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. 24018-24027**
APPLICATION OF GOODNIGHT MIDSTREAM PERMAN, 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. R-22869-A**

EMPIRE NEW MEXICO, LLC'S RESPONSE TO OIL CONSERVATION DIVISION'S MOTION TO COMPEL EXPERT WITNESS TESTIMONY OF ROBERT LINDSAY, Ph.D.

COMES NOW Empire New Mexico, LLC, by and through its undersigned counsel of record and for its *Response to Oil Conservation Division's Motion to Compel Expert Witness Testimony of Robert Lindsay, Ph.D.,* states as follows:

Argument and Authorities.

This Commission's *Order Granting Empire New Mexico, LLC's Motion for Four-Day Extension of Time to File Requests for Subpoenas,* at Paragraph 9, allowed Goodnight to depose Dr. Lindsay. Dr. Lindsay's deposition took place on January 17, 2025. When Goodnight discovered that Empire's expert witnesses relied on a report by Dr. Lindsay, Goodnight – not OCD – requested the deposition of Dr. Lindsay.

Empire at all times has acted in accordance with the Hearing Officer's *Procedural Order* in providing discovery.

Empire provided all the documents Dr. Lindsay relied on in making his expert opinions, including all geological materials. Empire even provided Dr. Lindsay's Ph.D. dissertation. At Dr. Lindsay's deposition, counsel for Empire agreed to provide Dr. Lindsay's final report, once it was finalized. (Lindsay Deposition, page 225 lines 7 – 10)

During examination by counsel for the Oil Conservation Division (OCD), Empire objected based both on attorney-client privilege and the work-product doctrine. Counsel for Empire first objected to OCD's line of questioning regarding conversations he had with Empire's attorneys:

Q: And have you spoken – my understanding is you've had conversation with Empire's counsel's, I'll call them trial counsel, the attorneys who are going to appear in this case before the OCC.

Have you – you've spoken with them?

A: Oh you mean like Ernie and Sharon?

Q: Yes.

…

Q: And what did you discuss with them?

Mr. Padilla: Objection: Attorney-client privilege.

Mr. Moander: Ernie, I'm going to take a stand here on that objection.

Is it your representation that Dr. Lindsay is your client?

Mr. Padilla: Yes.

(Lindsay Deposition page 223 line 7 – page 223 line 25)

Shortly thereafter, Empire again objected to questioning of Dr. Lindsay as to conversations between counsel and Dr. Lindsay. The following discussion took place:

Q: Have you discussed rebuttal testimony with anybody involving this case, Dr. Lindsay?

A: With Empire, yes.

Q: And are you intending to provide rebuttal testimony in this case?

A: Yes.

Mr. Padilla: Work product.

Mr. Moander: All right. So, to be clear, is that an objection to me learning what rebuttal testimony will be forthcoming?

Mr. Padilla: Yes.

Mr. Moander: Okay. So I'm going to have to talk with the hearing officer about that, too. This is a new objection.

So, Mr. Padilla, are you instructing this witness not to answer?

Mr. Padilla: Yes, I am instructing him not to answer, because we have – we haven't finalized the rebuttal testimony.

Mr. Moander: And it's your position, Mr. Padilla, that rebuttal testimony is not discoverable at this stage of things?

Mr. Padilla: Yes. You can have the report.

Mr. Moander: Excuse me? What was that?

Mr. Padilla: Once we finalize the report, I think you can discover the report.

(Lindsay Deposition page 224 line 10 -- page 225 line 10)

At no time did Empire refuse to provide Dr. Lindsay's report. Empire only objected to conversations between counsel for Empire and Dr. Lindsay, because Dr. Lindsay's rebuttal testimony is not discoverable at this stage of the proceedings.

Basically, Empire was objecting to providing its expert's draft opinions. An expert's draft opinion is protected from discovery by Rule 1-026(B)(5) NMRA unless exceptional circumstances are shown. According to that Rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial only upon a showing of substantial need and undue hardship to obtain the substantial equivalent by other means. Under that Rule, the court – or in this case, the Hearing Officer -- must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

In the case of *S.F. Pacific Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 42, 143 N.M. 215, 229, 175 P.3d 309, relying on Rule 1-026(B)(4) NMRA, the Court of Appeals held that the mental impressions, conclusions, opinions, and legal theories of an expert were not discoverable *Id.* ¶ 42.

An expert's draft opinions are generally protected from discovery as opinion work product unless there is a substantial need and undue hardship shown, and even then, the court must protect against disclosure of the expert's mental impressions and opinions. As Rule 1-026(B)(5) NMRA states:

> (5) *Trial preparation materials.* Subject to the provisions of Subparagraph (6) of this paragraph, a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the

> substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

(Emphasis added.)

Empire's objections are well-founded, based on both New Mexico and federal case law pertaining discovery of opinions by expert witnesses.

Under Fed. R. Civ. P. 26(b)(4)(B), disclosure will be permitted only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." The reason is obvious—such disclosure would violate the attorney work product doctrine and attorney-client privilege. *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 665, 62 Fed. R. Evid. Serv. 577, 56 Fed. R. Serv. 3d 710 (3d Cir. 2003). (Where a federal rule is essentially identical to a New Mexico Rule, "[w]e may look to federal law for guidance in determining the appropriate legal standards to apply under these rules." *Romero v. Philip Morris, Inc.,* 2005–NMCA–035, ¶ 35, 137 N.M. 229, 109 P.3d 768, *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶ 20, 142 N.M. 557, 564, 168 P.3d 129, 136.)

"It is clear that all documents and tangible things prepared by or for the attorney of the party from whom discovery is sought are within the qualified immunity given to work product, so long as they were prepared in anticipation of litigation or preparation for trial." 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024, at 359 (2d ed. 1994). (Emphasis added.)

Rules 1-026(B)(3)(a) and (b) NMRA protect communications between the party's attorney and any witness required to provide a report under Rules 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: (i) relate to

compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. In this case, Dr. Lindsay's communications to Empire's counsel do not meet any of these criteria.

Indeed, until the filing of the Division's motion to compel, during the depositions, all counsel have been respectful of each expert's communications with their respective parties' counsel. Counsel have been careful not to inquire about discussions that experts have had with attorneys because those discussions are protected as attorney-client communications. Likewise, drafts by an expert prepared in rebuttal would reveal the mental impressions of the attorneys, as they were prepared in anticipation of the upcoming adversarial proceedings.

Empire's counsel correctly objected to OCD's questioning of Dr. Lindsay based on attorney-client privilege and the work product doctrine. Therefore, the *Motion to Compel* is not well-taken and should be denied.

Conclusion.

For the foregoing reasons, Empire respectfully requests the Commission to deny OCD's *Motion to Compel* and grant any other relief to which the Commission may deem Empire to be entitled.

Respectfully submitted,

PADILLA LAW FIRM, P.A.

By: *Ernest L. Padilla*
Ernest L. Padilla
P.O. Box 2523
Santa Fe, NM 87504-2523
(505) 988-7577
padillalawnm@outlook.com

Dana S. Hardy
Jaclyn McLean
P.O. Box 2068
Santa Fe, NM 87504-2068
Phone: (505) 982-4554
Facsimile: (505) 982-8623
dhardy@hinklelawfirm.com
jcmlean@hinklelawfirm

Sharon T. Shaheen
Spencer Fane LLP
P.O. Box 2307
Santa Fe, NM 87504-2307
(505) 986-2678
sshaheen@spencerfane.com
ec: dortiz@spencerfane.com

Attorneys for Empire New Mexico, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record by electronic mail this _____ day of January, 2025, as follows:

Michael H. Feldewert	mfeldewert@hollandhart.com
Adam G. Rankin	agrankin@hollandhart.com
Paula M. Vance	pmvance@hollandhart.com
Nathan R. Jurgensen	nrjurgensen@hollandhart
Miguel A. Suazo	msuazo@bwenergylaw.com
remain	jessek.tremaine@emnrd.nm.gov
Chris Moander	chris.moander@emnrd.nm.gov
Matthew M. Beck	mbeck@peiferlaw.com

/s/ Ernest L. Padilla
Ernest L. Padilla