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 REPLY IN SUPPORT OF MOTION FOR CLARIFICATION ON SCOPE OF HEARING AND BURDEN OF PROOF

Empire New Mexico, LLC ("Empire") brought its Motion for Clarification on Scope of Hearing and Burden of Proof ("Empire's Motion") to request that the New Mexico Oil Conservation Commission ("Commission") clarify and confirm two issues: (1) Goodnight Permian Midstream, LLC's ("Goodnight") injection of produced water into Empire's unitized interval must cease if Empire demonstrates the injection is causing waste or violating correlative rights; and (2) Goodnight and Empire each bear the burden of proof on their respective applications. Although neither issue should be controversial because these matters are clearly established by New Mexico law, Goodnight's Response to Empire's Motion asks the Commission to ignore the Oil and Gas Act ("Act") and upend fundamental legal principles by holding that: (1)

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Goodnight can continue to inject into Empire's unitized formation unless Empire establishes that the San Andres ROZ is capable of production in paying quantities; and (2) Empire bears the burden of proof on *all* of the pending applications – including Goodnight's. Goodnight's arguments have no merit and should be rejected. Empire will also briefly address the New Mexico Oil Conservation Division's Response to Empire's Motion. The Commission should issue an order clarifying the scope of the hearing and the burden of proof as Empire has requested.

I. Goodnight's injection of produced water into Empire's unitized interval must cease if Empire demonstrates the injection is causing waste or violating correlative rights.

The New Mexico Oil and Gas Act requires the Commission to prevent waste of hydrocarbons and protect correlative rights. NMSA 1978, §§ 70-2-6 and 70-2-11; *see also Continental Oil Co. v. Oil Conservation Comm'n,* 1962-NMSC-062, ¶ 27, 373 P.2d 809 ("Our legislature has explicitly defined both 'waste' and 'correlative rights' and placed upon the commission the duty of preventing one and protecting the other."). NMSA 1978, Section 70-2-3(A) of the Act defines "underground waste" to include:

> 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.

"Correlative rights" means:

> the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H).

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Thus, it is abundantly clear that the Commission must preclude injection operations that "tend to reduce the total quantity of oil ultimately recovered from any pool" or prevent an interest owner from producing without waste his just and equitable share of oil in the pool.

Notwithstanding this unambiguous requirement, Goodnight seeks to constrain the Commission's authority by arguing that Empire must "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)." *See* Goodnight Response at 9. Neither provision supports Goodnight's argument.

To begin with, neither party has filed an application for statutory unitization pursuant to NMSA 1978, Section 70-7-6. Therefore, the "[m]atters to be found by the division precedent to issuance of a unitization order," under Section 70-7-6(A) are in no way applicable to the applications currently before the Commission.

And *even if* the matters the Commission is required to determine prior to issuing an order on an application for unitization *were* applicable to these cases, the statute in no way requires a showing that the San Andres is capable of producing in paying quantities. Goodnight eventually concedes, as it must, that at the point when Empire seeks to amend the Unit to allow for tertiary recovery, it will be required "to prove…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.'" Goodnight Response at 12 (quoting Section 70-7-6(A)(3)). While Empire will be able to show that the costs of conducting tertiary recovery will "not exceed the estimate value of the additional oil and gas so recovered plus a reasonable profit" at the time it applies to the Division to amend the Unit, it will not need to show that the "San Andres ROZ is capable of producing in paying quantities, and, therefore, protectable." *See* Goodnight Response at 15. Estimates that tertiary recovery will be profitable are not the same thing as being able to

ascertain whether oil and gas that is actually produced is paying a profit over operating expenses. *See* 19.15.27.7(Q) NMAC; *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 9. This determination quite simply cannot be made at this stage of Empire's development of the EMSU.

Goodnight also continues to erroneously rely on NMSA 1978, Section 70-2-12(B)(4) for its position that Empire must demonstrate that the "San Andres ROZ is capable of producing in paying quantities" if it is to defeat Goodnight's applications *or* be successful on its own applications before the Commission. *See* Goodnight's Response at 9. Section 70-2-12 enumerates the powers of the Oil Conservation Division and provides that the Division "may make rules and orders for the purposes and with respect to the subject matter" of 22 different topics listed in Section 70-2-12(B). One of those topics is "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." Goodnight ignores the statute's language and misreads this provision as establishing Empire's burden of proof. Goodnight's tortured interpretation of Section 70-2-12(B) must be rejected because it "leads to absurdities [and] …conflict[s] with the legislative intent." *See Rutherford v. Chaves Cnty.*, 2004-NMSC-010, ¶ 24.

If the Commission were to read Section 70-2-12(B)(4) as Goodnight suggests, with "the conjunctive use of 'and'…requir[ing] an interpretation that all elements must be present", *see State v. Montano*, 2020-NMSC-009, ¶ 36, 468 P.3d 838; it would essentially mean that the Division would only be permitted to make rules and orders that meet *all* 22 of the subparts, because each subsection is separated with an "and." *See* § 70-2-12(B). Goodnight asks the Commission to read

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one subpart of Section 70-2-12(B)(4) in isolation and out of context, as the only portion of the entire Oil and Gas Act applicable to the instant cases.

However, this position wrongly ignores the overriding requirement for all applications to the Division – that the Division prevent waste and protect correlative rights. *See* Section 70-2-11(A). This overarching requirement must be read in conjunction with Section 70-2-12(B), which provides that the Division "may make rules and orders…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]* ***to require wells to be drilled, operated and produced in such a manner as to prevent injury to neighboring leases or properties***." Section 70-2-12(B)(4), (7) (emphasis added); *see also Eldridge v. Circle K. Corp.*, 1997-NMCA-022, ¶ 29 ("[O]ur task is not to apply language literally when it would lead to counterproductive, inconsistent, and absurd results; we must harmonize the statutory language to achieve the overall legislative purpose.").

Further, this very provision was considered, and relied upon by the Division in Order No. R-22869-A, when it denied Goodnight's application for the proposed Piazza SWD Well No. 1. The Division found that "***Empire has provided sufficient evidence*** for continued assessment of the Unitized Interval for potential recovery of any additional hydrocarbon resources remaining in place" and 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). Empire was not required to show that the Grayburg was capable of producing in paying quantities, only that it should be continued to be assessed for the potential recovery of additional hydrocarbon resources.

Goodnight's insistence on siloing Empire into its manufactured burden of proof, derived from a misreading of one phrase in a subpart of a larger jurisdictional statutory framework, is precisely why Empire filed its Motion. Empire is requesting relief from the Commission because 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. This fact alone requires the Commission's intervention, as it is charged with doing "whatever may be reasonably necessary" "to prevent waste…and protect correlative rights." Section 70-2-11(A).

II. Goodnight and Empire each bear the burden of proof on their respective applications.

It is well established in New Mexico that administrative proceedings are subject to the common-law rule that the moving party bears the burden of proof. *Int'l Minerals & Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-032, ¶ 10, 81 N.M. 280. In a shocking turn, Goodnight presents the novel theory that Empire alone "ultimately bears the burden of proof and persuasion in all applications pending before the Commission." Goodnight Response at 17. In seeking to overturn the common law as we have known it, Goodnight cobbles together its own burden of proof, claiming that "the party seeking to change the status quo" has the burden of proof. *Id*. at 18. Goodnight relies on *Atlantic & Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. Ct. App. 1983), for this novel proposition. Close review reveals that Goodnight distorts the Colorado court's holding. The court stated, "as a general rule, the burden of proof rests upon the party who asserts

the affirmative of an issue." *Id*. at 165. In further explaining this general rule, the Colorado Court of Appeals goes on to state, "[t]he test is to determine which party would be successful if no evidence were given and then place the burden of proof on the adverse party. *In other words*, the party seeking to change the status quo has the burden on proof." *Id*. (emphasis added). This in no way creates some sort of new burden of proof that places the entirety of the burden – no matter who brings an application – on the party "seeking to change the status quo" on anything.

In applying the test set out by the Colorado Court of Appeals, if Goodnight were to fail to present sufficient evidence in support of its injection applications in Case Nos. 23614-23617, Goodnight would not be able to prevail. Thus, Goodnight is seeking to change the status quo by obtaining injection permits that do not currently exist. Looking at it the other way posed by the Court of Appeals, Goodnight's application in Case No. 23775, for example, seeks to change the status quo as Goodnight requests approval "to increase the approved maximum rate of injection in its Andre Dawson SWD #1." *See* 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 filed 8/31/2023). Therefore, the burden must lie with Goodnight on its own applications.

Goodnight also attempts to argue that Empire bears the burden of proof going forward because Goodnight has already met its *prima facie* case through its direct testimony and exhibits. *See* Goodnight Response at 2. It is well established that a party can only make a *prima facie* showing by demonstrating to the fact finder – in this case the Commission – "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10 (quoting *Goodman v. Brock*, 83 N.M. 789, 792-93 (1972)). To determine what facts must be established, the fact finder "must 'look to the

substantive law governing the dispute. . . .' The inquiry's focus should be on whether, under substantive law, the fact is 'necessary to give rise to a claim.'" *Id.* ¶ 11 (quoting *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 17, *inter alia*). Essentially, the key to making a *prima facie* case is the presentation of facts, to a fact finder, who then applies those facts to the applicable law, and determines whether or not the elements of the claim have been met. There has been no such showing by Goodnight, and no such finding by the Commission. Just because Goodnight says its documents provide evidence sufficient to support its *prima facie* case does not make it true.

In addition, following Goodnight's logic, Goodnight would now bear the burden of proof on Empire's applications because Empire has presented direct testimony and exhibits to establish a *prima facie* case. Goodnight ignores this fact and conveniently attempts to shift the entire burden of proof to Empire. Goodnight's request that the Commission overturn fundamental principles of common law and administrative law must be rejected.

Finally, Goodnight willfully ignores the fact that the Division has already heard Goodnight's application for authority to inject produced water into the San Andres formation using the proposed Piazza SWD Well No. 1 and found that Goodnight was **unable to meet its burden.** *See* Order No. R-22869-A. The Division determined that Goodnight was unable to succeed on its application because approving the proposed well "with the injection of UIC Class II fluids into the Unitized Interval would encroach towards the northeast and the interior of the EMSU and the use of the San Andres formation as a compatible source of make-up water for waterflood operation." Order No. R-22869-A at 8, ¶ 11. Goodnight alone 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. Reply to the Division's Response

The Division's Response to Empire's Motion argues that the Commission must consider the potential impact of injection on the Capitan Reef at the hearing on Goodnight's and Empire's applications. As an initial matter, Empire disagrees with the Division that Empire failed to seek information regarding the Division's position in these cases.[1] The Division did not raise water quality concerns in its Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024 (filed May 23, 2024) or in its witness disclosure filed on July 8, 2024. Empire relied on the Division's filings and was unaware of the Division's water quality concerns until the Division filed its Prehearing Statement on August 26, 2024. Regardless, Empire does not dispute that the Commission has jurisdiction over the Division's water quality concerns or that the concerns may be addressed at the February 2025 hearing if the Commission determines it is appropriate to do so.

IV. Conclusion

Goodnight continues to attempt to make these cases about something they are not. Goodnight has sought to apply for new SWDs and to increase the approved injection rate into existing SWDs. Empire is seeking to revoke Goodnight's existing injection permits and protest Goodnight's applications for additional wells. Goodnight and Empire each bear the burden of proof for their own applications. Empire has not filed an application to permit tertiary recovery of the unitized interval at this point in time and need not meet the burden set out in Section 70-7-6 of the Statutory Unitization Act. All Empire must show in these proceedings is that Goodnight's proposed and continuing actions will create waste and impair correlative rights. It will do so through evidence presented at hearing.

[1] *See* Oil Conservation Division's Response to Empire New Mexico's Motion for Clarification on the Scope of Hearing and Burden of Proof at 3.

Because there continues to be confusion on Goodnight's part of what exactly the parties must show in these cases, Empire requests that the Commission 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. The requested order will promote efficiency both before and during the hearing because it will allow the parties to focus their efforts and evidence on the applicable standard and avoid the wasteful exercise of preparing and presenting evidence that supports or contradicts an inapplicable legal standard and/or burden of proof.

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 September 19, 2024:

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