

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

**APPLICATIONS OF EMPIRE NEW MEXICO
LLC TO REVOKE THE INJECTION AUTHORITY
FOR WELLS OPERATED BY RICE OPERATING COMPANY,
LEA COUNTY, NEW MEXICO.**

Case Nos. 24433-24435, 24437-24439

**APPLICATION OF EMPIRE NEW MEXICO LLC
TO REVOKE THE INJECTION AUTHORITY GRANTED
UNDER ADMINISTRATIVE ORDER SWD-1754
FOR THE N 11 #001 WELL OPERATED BY PERMIAN LINE SERVICE,
LEA COUNTY, NEW MEXICO.**

Case No. 24436

**RESPONSE TO GOODNIGHT'S NOTICE OF WITHDRAWAL
OF OPPOSITION TO MOTION TO DISMISS**

Empire hereby responds to the Notice of Withdrawal of Opposition to Motion to Dismiss (“Notice”) filed by Intervenor Goodnight Midstream Permian, LLC (“Goodnight”) in the above-referenced matters. Importantly, Empire is not seeking to dismiss the subject applications with prejudice. Goodnight’s hyperbolic rhetoric advocating a contrary result is based on mistaken assertions and assumptions regarding the facts and the law. As explained below, Goodnight’s efforts now to pigeonhole Empire and limit its ability to obtain relief in the future for damages caused by other operators cannot be sustained under New Mexico law.

As a threshold matter, Empire notes that Goodnight’s bullet points on pages 2-3 of the Notice simply highlight the hoops that Empire has been forced to jump through over the course of two and a half years to protect its interests in New Mexico—interests that align with those of the Division, the Commission, and the State generally. Goodnight’s efforts to paint Empire in a bad light are desperate at best.

Goodnight appears to be using its Notice to argue doctrines of preclusion prior to determination of the issues. *See, e.g.*, Notice at 4 (“Empire should be, and will be, bound by the determination of the Commission following the Commission Hearing, subject to any rights regarding appeal.”); *id.* (“Empire should not be permitted the unique position to relitigate those issues against any party.”); *id.* at 5 (“[T]he Commission intends for Empire to be bound by its determination at the Commission hearing[.]”). Any claims regarding res judicata or collateral estoppel would need to be addressed after any pertinent determinations are made, and not prematurely as Goodnight suggests. *Bank of New York v. Romero*, 2016-NMCA-091, ¶ 25, 382 P.3d 991 (“[R]uling on issue preclusion at this point is premature insofar as there may be additional facts presented or ways of evaluating the standing issue in the second case that re-frame the issue.”); *id.* (“Our United States Supreme Court has specifically noted that ‘a court does not usually get to dictate to other courts the preclusion consequences of its own judgment.’” (citing *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011))). Indeed, the only cases cited by Goodnight recognize this fundamental principle. *Moffat v. Branch*, 2005-NMCA-103, ¶ 1, 138 N.M. 224 (explaining that the district court granted summary judgment, after concluding that the plaintiff’s claims were barred by the doctrine of res judicata”); *accord Town of Beloit v. Morgan*, 74 U.S. 618, 623 (1869).

Incredibly, Goodnight fails to recognize that a preclusive doctrine would, if applied as posited by Goodnight, bar any of the parties in the proceeding from relitigating issues decided in the proceeding on Goodnight-related operations. Goodnight assumes that the Commission will decide the facts in Goodnight’s favor. However, if the Commission rules in favor of Empire, Goodnight’s position means that all of the parties to the proceeding would be bound by findings favorable to Empire as it applies to their wells and operations, even though no evidence is presented on those issues. Rice Operating Company; Permian Line Company, LLC; OWL SWD

Operating LLC; and Pilot Water Solutions (“Other Operators”) would be precluded from offering evidence in support of their operations, and the Division would be required to revoke any permit implicated by findings favorable to Empire. Additionally, Goodnight would be bound by these same findings with respect to its wells outside of the EMSU. Goodnight provides no rationale as to how or why it has standing to raise a legal argument that would bind the Other Operators or the Division in the manner it proposes in the Notice.

Dismissal of applications for hearing without prejudice is a common practice before the Division. Applications are often dismissed at the request of an applicant and subsequently refiled. The Division’s practice in this regard is consistent with Rule 1-041(A)(1)(b) NMRA, which provides that voluntary dismissals by a plaintiff are ordinarily without prejudice. This practice is also consistent with the Division’s retention of jurisdiction in perpetuity with respect to the subject orders and operations thereunder, in the event that circumstances change. *See, e.g.*, SWD-1754 at 3 (Oct. 3, 2018). Goodnight provides no support for its position that the Division’s practice of dismissing applications without prejudice should be ignored here. And, in fact, Goodnight’s position would lead to absurd results, such as preventing the Division from satisfying its statutory obligation to reconsider the impact of Goodnight’s injection when facts or circumstances change.

Moreover, in its Notice, Goodnight assumes that the same facts apply to Goodnight and to Other Operators. As explained in Empire’s Motions, however, there are significant differences in the volumes of water injected by the various operators of saltwater disposal wells (“SWD”) in the subject area. *See, e.g.*, Case No. 24433, Empire’s Opposed Motion to Dismiss at 3-4 (Released to Imaging June 26, 2024) (demonstrating, inter alia, that the amount of water injected by Goodnight is over three times the amounts that other SWD operators are injecting in the area, consists of water of different composition, and is much more recent than injection by other SWD operators).

Consequently, Empire sought to dismiss the applications relating to Other Operators, without prejudice, to dispel Goodnight's efforts to consolidate those applications with the numerous Goodnight cases, which would have unnecessarily complicated this proceeding and obfuscated the significant issues caused by Goodnight. As further explained in the Motions, Empire sought to avoid the additional delay that would have undoubtedly occurred if the cases had been consolidated, causing yet additional adverse impact to the correlative rights of Empire and others, including the State of New Mexico, and exacerbating the waste already occurring as a result of Goodnight's operations.

Goodnight itself expressly detailed the differences between SWDs and related injection in its Motion to Limit the Scope of the Commission Hearing (May 23, 2024) ("Scope Motion"):

For example, offsetting disposal well injection rates and volumes, and production volumes from nearby water supply wells, are likely to substantially influence water movement in the San Andres within and around the EMSU. See Exhibit E. It will be important therefore to understand how these injection and water supply wells affect injection plumes within the San Andres for each non-EMSU SWD. Localized geologic conditions will also influence each SWD's radius of injection and water migration within the San Andres, especially as there is known reservoir anisotropy/heterogeneity and complex diagenetic alteration in the area. Similarly, produced water chemistries likely vary between SWDs, depending on the sources of injected water, their volumes and ratios, and any treatment protocols instituted over time. Individualized analyses of water chemistries from each non-EMSU SWD may influence whether and to what extent each SWD contributes to the water chemistry within the San Andres that Empire alleges is causing impairment in the EMSU.

Finally, similar to its claims that Empire must be bound by findings made in the Goodnight-related proceedings, Goodnight argues that Empire will be precluded from proceeding with its claims against Other Operators if the instant applications are dismissed. *See, e.g.*, Notice at 5 ("Goodnight does not waive its objection to Empire seeking to relitigate these factual issues after the Commission Hearing by reinitiating any proceeding, like this, it dismissed or initiating any other proceeding[.]"). Goodnight appears to be suggesting that Empire's claims against Other

Operators are compulsory claims that must be brought together with Goodnight's claims against Empire. This suggestion is inconsistent with compulsory joinder, which arises under the doctrine of res judicata.

Notably, the Commission already rejected Goodnight's lone efforts to consolidate certain applications relating to Other Operators. *See* Scope Motion at 2 (asking the Division director to refer Case Nos. 24432, 24434, and 24436 and the Commission to hear these cases together with the Empire and Goodnight applications); Joint Order on Goodnight's Scope Motion and the Oil Conservation Motion Concerning the Scope of the Evidentiary Hearing ¶ 3 ("Such evidence, testimony, and legal argument shall be limited to applications and wells by Goodnight or by Empire[.]"). The Rules of Civil Procedure, while not binding, provide guidance here in light of the Commission's order on scope.

Rule 1-021 NMRA expressly recognizes a decision maker's discretion to add or drop parties. *Id.* ("Any claim against a party may be severed and proceeded with separately."). Perhaps more significant, Other Operators have never sought to consolidate Empire's applications involving Other Operators with the applications involving Goodnight. *See* Rule 1-020(A) NMRA ("All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."). And no party has argued that Other Operators are indispensable parties to the cases involving Goodnight. *See* Rule 1-019 NMRA.

As explained by our Court of Appeals, "[A] plaintiff ... may join [multiple claims] if he wishes, but he is not obliged to do so out of fear that he will lose any claims that he omits to join. Joinder of multiple claims is permissive, not compulsory." *Aguilar v. Roosevelt Cnty. Bd. of Cnty.*

Commissioners, No. A-1-CA-36828, ¶ 14, 2020 WL 7312034, at *4 (N.M. Ct. App. Dec. 3, 2020) (quoting Restatement (Second) of Judgments § 24 cmt. h (alterations in original)). This is true because res judicata will bar a subsequent claim only when that claim arises out of the same transaction resolved in the in the first action. *Id.*; see *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 10, 139 N.M. 99.

It remains to be seen whether the doctrines of res judicata or collateral estoppel may be invoked by any party. It cannot be disputed, however, that such a determination must be made in a future proceeding, and not prematurely, as Goodnight appears to contend.

For all of these reasons, the Motions should be granted and the above-referenced cases should be dismissed without prejudice. If the Division is inclined to agree with Goodnight's position set forth in the Notice and dismiss the applications with prejudice, however, Empire will decline to seek vacation of the stay and will withdraw its motions to dismiss.

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
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