on the motions by Goodnight Midstream Permian L.L.C. ("Goodnight") and the Oil

Conservation Division ("OCD"), to limit the scope of the Commission's hearing on the above captioned cases ("Motion"), and the Commission, being fully advised and having heard arguments of the parties' counsel at a public meeting on June 20, 2024, hereby finds as follows:

1. The hearing on the above captioned matters, as amended by this or any other order by the Commission, shall be heard on September 23-27, 2024 by hearing examiner Rip Harwood, as per previous Commission order.

2. At said hearing, the parties shall submit all evidence, testimony, and legal argument on the issue of the existence, extent of and possible interference with a residual oil zone the Eunice Monument South Unit ("EMSU") by produced water injection activities undertaken by Goodnight.

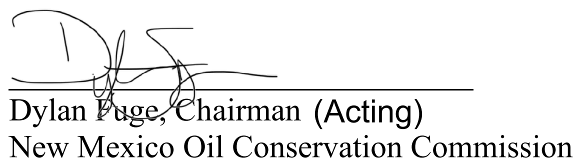
3. Such evidence, testimony, and legal argument shall be limited to applications and wells by Goodnight or by Empire New Mexico LLC within the EMSU and shall include the following cases:

   a. Commission Case No. 24123;
   b. Division Case No. – 23775;
   c. Division Case Nos – 23614-23617;
   d. Division Case Nos – 24018-24020, and 24025; and

4. The following cases, previously part of this case, have been stayed by other Order of the Commission pending resolution of the cases above:

   a. Division Case Nos – 24021-24024, 24026, and 24027
   b. Commission Case Nos – 24277 and 24278.

SO ORDERED.



Dylan Fuge, Chairman (Acting)
New Mexico Oil Conservation Commission



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**EXHIBIT B**



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

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

**Case No. 22626**

# ORDER ON MOTION TO DISMISS

This Order follows a Motion to Dismiss ("Motion") filed by Empire New Mexico, LLC ("Empire") on June 6, 2022. The Oil Conservation Division ("Division") Hearing Examiner ("Examiner"), having heard arguments presented on June 16, 2022 on the Motion, enters the following findings and order.

## FINDINGS

1. On March 4, 2022, Goodnight Midstream Permian, LLC ("Goodnight") filed an application ("Application") for approval of a produced water disposal well located in Section 9, T21S, R36E, Lea County ("Proposed Well"). The Application proposed disposal into the San Andres formation.

2. Empire entered an appearance into the case and objected to the case being heard by affidavit. Empire then filed the Motion. Empire seeks to dismiss the Application because the Proposed Well will inject within an existing statutory unit

3. Order R-7765, issued December 27, 1984 in Case No. 8397 ("Unit Order"), established the Eunice Monument South Unit ("Unit") pursuant to the Statutory Unitization Act. NMSA 1978, §§70-7-1 et seq. ("Act"). The Unit Order established a Unit Area of over 14,000 acres including Section 9, T21S, R36E. Unit Order, Order ¶2. The vertical limits of the Unit extend from the top of the Grayburg formation "to a lower limit at the base of the San Andres formation". Unit Order, Order ¶3.

4. Gulf Oil Corporation was the operator of the Unit under the Unit Order. Empire is the current operator.

5. The Proposed Well will inject at a location within the Unit Area. The issue for the purposes of this Order is whether the existence of the Unit precludes any injection within the Unit Area.

6. The purpose of the Act is to "provide for the unitized management, operation and further development of the oil and gas properties to which the Statutory Unitization Act is applicable, to the end that greater ultimate recovery may be had therefrom,

waste prevented, and correlative rights protected of all owners of mineral interests in each unitized area." NMSA 1978, §70-7-1.

7. The Unit Order authorizes the operator of the Unit "to institute a secondary recovery project for the recovery of oil and all associated and constituent liquid or liquified hydrocarbons within the unit area". Unit Order, Order ¶4. For the purposes of this Order, this language is assumed to be the "unit operations" described in the Act.

8. The Unit Order does not specifically prohibit, or even address, potential injection operations within the Unit Area.

9. The existence of a Unit, established under the Statutory Unitization Act, does not, by itself, prohibit the operation of a disposal well within the Unit. The Division must evaluate whether the proposed injection is allowable under the Oil and Gas Act.

10. The Oil and Gas Act prohibits "waste" which includes "…the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool…". NMSA 1978, §70-2-3(A). The Oil and Gas Act requires the Division to regulate the disposal of produced water by injection "in a manner that protects public health, the environment and fresh water resources", NMSA 1978, §70-2-12(B)(15), and further "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". NMSA 1978, §70-2-12(B)(4).

11. Empire claims in the Motion that Goodnight's injection will affect current and future unit operations. These claims can only be verified through an evidentiary hearing.

12. The Division concludes that there are insufficient grounds to dismiss the Application. The location of the Proposed Well within the Unit Area requires an evidentiary hearing to determine whether the proposed injection will interfere with unit operations.

## ORDER

It is hereby **ORDERED** that the Motion is denied. At the hearing, evidence can be presented to determine whether the Proposed Well will interfere with unit operations, will not cause waste, will protect correlative rights and will otherwise comply with the Oil and Gas Act.

**STATE OF NEW MEXICO**
**OIL CONSERVATION DIVISION**

_William R. Brancard__
**WILLIAM R. BRANCARD**
**HEARING EXAMINER**

**Date: _August 24, 2022______**



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