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

APPLICATION OF EMPIRE NEW MEXICO TO REVOKE THE INJECTION AUTHORITY GRANTED UNDER ORDER NO. R-22026 FOR THE ANDRE DAWSON SWD #001 WELL OPERATED BY GOODNIGHT MIDSTREAM PERMIAN LLC, LEA COUNTY, NEW MEXICO.

CASE NO. 24018

APPLICATION OF EMPIRE NEW MEXICO TO REVOKE THE INJECTION AUTHORITY GRANTED UNDER ORDER NO. R-22027 FOR THE ERNIE BANKS SWD NO. 1 WELL OPERATED BY GOODNIGHT MIDSTREAM PERMIAN LLC, LEA COUNTY, NEW MEXICO,

CASE NO. 24019

APPLICATION OF EMPIRE NEW MEXICO TO REVOKE THE INJECTION AUTHORITY GRANTED BY ADMINSTRATIVE ORDER SWD-2307 FOR THE RYNO SWD #001 F/K/A/ SNYDER SWD WELL NO. 1 OPERATED BY GOODNIGHT MIDSTREAM PERMIAN LLC, LEA COUNTY, NEW MEXICO,

CASE NO. 24020

APPLICATION OF EMPIRE NEW MEXICO TO REVOKE THE INJECTION AUTHORITY GRANTED UNDER ORDER NO. R-21190 FOR THE SOSA SA 12 NO, 2 WELL OPERATED BY GOODNIGHT MIDSTREAM PERMIAN LLC, LEA COUNTY, NEW MEXICO.

CASE NO. 24025

GOODNIGHT MIDSTREAM PERMIAN, LLC'S REPLY IN SUPPORT OF ITS CONSOLIDATED MOTION FOR PARTIAL SUMMARY JUDGMENT

Goodnight Midstream Permian, LLC ("Goodnight") (OGRID No. 372311), through its undersigned attorneys, hereby submits this Reply in support of its Consolidated Motion for Partial Summary Judgment (the "Motion") in the above-referenced matters.

While most parties joined the Motion, including Rice Operating Company, Permian Line Service, LLC, and Pilot Water Solutions SWD, LLC, the Oil and Gas Conservation Division ("OCD") and Empire New Mexico, LLC ("Empire") opposed the Motion and filed Responses. Given that there is substantial overlap among the arguments raised in OCD and Empire's responses, Goodnight submits this consolidated Reply.

I. Introduction

The OCD and Empire and have failed to raise a genuine fact issue precluding partial summary judgment finding that the Commission lacked authority to unitize the San Andres aquifer and include it in the unitized interval under Order Nos. R-7765 and R-7767.

The San Andres should have never been included in the EMSU or the Eunice Monument Grayburg-San Andres special pool. The facts, evidence, and testimony presented to the Commission **at the time it created the EMSU** and Eunice Monument Grayburg-San Andres special pool were legally deficient as a matter of law. The facts the OCD and Empire point to fail to raise a genuine fact issue.

The San Andres was not shown to be an oil-bearing formation at the time it was included in the EMSU and the Eunice Monument Grayburg-San Andres special pool. The OCD and Empire point to no specific, concrete evidence presented to the Commission in 1984 that there were hydrocarbons in the San Andres formation, as separate and distinct from the Grayburg-San Andres pool or the proposed unitized interval. Instead, they point to vague and ambiguous statements from the testimony or evidentiary record that requires a leap of logic, supposition, or conjecture that are legally insufficient from which to draw a reasonable inference that the San Andres was hydrocarbon-bearing. Such wobbly evidence—in contrast to the specific and definitive evidence, testimony, and exhibits presented at hearing showing that the San Andres

was non-productive and would serve as the source of water supply—is not sufficient to raise a genuine fact issue.

Nor do the OCD or Empire raise a genuine fact issue regarding whether at the time of the Commission hearing the San Andres was reasonably defined by development, as required under the New Mexico Statutory Unitization Act. Indeed, in its own testimony Empire concedes that "No wells have produced from the San Andres at the EMSU[.]"[1] Empire has no reasonable basis to dispute this fact. It is conceded. The OCD likewise points to no specific facts showing that the San Andres formation—as distinct from the Grayburg-San Andres pool or the unitized interval—was productive as of 1984. But even if the San Andres formation produced some oil—prior to 1984 or since—it was not, and still has not been, reasonably defined by development, as the Act requires. Neither the OCD nor Empire proffer any genuine fact showing how the Commission could possibly find that the San Andres has been reasonably defined by development. This fact alone supports granting the Motion.

Each of these two fundamental legal infirmities gives rise to an independent basis to grant the Motion. **The evidence and testimony presented to the Commission under Order Nos. R-7765 and R-7767 (collectively, the "Orders") does not, as a matter of law, support inclusion of the San Andres formation in the unitized interval of the EMSU or in its special pool**. As a non-hydrocarbon bearing aquifer that has not been reasonably defined by development, the San Andres does not qualify for inclusion as part of the EMSU's unitized interval. And, as explained in detail below, the legal and equitable arguments the OCD and Empire raise are equally unavailing and should be rejected.

[1] *See* **Rebuttal Exhibit B**, attached hereto.

The Commission should grant this Motion or, in the alternative, hold a decision in abeyance pending resolution of the hearing on the merits.

II. Applicable Law

Under New Mexico law, "summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment." *Romero v. Philip Morris Inc*., 2010-NMSC-035, ¶ 10, 242 P.3d 280 (citing *Roth v. Thompson*, 1992-NMSC-011, 825 P.2d 1241)). To establish a prima facie showing, a movant must provide evidence that "is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Id*. (citation omitted). Once the prima facie showing is established, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require hearing on the merits. *Id*. (quotation omitted). A non-movant "may not simply argue that such evidentiary facts might exist," but rather "must adduce evidence to justify a trial on the issues." *Id*. (citing *Dow v. Chilili Coop. Ass'n*, 1986-NMSC-084, 728 P.2d 462; *Clough v. Adventist Health Sys., Inc*., 1989-NMSC-056, 780 P.2d 627. Evidence adduced must result in reasonable inferences and those inferences must be a logical deduction from facts proved. *Id*. (citation and quotation omitted). "When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment. Only when the inferences are reasonable is summary judgment inappropriate." *Id*. In addition to requiring reasonable inferences, to survive summary judgment the alleged facts at issue must be material. *Id*. at ¶ 11. "A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case." *Id*. (quoting *Parker v. E.I. Du Pont de Nemours & Co*., 1995- NMCA-086, 909 P.2d 1.

III. Argument

1. Goodnight met its prima facie burden.

Goodnight is entitled to summary judgment because it provided evidence showing that the Commission improperly included the San Andres formation within the EMSU unitized interval and the Eunice Monument Grayburg-San Andres special pool. The evidence adduced in the Motion proves that the evidence and testimony presented to the Commission under Order Nos. R-7765 and R-7767 ("Orders") did not, as a matter of law, support the Commission's decision to include the San Andres in the unitized interval of the EMSU or in a special pool. Because the Commission is required to make specific findings, and the findings it made were not supported by the evidence presented to the Commission, the Orders are void as a matter of law.

The Motion established the material facts in question and those facts remain rebutted. It remains undisputed that the Commission lacked authority to include the San Andres in the pool because the evidence presented to the Commission indicated the San Andres is a non-hydrocarbon bearing aquifer that was not reasonably defined by development. *See* Motion at 9-12 (citing evidence that the San Andres is a non-hydrocarbon bearing formation) and Motion at 17-19 (citing evidence that the San Andres is not reasonably defined by development).

- It is undisputed that the San Andres was not "reasonably defined by development" because it was not producing oil or gas in 1984, when the Commission considered Order Nos. R-7765 and R-7767. *See* Empire Response at 7, ¶ 7 ("Empire admits that the San Andres was not producing oil and gas" in 1984). Empire concedes in its testimony that "No wells have produced from the San Andres at the EMSU[.]" *See* Testimony of W. West, Empire Exhibit I, attached as **Rebuttal Exhibit B**.

- It is undisputed that the inclusion of the San Andres in the unitized interval would not yield more recovery than primary recovery alone because there was no primary recovery. *See* Empire Response at 7, ¶ 7. Neither the OCD nor Empire raise dispute this fact.

Based on these undisputed facts, Goodnight is entitled to judgment as a matter of law.

2. Empire and OCD did not adduce evidence to justify a hearing on the issue.

In responding to Goodnight's undisputed material facts ("UMFs"), Empire and OCD failed to satisfy their burden to identify any specific evidentiary facts that would require hearing on the merits. Neither Empire nor OCD adduced evidence that would lead to the reasonable inference that the Commission properly included the San Andres aquifer in the EMSU.

i. UMFs 1, 2, 3, 4, 5, 12, and 13.

Empire and OCD did not dispute UMF Nos. 1, 2, 3, 4, 5, 12, and 13. *See* Empire Response at 3 & 8; OCD Response at 3.[2]

ii. UMF 6

Empire and OCD dispute that the "San Andres formation within and around the Unit Area is a geologically separate zone from the overlying Grayburg and Lower Penrose formations and does not share a common accumulation of crude petroleum oil or natural gas or both with either the Grayburg or Lower Penrose formations." UMF 6; *see also* Rebuttal Exhibit B (Empire conceding that the San Andres is a separate zone because no wells produced from the San Andres in the EMSU). Neither party's response demonstrates the existence of specific evidentiary facts which would require a hearing on the merits. Their allegedly disputed facts do

[2] Empire also does not dispute UMF 8.

not support reasonable inferences and are immaterial, and therefore cannot serve as a basis for denying summary judgment. *See Romero*, 2010-NMSC-035, ¶ 10.

Empire disputes UMF 6 "because the San Andres and Grayburg intervals have been known to communicate since field discovery on March 21, 1929." Empire Response at 3. Empire cites several statements from its witnesses to argue that the "San Andres is in hydraulic communication with the Grayburg." Empire Response at 4. Empire does not dispute the material portion of UMF 6, which states that the San Andres "does not share a common accumulation of crude petroleum oil or natural gas or both with either the Grayburg or Lower Penrose formations." UMF 6; *see also* Rebuttal Exhibit B. Whether hydraulic communication occurs between the San Andres and Grayburg formation has no bearing on whether the San Andres shares a common accumulation of crude petroleum with the Grayburg. Accordingly, the evidence Empire adduced to dispute UMF 6 does not lead to a reasonable inference that the San Andres shares a common accumulation of crude petroleum with the Grayburg and does justify a hearing on that issue.

OCD argues that the history of the EMSU and special pool rebut UMF 6. OCD's rebuttal does not create an issue of material fact because the OCD history adduced does not dispute the critical facts: no history exists to support the conclusion that the San Andres contains oil. OCD cites Motion Exhibits 3 and 11 to argue that, historically, the San Andres has been included in the Eunice oil pool. OCD Response at 5-8. The evidence OCD adduced is not responsive the whether the San Andres contains oil or whether the Commission considered such evidence in issuing the Orders. The whole point of the Motion is to show that the Orders are invalid because there was no evidence presented to the Commission that supported the inclusion of the San Andres in the EMSU. No evidence presented to the Commission indicated that the San Andres

contained oil. That the Commission included the San Andres in the EMSU without considering evidence that the San Andres contains oil is precisely why the Orders are invalid. The gravamen of the Motion is the San Andres should never have been included in the unitized interval. OCD's history of prior orders does not call that into question. In addition, OCD's history of prior orders does not adduce evidence that would result in reasonable inference that the San Andres contains oil.[3]

Neither party's responses to UMF 6 demonstrates the existence of specific evidentiary facts which would require a hearing on the merits.

iii. UMF 7

Empire and OCD dispute that the oil column reasonably defined by development was "limited to the Grayburg and Lower Penrose formations and does not extend into the San Andres." UMF 7. Neither party's response demonstrates the existence of specific evidentiary facts which would require a hearing on the merits.

Empire disputes UMF 7 by arguing that testimony from the EMSU Hearing transcript indicates that the "Commission found that the oil column for unitization included the San Andres formation." Empire Response at 5. The cited testimony from Gulf's geologist, Ray Hoffman, does not support the inference that the "Commission found that the oil column for unitization included the San Andres formation." That portion of Mr. Hoffman's testimony is an answer to a question about what formations the unitized area would cover. Mr. Hoffman's response

[3] OCD claims Goodnight relied "on maps without testimonial support." OCD Response at 8. OCD is mistaken that Goodnight did not provide testimonial support for the maps cited in UMF 6. The maps are Motion Ex. 7 & 8, which were exhibits that Gulf's geologist, Ray Hoffman, testified about during the EMSU Hearing in 1984. For testimonial support supporting Motion Exs. 7 & 8, *see* Motion Ex. 9 at 46-47 (Mr. Hoffman testifying about Ex. 7 and explaining that the oil column is limited to -325 subsea up to -100 subsea and that -325 is the lower limit of oil production in the unit).

indicates that the unit would cover the Grayburg and San Andres formations. This answer does not lead to the reasonable inference that the "Commission found that the oil column for unitization included the San Andres formation" because the rest of Mr. Hoffman's testimony makes clear that the lower limit of production is -325 feet subsea, which is above the top of the San Andres. *See* Motion Ex. 9. Because Empire's disputed facts do not reasonably support Empire's inferences, they cannot serve as a basis for denying summary judgment. In any event, Empire has conceded in its testimony that the San Andres has not produced and, therefore, cannot be deemed to be reasonably defined by development. *See* Rebuttal Exhibit B (West testimony stating that "No wells have produced from the San Andres at the EMSU")

OCD disputes UMF 7 by citing evidence that (1) "the San Andres was already pooled," (2) the San Andres "fell within the oil production zone in the area," (3) Gulf sought to unitize "all oil production from the lower Penrose, Grayburg, and San Andres formations," and (4) Gulf represented that "the San Andre contributes very little if any production to the field." OCD Response at 8-9. First, as described above in relation to UMF 6, evidence showing the San Andres was already pooled or that Gulf sought to include the San Andres in the unit does not rebut the undisputed fact that oil development was limited to the Grayburg and Lower Penrose formation and does not extend into the San Andres. The undisputed facts remain: the Commission did not consider whether there was oil in the San Andres because such information was not presented to the Commission. The entirety of the EMSU Hearing transcript supports that undisputed fact and none of the evidence OCD adduced rebuts it. Second, it is not reasonable to infer that including the San Andres in the unitized interval leads to the conclusion that the Commission considered evidence that the San Andres contained oil and was reasonably defined by development. Third, the statement "[the] San Andres contributes very little if any oil

production to the field" is not sufficient to overcome summary judgment because it remains uncontested that there is no history of production from the San Andres. OCD's evidence rebutting UMF 7 is not sufficient to defeat summary judgment.

iv. UMF 8

OCD disputes that "the oil-water contact around and within the Unit Area is at a depth of approximately -325 feet subsea, well above the top of the San Andres formation." UMF 8. OCD argues that UMF 8 is disputed because Mr. Hoffman's testimony conflicts with it. It is unreasonable to conclude that Mr. Hoffman's testimony rebuts UMF 8 because at the time of his testimony, it was common nomenclature to group the San Andres together with the Grayburg. Mr. Hoffman's positive response to a question asking about the "Grayburg-San Andres" does not lead to the conclusion that Mr. Hoffman contradicted his earlier testimony that the oil-water contact was at "a depth of approximately -325 feet subsea." *Compare* Motion Ex. 9 at 46:14-16 *with* 46:24-47:13. The context of Mr. Hoffman's testimony forecloses OCD's inference that a general refence to the "Grayburg-San Andres" contradicted his prior testimony. Reliance on imprecise nomenclature is not sufficient to require a hearing because it does not create a genuine issue of fact.

v. UMF 9

Empire does not directly challenge that UMF 9 which states, "[n]o hydrocarbons have been reported in the public records as having been produced from the San Andres within or around the Unit Area." UMF 9. Empire tacitly admits that there is no record of production, arguing instead, that such "public records does [sic] not demonstrate that hydrocarbons do not exist in the San Andres formation." Empire Response at 6. Empire cites the inclusion of the San Andres in the Unit allocation formula as evidence to dispute UMF 9, but that does not contradict

that there has never been any record of production from the San Andres. Empire's reference to the allocation formation does not create a genuine issue of fact for the same responses OCD's arguments that the San Andres was already pooled in response to UMFs 6 & 7 do not defeat summary judgment. Evidence showing the San Andres was already pooled does not rebut UMF 9. The undisputed fact remains: there is no record of oil production from the San Andres in the Unit Area. It is not reasonable to infer that including the San Andres in the Unit allocation formula leads to the conclusion that there has been any record of production from the San Andres. Indeed, Empire concedes the point in its testimony. *See* Rebuttal Exhibit B. Empire's evidence rebutting UMF 9 is not sufficient to defeat summary judgment.

OCD disputes UMF 9 by citing Motion Ex. 13, which includes the statement "[the] San Andres contributes very little if any oil production to the field." OCD Response at 10. OCD only includes part of the sentence to obscure the true meaning of its evidence. The rest of the sentence confirms that the San Andres is not a source of oil production, but rather a source for water. *See* Motion Ex. 13, ("The San Andres contributes very little if any oil production to the field and serves primarily as a source for injection make-up water and as a zone for salt water disposal.") (emphasis added). Evidence adduced must result in reasonable inferences and those inferences must be a logical deduction from facts proved. *Romero*., 2010-NMSC-035, ¶ 10 (citation and quotation omitted). "When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment. Only when the inferences are reasonable is summary judgment inappropriate." *Id*. It is not reasonable to infer that the statement in Exhibit 13 refutes the evidence that no hydrocarbons have been reported in the public records as having been produced from the San Andres within the Unit Area. If anything, the statement in Exhibit 13 confirms that the San Andres is not an oil producing formation; it's a water producing

and disposal formation. OCD's evidence rebutting UMF 9 is not sufficient to defeat summary judgment

vi. UMF 10

UMF 10 states, "Gulf presented evidence and testimony that the proposed waterflood operations within the EMSU would target the oil column and, therefore, would be limited to the Grayburg and Lower Penrose formations and expressly excluded the San Andres from its proposed waterflood operations."

Empire disputes UMF 10, which is specifically about the evidence Gulf presented at the EMSU Hearing, by referencing facts related to present-day evidence about a ROZ. Empire adduced no evidence that dispute what Gulf presented to the Commission at the EMSU Hearing. In fact, Empire effectively concedes that the evidence presented at hearing was limited to showing that the "waterflood would target the oil column of the Grayburg formation." *See* Resp. at 6. Empire's proffered evidence does not lead to the conclusion that the Commission was presented evidence that the waterflood targeted anything other than the Grayburg. None of Empire's evidence is material because it does not address what was presented to the Commission. Empire's evidence does not create a genuine issue of material fact to justify denying the Motion.

OCD disputes UMF 10 on the same basis as UMFs 6, 7, and 9. *See* OCD Response at 10 (explaining that "OCD addressed the issue of production several times above, both in terms of documents showing possible recovery from the San Andres and that the Eunice-Monument Oil Pool terminates at the base of the San Andres as a matter of law and fact."). OCD's response to UMF 10 does not create a genuine issue of material fact for the same reasons stated above regarding UMFs 6, 7, and 9.

vii. UMF 11

UMF 11 states, "the San Andres formation is non-productive and 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 makeup water in the future." UMF 11.

Empire admits UMF 11 to the extent that "the San Andres was not producing oil and gas from the San Andres in 1984," but that admission "does not mean that the San Andreas did not contain any oil and gas." Empire Response at 7. Empire adduced evidence from its experts and witnesses that the San Andres "has a ROZ." *Id*. at 7. Empire's evidence does not lead to the conclusion that the Commission thought the San Andres contains any oil and gas. None of Empire's evidence is material because Empire's evidence does not address whether the Commission thought the San Andres contains any oil. The facts Empire adduced are not material for the purpose of summary judgment because those facts have no bearing on the outcome of the case. *Romero*., 2010-NMSC-035, ¶ 10.

OCD disputes UMF 11 on the same basis as UMFs 6, 7, 9, and 10. *See* OCD Response at 10. OCD's response to UMF 11 does not create a genuine issue of material fact for the same reasons stated above regarding UMFs 6, 7, and 9.

For the foregoing reasons, neither Empire nor OCD's response demonstrates the existence of specific evidentiary facts which would require hearing on the merits.

3. Laches does not bar Goodnight's Motion.

OCD argues that Goodnight's Motion "amounts to a stale claim barred by laches." OCD Response at 13-15 (citing no authority). The Commission can easily reject OCD's laches argument because a party may challenge a void order at any time.

Laches does not apply to Order Nos. R-7765 and R-7767 because they were void when the Commission issued them, and the New Mexico Rules of Civil Procedure require void orders to be set aside. Rule 1-060.B(4) provides, "On motion and on such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . the judgment is void"). N.M. R. Civ. P. Dist. Ct. 1-060.B(4). A motion to void an order can be brought at any time, and does not permit a court to exercise jurisdiction to deny the motion. *Classen v. Classen*, 1995-NMCA-022, ¶ 9, 893 P.2d 478 ("There is no time limitation on a motion filed pursuant to SCRA 1-060(B)(4)."); *see also Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 12, 575 P.2d 1340 (void orders "may be attacked at any time in a direct or collateral action."); *see also Molenaar v. Tr. of the De Graaf Family Trust*, 2018 N.M. App. Unpub. LEXIS 190, *12 (concluding laches "has no application" where a party challenges a void judgment); *Deutsche Bank Nat'l Tr. Co. v. Johnston*, 369 P.3d 1046, 1057 (N.M. 2016) ("party can raise subject matter jurisdiction at any time, even through a collateral attack alleging that a final judgment is void for lack of subject matter jurisdiction."). Given that a party may challenge a void order at any time, laches does operate to bar Goodnight's Motion.

Goodnight also rejects the assertion that the Motion is stale. Goodnight acted promptly to protect its interests after Empire sought to revoke Goodnight's injection authority. Before that occurred, Goodnight operated under its injection authority without issue for many years and did not know its authority to inject produced water into the San Andres formation would be called into question. If anything, Empire's claim is stale and subject to laches because Empire was dilatory in bringing its claims to attack Goodnight's longstanding inject authority.

4. Stare decisis does not justify perpetuating void Orders.

OCD's stare decisis argument is essentially a variation on its laches argument. OCD argues that stare decisis should operate to prevent Goodnight from obtaining summary judgment that the Orders are void as a matter of law because those Orders have "been decided and should remain decided." OCD Response at 15. OCD's argument suffers from a fatal flaw: it assumes the Orders were legally sound when the Commission entered them back in the 1980s. As the Motion demonstrates, the Orders are void because the Commission lacked authority to issue them. *See* Motion at 9-19.

First, the Commission retained jurisdiction over the Orders to ensure its ability to correct any errors in the Orders. In Order No. R-7765, for example, the Commission wrote, "Jurisdiction of cause is retained for the entry of such further orders as the Commission may deem necessary." Motion Ex. 4 at 11; *see also* Motion Ex. 5 at 3 (same); Motion Ex. 6 (Commission exercising its jurisdiction to correct the Orders). Because the Commission retained jurisdiction to enter further orders the it deems necessary, it retains jurisdiction to enter an order granting the Motion—especially where it is necessary to correct a legal infirmity.

Second, the Orders fit within the exception to stare decisis because Orders that are void are "so unworkable as to be intolerable." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 34, 965 P.2d 305. As discussed above, a party may contest void orders at any time. N.M. R. Civ. P. Dist. Ct. 1-060.B(4). And where an order is proven to be void, the Commission may not exercise its jurisdiction to deny the motion. *Classen*, 1995-NMCA-022, ¶ 9. Here, the Orders are void and thus not protected by stare decisis.

To the extent that the Commission finds any merit in OCD's stare decisis argument, it should consistently apply its reasoning and reject Empire's application to revoke Goodnight's

injection authority. All the reliance and regulatory concerns OCD advanced in its response similarly would apply to the orders authorizing Goodnight to inject produced water into the San Andres. Goodnight has operated pursuant to its injection authority from the Commission for years, and in reliance on the Division's previously approved injection orders authorizing disposal in the San Andres before the EMSU was even created. Over that time, Goodnight relied on that authority, and the Division's approval of other SWDs, and spent millions of dollars to develop its operations infrastructure. If the Commission is persuaded that stare decisis justifies perpetuating the Order, it should act consistently and conclude that stare decisis justifies perpetuating Goodnight's injection authority as well.

5. Collateral Attack

Empire argues the Motion is an "impermissible collateral attack on the Commission's unitization orders." Empire Response at 10. Empire cites no authority to support its argument except one case that merely defines "collateral attack." *Id*. (citing *Phoenix Funding, LLC v. Aurora Loan Servs., LLC,* 2017-NMSC-010, ¶ 32). As discussed in Section 3 above, the New Mexico Supreme Court has already concluded that void orders "may be attacked at any time in a direct or collateral action." *Nesbit*, 1977-NMSC-107, ¶ 12 (emphasis added).

It is inequitable for Empire to make this argument because it previously stated that Goodnight should do exactly what it now claims Goodnight cannot do. Empire should be estopped from taking a contradictory position now because it invited Goodnight to raise this precise issue. Under the doctrine of unclean hands, a complainant may not obtain relief "where he or she has been guilty of . . . inequitable conduct in the matter with relation to which he or she seeks relief." *Wells Fargo Bank N.A. v. Graham*, 2023-NMCA-023, 14 (quoting *Randles v. Hanson*, 2011-NMCA-059, ¶ 21, 258 P.3d 1154). The unclean hands doctrine applies "in

circumstances where the complainant has dirtied his or her hands in acquiring the right he or she now asserts." *Id*. Here, the unclean hands doctrine should operate to estop Empire from complaining about Goodnight's Motion because Empire previously suggested Goodnight take the action for which Empire now complains.

At a hearing on Empire's motion to dismiss Goodnight's application in Case No. 22626 (the Piazza case), the OCD Hearing Officer suggested—and Empire's counsel agreed—that Goodnight should file an application to amend the unit interval. Ex. 1 at 27:24-28:2 (the Hearing Officer stated, "if you're concerned that the order is overbroad or improper as you put it, why not file an application to amend the order?") and 43:16-20 (Empire's counsel concurred with the Hearing Officer's suggestion, "you have to go back and amend the unitized vertical of the unit."). The Hearing Officer's suggestion and Empire counsel's concurrence put Goodnight on notice that it may need to amend the unit interval. Amending the unit interval became a necessity for Goodnight after Empire filed applications to revoke Goodnight's authority on the basis, in part, that the San Andres is included in the unit interval. Prior to that exchange and prior to Empire filing its applications, Goodnight had no reason to believe that they were required to file an application to amend because the Commission had already authorized Goodnight and many other operators to inject produced water into the San Andres going back to the 1960s. *See* Motion Ex. 24 (map depicting date of first SWD injection into the San Andres in the EMSU area). Empire's collateral attack argument lacks merit.

6. The Motion does not circumvent the stayed cases.

Empire and OCD argue the Motion should be denied because of its relationship to two cases that are stayed. *See* Empire Response at 10; OCD Response at 12. This argument is misplaced. Notwithstanding the fact that Goodnight's applications under Case Nos. 24277 and

24278 have been stayed, the Motion is proper because it directly challenges a basis for Empire's claims in its applications to revoke that have no sound legal basis.

Goodnight's Motion is proper because it seeks to narrow the issues at hearing, which is a proper use of Rule 56. "The purpose of summary judgment is to hasten the administration of justice and to expedite litigation by avoiding needless trials and to enable one promptly to obtain a judgment by preventing the interposition of frivolous defenses for purpose of delay." *Pedigo v. Valley Mobile Homes, Inc*., P.2d 1247, 1249-50 (N.M. Ct. App. 1982). This purpose is expressly recognized in the Commission's rules. *See* 19.15.4.16.B NMAC (authorizing prehearing conferences to "narrow issues"). If granted, the Motion would streamline the hearing and expedite litigation by avoiding needless testimony on issues that Goodnight is entitled to judgment in its favor as a matter of law.

In addition, Empire's Motion is proper because it directly implicates Empire's applications to revoke Goodnight's injection authority in Case Nos. 24018, 24019, 24020, and 24025. Empire's applications in those cases seek to revoke Goodnight's injection authority based on the premise that the San Andres is in the unitized interval. Goodnight's Motion challenges that premise. The Motion does not separately challenge the stayed cases. *See* Motion at 2 (referencing Case Nos. 24018, 24019, 24020, and 24025 to explain that "[a]ll four of Empire's applications rest in part on the fact that the San Andres formation is included within the EMSU's unitized interval."). Goodnight properly filed this Motion under Case Nos. 24018, 24019, 24020, and 24025 with the explicit purpose of challenging Empire's applications, not the stayed cases. The Motion simply argues that part of Empire's claim should be denied as a matter of law because its applications are premised, in part, on a faulty legal basis. Because Goodnight's

Motion challenges the applications at issue in Case Nos. 24018, 24019, 24020, and 24025, nothing prevents Goodnight from challenging the applications here.

7. Granting the Motion would not violate the Commission's obligation to prevent waste and protect correlative rights.

Empire contends that that Motion should be denied because it "ignores" the Commission's obligation to prevent waste and protect correlative rights. Empire Response at 8. If Goodnight understands the argument correctly, Empire contends that the scope of the hearing precludes the Commission from considering whether the San Andres should have been excluded from the EMSU unit interval or that doing so would somehow result in waste or impair correlative rights. To be clear, the Motion does not seek to preclude Empire from developing an economic residual oil zone (if one exists). As Goodnight explained in the Motion, the relief it requested "will not impact oil or gas production—or EMSU operations more generally—now or going forward." Motion at 19. If the Commission grants the Motion, Empire will still be able to develop any residual oil zone "through a voluntary unit agreement or some other voluntary plan of development," if it prevails at the hearing on the merits. Motion at 20. Empire simply cannot rely on the Statutory Unitization Act to develop any residual oil zone because the Act only allows Empire to develop portions of pools that have been reasonably defined by development. Goodnight is asking the Commission to abide by its statutory duties, not ignore them.

8. Granting the Motion will not create regulatory instability, absurd results, or far-reaching implications.

OCD claims granting Goodnight's MPSJ "would result in regulatory instability." OCD Response at 2 & 14-15. Empire similarly argues that the Motion should be denied because it would yield absurd results and have far-reaching implications. Empire Response at 14-15.

As an initial matter, Goodnight acknowledges that OCD is rightfully concerned about regulatory instability and appreciates OCD's concern about this matter. Goodnight agrees with OCD that orders should stay in place and parties should have an expectation of stability, but that expectation only goes as far as the law allows. Void orders should not stay in place just to promote stability where it remains undisputed that the San Andres has never produced oil and has never been reasonably defined by development. It would be absurd to perpetuate Orders that have been proven void under the New Mexico Constitution and the Statutory Unitization Act. *See* Motion at 12.

Moreover, granting the Motion will not create far-reaching implications, as Empire suggests. The relief sought in the Motion is specific, narrow, and limited to the EMSU. Goodnight explained in the Motion, "Goodnight raises this legal defect only with respect to the EMSU. A decision to exclude the San Andres from the EMSU will not set a precedent for any other statutory unit currently in operation, because potential defects with other statutory units must be raised and evaluated on a case-by-case basis." Motion at 20. In other words, this is a fact-specific issue. Neither OCD or Empire directly address the narrow relief sought; and instead, broadly warn of impacts that ignore Goodnight's narrow request and the limited factual scope.

9. The Commission may decide Goodnight's Motion for Summary Judgment

According to Empire, summary judgment is "not an appropriate vehicle for relief in an administrative hearing." Empire Response at 15. This argument is surprising and lacks merit.

It is surprising because Empire's counsel requested that the parties be allowed to submit dispositive motions. In April 2024, Goodnight's counsel sent to Empire's counsel a list of items to include in the Proposed Pre-Hearing Order. Goodnight's list did not mention dispositive

motions. In response, Empire's counsel added several items, including a provision that "Dispositive motions shall be filed 4 weeks prior to the hearing, answers will be due 3 weeks prior to the hearing, and all replies will be due 1 week prior to the hearing." Thereafter the Hearing Officer issued the Pre-Hearing Order, which permitted the parties to submit dispositive motions.

Regardless, the Commission should disregard this argument because it also lacks merit. The Commission rules governing adjudications expressly recognize and provide for dispositive motions practice before a hearing on the merits. *See* 19.15.4.16.C NMAC ("The director or a division examiner may rule on motions that are necessary or appropriate for disposition prior to a hearing on the merits. If the case is pending before the commission, the director shall rule on a motion" (emphasis added)). Summary judgment motions are not unusual or uncommon, and are permitted in other administrative hearings. For example, the regulations that govern proceedings before the New Mexico Environmental Improvement Board also expressly recognize and address handling of dispositive motions. *See* 20.1.2.113.F NMAC ("The hearing officer shall refer any motion that would effectively dispose of the matter, and may refer any other motion to the board for a decision."). Further, New Mexico courts have held that "an administrative body acts in a 'quasi-judicial' capacity when it is "required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Zamora v. Vill. of Ruidoso Downs*, 1995-NMSC-072, ¶ 9, 907 P.2d 182.

IV. Conclusion

For the reasons stated above and in the Motion, the Commission should grant Goodnight's Motion for Partial Summary Judgment in Case Nos. 24018, 24019, 24020, and

24025 and modify the definition of the unitized interval within the EMSU under Order No. R-7765, as amended, to exclude the San Andres formation. In the alternative, the Commission should hold a decision in abeyance pending resolution of the hearing on the merits.

Respectfully submitted,

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San Andres within the vertical limits of the unitized area, was simply because it was going to be the water source. And I think that an order that locks out and prevents any other operator from using an area that's purely been confirmed to be an aquifer is an error and not justified or supported by the statute or any other authority.

And so, you know, I have concerns about the way this order was written, number one, but nevertheless, I think the proper way to interpret it is to read the definition and the finding of Paragraph 10 of the unitized formation as properly limiting the unitized formation to the Grayburg or Penrose where oil is present. The rest was included simply for purposes of oil -- of water production and not for any other reason, which is not a proper basis for it to be unitized under the Division's and Commission's own authority.

So that's why I believe Paragraph 10 is important because it does limit the unitized formation to only the portion that has been confirmed and has presented to the Division as having oil.

HEARING OFFICER BRANCARD: Well, if you're concerned that the order is overbroad or improper as

you put it, why not file an application to amend the order?

MR. RANKIN: Well, Mr. Examiner, I guess if that's where the Division is heading, if that's where we need to go with this, we'll certainly do that. I don't believe it's necessary because I believe that it can be addressed on the merits at a hearing in light of the express language of the order itself, which limits the unitized formation only to that oil bearing zone.

HEARING OFFICER BRANCARD: The order establishes a unit. It establishes what the horizontal limits of the unit is and then it names -- this a statutory unit. We're not talking about property rights. It's a statutory unit, it names an operator of that unit. And that operator, once upon a time Gulf, seems today to be Empire, operates that entire unit.

I'm not sure how we work our way around that other than as appears what has happened in the past, that the applications as your client has made have been made in the past and either with the consent of or lack of a (audio cut out) of (audio cut out) unit operator.

THE COURT REPORTER: Mr. Hearing Officer,

believe there's oil recoverable in that zone but if that's not the case, I mean, yeah, I want demonstration in the records, their own, that they don't have any evidence of oil being present, that's all.

MR. ROSE-COSS: So if they came forward hypothetically and said there is oil and we're planning to move in there next week, Goodnight Midstream would rescind its application?

MR. RANKIN: Depending on that strength of that evidence, I mean, we may not have any choice, but I would like to see it. In other words, you know, our request isn't one I would think that Empire should be resisting, if it exists.

MR. ROSE-COSS: I understand, yeah. And, Mr. Padilla, is any of this easing the concerns of Empire? Does any of this sound less onerous or in his clarification or does it still sound overly broad and egregious?

MR. PADILLA: Still overly broad because, good God, you know, you have to go into everybody's computer, any memorandum that they did. That's why I'm making this statement, that you almost have to -- they're asking for the entire hard drive portion of -- for the unit. I mean, I guess if we

limit this to simply a very simple thing that says hydrocarbons do not exist, or in the San Andres formation maybe none, but it begs the question that with technological advancement like horizontal drilling that even in the San Andres horizontal drilling has occurred that would produce oil. We don't know that.

And they're simply making the assumption coming out of the stranger to title or anything, note no ownership interest in the unit and certainly not in the oil and gas lease committed to the unit that would -- I mean, just because you simply say it's all water, it's an aquifer, therefore there's no oil, therefore we can dump water in there without a property interest and you go back to the pour space issue. And it can avoid, I think that the best thing to say is the issue that Mr. Gets brought up is that if you're going to say that that's simply an aquifer that is useless, therefore you have to go back and amend the unitized vertical of the unit.

MR. ROSE-COSS: I guess my understanding of what's being asked for, then, is that any additional potential information and I like the caveat you had of something that could be found on the OCD records and I imagine most of it can be that

EXHIBIT B

recompleted to a disposal well in the San Andres within the EMSU unitized interval. Failure to furnish notification of the recompletion of a disposal well into a new zone violated NMOCD rules and therefore should never have been approved. As a result, the well has disposed of 16.61 million barrels saltwater into Empire's unitized interval and has impacted roughly 181 acres as of June 1, 2024.

A. Discussion of Exhibits

4. **Exhibit I-1** shows the location of the five proposed SWD wells inside the EMSU. These wells are located in areas of EMSU where water production prior to the waterflood in 1986 was abnormally high, indicating communication between the San Andres and Grayburg through natural fractures.

5. **Exhibit I-2** shows the above five wells and the four active SWD wells Goodnight already operates within the EMSU that are disposing of water into the unitized interval. No disposal volumes are available on the Division's website for the Andre Dawson SWD #1, but Goodnight's document production demonstrates it has been disposing of water since January, 2023. The Ernie Banks SWD #1 has also been utilized for disposal since May, 2023 but disposal volumes are not available on the Division's website. It is estimated that these 2 wells have disposed of 12.8 million barrels as of June 1, 2024.

6. **Exhibit I-3** shows the results from an open-hole Repeat Formation Test (RFT) taken on April 8, 1986 in the EMSU-211 well prior to the start of water injection. The results show the depths where pressure measurements were made and the subsea depth associated with these measured depths based on a well elevation of 3576 feet. The original reservoir pressure in 1929 was measured to be 1450 psi at subsea depth of -250 feet. We assume a 0.43 psi per foot pressure gradient to determine the original reservoir pressure at the various depths where the RFT pressure measurements were taken. The top of San Andres has been picked at 3975' measured depth in the EMSU-211 well and this depth equates to -399' subsea. We then compare the original reservoir pressure at each depth with the measured pressure in 1986 and see that the pressure at the one depth tested in the San Andres has declined by 282 psi or 18.5%. The pressure in the Grayburg has declined by over 1000 psi at the top of the interval due to oil, water, and gas production from wells completed in the Grayburg since 1929. No wells have produced from the San Andres at EMSU, so the only way this San Andres pressure could have dropped is through communication with the Grayburg.

7. **Exhibit I-4** is a graphical representation of **Exhibit I-3** showing the measured pressures plotted on the X axis and the measured depth plotted on the Y axis. The graph shows the 282 psi (18.5%) pressure depletion in the San Andres in the area shaded in red at the bottom of the graph. The only physical explanation is that fluids from the San Andres interval migrated into the Grayburg interval. This confirms the two formations are hydraulically connected.

8. **Exhibit I-5** shows the 1/1/1986 cumulative water production for wells which produced over 500,000 barrels water before the waterflood and their location in respect to the 5 application and 4 existing active SWD wells. The high water production from these wells can be attributed to San Andres water migrating into the crestal areas of the Grayburg though natural