

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

**APPLICATION OF GOODNIGHT  
MIDSTREAM PERMIAN 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**

**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**

**APPLICATIONS OF EMPIRE NEW MEXICO LLC  
TO REVOKE INJECTION AUTHORITY,  
LEA COUNTY, NEW MEXICO**

**CASE NOS. 24018-24020, 24025**

**EMPIRE NEW MEXICO LLC'S RESPONSE TO  
GOODNIGHT MIDSTREAM PERMIAN, LLC'S CLOSING BRIEF**

**INTRODUCTION**

After weeks of technical testimony on the merits, Goodnight begins its closing brief by urging the Commission to revisit an issue the Commission severed and stayed. But this case is not about whether the San Andres formation should remain within the Eunice Monument South Unit's ("EMSU") unitized interval. It is about whether Goodnight's proposed injection wells will cause waste or impair Empire's correlative rights within the EMSU. Goodnight's decision to lead its brief with a procedurally barred claim demonstrates the weakness of its evidence.

Goodnight's remaining arguments further underscore its weak position. On the burden of proof, Goodnight wrongly suggests that Empire had to disprove Goodnight's claims or

demonstrate that recovery was “practicable.” This is not the law. Each party bears the burden of persuasion on its own applications.

Further, Empire presented compelling evidence that Goodnight’s injection operations are flooding a recoverable residual oil zone in the San Andres, impairing Empire’s ability to extract hydrocarbons, and reducing total ultimate recovery - a conclusion with which Goodnight's own experts agreed. This is the very definition of "waste," notwithstanding anything contained in Goodnight’s six-page, academic discursion on the subject.

Nor can Goodnight take refuge in the EMSU Unit documents. The Unit Agreement does not grant Goodnight the right to inject into the unitized formation. It delegates exclusive operational authority to Empire, as the Unit Operator. The Operating Agreement, likewise, reinforces that only parties to the agreement, which Goodnight is not, may control well operations within the Unit. These private contracts refute Goodnight’s position and, in any event, do not override the Commission’s independent statutory duty to prevent waste and protect correlative rights. For the reasons set forth below and in Empire’s initial brief, Goodnights applications should be denied, and Empire's should be granted.

## **ARGUMENT**

### **I. Goodnight’s argument that the San Andres formation should be excluded from the EMSU’s unitized interval remains outside the scope of this proceeding and fails as a matter of law.**

Goodnight’s first argument rehashes its San Andres exclusion theory, which the Commission stayed, denied at summary judgment, and severed from the hearing in this matter. It should be rejected for the reasons set forth in Empire’s response to Goodnight’s Renewed Motion, which Empire incorporates here by reference. As Empire’s response explains, Goodnight’s argument fails because: (1) the Commission twice excluded the San Andres issue from the scope

of this proceeding; (2) the Commission denied Goodnight's motion for partial summary judgment on the exclusion issue; and (3) Goodnight's renewed argument violates Empire's procedural due process rights.<sup>1</sup> Additionally, Empire presented un rebutted evidence that the San Andres formation contains a residual oil zone suitable for enhanced recovery and, by extension, unitization.<sup>2</sup> Accordingly, Goodnight's exclusion argument has now failed multiple times. The Commission should not entertain it again.

**II. Goodnight's injection into the San Andres formation is causing, and will continue to cause, waste.**

Goodnight provides a six-page definition of the meaning of "waste" without applying its discussion to the evidence presented during the five-week hearing. Goodnight claims that the "common law history of waste 'illuminates that implicit in the concept's definition is a sort of cost-benefit analysis.'"<sup>3</sup> Goodnight also asserts that in order to constitute "waste" as that term is defined under the Oil and Gas Act, oil and gas must be shown to be recoverable, and must be produced for a profit (*i.e.*, production in paying quantities).

To begin with, Goodnight fails to conduct any sort of "cost-benefit analysis" to support whether there is or is not waste created by Goodnight's activities. Further, Goodnight wholly fails to present any evidence or make any argument in its Closing Brief to demonstrate that its injection operations are not causing waste within the EMSU. The best Goodnight does is allude, by cobbling together citations to Division Orders that are readily distinguishable from the situation at hand, that there can be no waste because Empire has not shown recoverable hydrocarbons in the San Andres.<sup>4</sup> However, the decisions Goodnight cites involve instances where parties objecting to

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<sup>1</sup> See *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 21.

<sup>2</sup> NMSA 1978, § 70-7-1.

<sup>3</sup> Goodnight Closing Brief at 10 (citing Joseph A. Schremmer, *Regulating Natural Gas Venting and Flaring as Waste: A Review of the New Mexico Approach*, 20 Oil, Gas & Energy Law Intelligence Law Journal, 11 (2022)).

<sup>4</sup> See Goodnight Closing Brief at 11-15.

SWD wells: (1) failed to present evidence that the injection intervals contemplated in the applications contained recoverable hydrocarbons;<sup>5</sup> or (2) the proposed SWD wells targeted an injection interval well above the producing formation.<sup>6</sup> This is simply not the case here.

Goodnight also claims that the Commission orders it cites support the proposition that “even where oil and gas are capable of being produced in paying quantities, disposal should be approved where it will result in greater economic benefit and overall prevention of waste by supporting offsetting production.”<sup>7</sup> The Order relied upon to support this bold assertion states that one of the parties objecting to the application protested “on the grounds that the well is still producing in paying quantities.”<sup>8</sup> However, the objecting party failed to present any evidence at hearing.<sup>9</sup> Only the applicant presented evidence and demonstrated that the producing well was “truly a stripper well,” because “the cost of producing the well to abandonment will be greater than the revenues generated” *i.e.*, the well was not producing in paying quantities.<sup>10</sup> There was no balancing of “the competing interests [of] the potential loss of a small volume of oil and gas, which was nevertheless being produced in paying quantities, against the more substantial benefit of supporting new offsetting production,” as Goodnight claims<sup>11</sup> because there was no evidence to balance, and no evidence to show that the well sought to be converted to an injection well was even remotely producing in paying quantities. In contrast, Empire has shown that a ROZ exists within the San Andres, and all experts agree – both Empire’s and Goodnight’s.<sup>12</sup> Goodnight’s

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<sup>5</sup> See Order Nos. R-11855-B, R-13889 (Goodnight Exhibits 9, 10).

<sup>6</sup> See Order Nos. R-7637, R-13922, R-13958 (Goodnight Exhibits 11, 12, 13).

<sup>7</sup> See Goodnight Closing Brief at 15.

<sup>8</sup> See Order No. R-13922 at ¶ 11 (Goodnight Exhibit 12).

<sup>9</sup> *Id.* at ¶ 8.

<sup>10</sup> *Id.* at ¶ 11, 12.

<sup>11</sup> See Goodnight Closing Brief at 15.

<sup>12</sup> See, e.g., 04/25 Tr. 104:22-25 (Commissioner Ampomah recognizing that “Empire’s experts and also even Goodnight’s experts, they’ve all – they’ve all presented to the Commission, at least based on the evidence, there is an ROZ.”).

petrophysicist, Dr. Davidson, confirmed that oil saturation exists throughout the San Andres.<sup>13</sup> Empire has also shown that the wastewater Goodnight is injecting into the Lower San Andres is migrating into the Upper San Andres and Grayburg.<sup>14</sup> This migrating wastewater is causing waste within Empire's unitized formations by reducing the total recoverable hydrocarbons.

Throughout these proceedings, Goodnight has argued that Empire must prove that its tertiary recovery project is recoverable in paying quantities to prevail. The Division has defined "Production in paying quantities" as "the production of a quantity of oil and gas that yields revenue in excess of operating expenses."<sup>15</sup> It is well established that whether a well has produced in paying quantities is determined in hindsight, by considering whether the well "pays a profit, even small, over operating expenses... though it may never repay its costs, and the enterprise as a whole may be unprofitable."<sup>16</sup> Despite Empire's continued demonstration that it need not actually prove the economics of its tertiary recovery to prevail on its application, Empire has shown that the ROZ is sufficiently oil saturated to be recoverable through CO<sub>2</sub> flooding, and that a CO<sub>2</sub> flooding project in the EMSU should yield 18% and may be closer to 30% recovery of the ROZ.<sup>17</sup> Ultimately, this project would result in \$1.1 billion in royalties and a half billion dollars in taxes paid to the State of New Mexico.<sup>18</sup> As a result, the decisions cited by Goodnight do not support its position and have no bearing here. Goodnight's continued injection of wastewater hinders Empire's ability to recover hydrocarbons from the ROZ within the EMSU, precisely the type of "underground waste" the Commission is tasked with preventing.

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<sup>13</sup> 04/21 Tr. 242:17-243:14.

<sup>14</sup> See Empire's Initial Brief at 20-21.

<sup>15</sup> 19.15.27.7(Q) NMAC.

<sup>16</sup> *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959); see *Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 9, 134 N.M. 308.

<sup>17</sup> See 02/27 Tr. 862:20-864:6; 02/28 Tr. 1164:2-19; 04/09 Tr. 154:17-156:18; Empire Exhibits I at ¶¶ 30-33, I-26 through I-29.

<sup>18</sup> 04/09 Tr. 154:3-7.

### III. Goodnight's injection operations are impairing Empire's correlative rights.

Goodnight claims, without any support, that “[d]etermining the extent of correlative rights is a threshold issue that precedes the Commission’s ability to protect those rights.”<sup>19</sup> As the New Mexico Supreme Court has recognized, “the basis of [the Commission’s] powers is founded on the duty to prevent waste and protect correlative rights. . . . *[T]he prevention of waste is the paramount power*, inasmuch as this term is an integral part of the definition of correlative rights.” *Continental Oil Co. v. Oil Conservation Comm’n*, 1962-NMSC-062, ¶ 11, 146 N.M. 24 (emphasis added). For this reason, the concepts of waste and correlative rights are intertwined, and the Commission must consider both in evaluating these cases.

An integral piece to the protection of Empire’s correlative rights is the existence of the Commission-approved exclusive right of Empire to operate and manage the EMSU, which has been in existence for over 40 years, and to produce oil from the Grayburg *and* San Andres intervals within the Unit. The purpose of the Statutory Unitization Act is to “provide for the unitized management, operation and further development of...oil and gas properties...to the end that greater ultimate recovery may be had therefore, waste prevented, *and correlative rights protected of all owners and mineral interests in each unitized area.*” NMSA 1978, Section 70-7-1.

Empire has demonstrated that the wastewater Goodnight is injecting into Lower San Andres is migrating into Upper San Andres and Grayburg. The migrating wastewater is causing the waste and infringement of correlative rights throughout the San Andres and the Grayburg formations underlying the EMSU. In fact, Goodnight’s commercial disposal has already increased the expense of, and lowered production from, Empire’s Grayburg producers.<sup>20</sup> Because Empire is

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<sup>19</sup> See Goodnight Closing Brief at 17.

<sup>20</sup> 4/11 Tr. 43:7-25.

the Unit Operator of the EMSU, it must be afforded the opportunity to produce its unitized interval “without waste.”<sup>21</sup>

#### **IV. Goodnight Misstates the Evidentiary Burden and Misconstrues the Law**

##### **A. Each applicant bears the burden on its own requests for relief.**

In proceedings before the Commission, each applicant bears the burden of persuasion on its own affirmative applications.<sup>22</sup> As noted in Empire’s closing brief, that burden never shifts.<sup>23</sup> Here, Goodnight, as the party seeking expanded injection authority, had the obligation to prove by a preponderance of the evidence that its proposed operations would not cause waste or impair correlative rights. At no point does Empire have to disprove Goodnight’s case. Goodnight’s brief omits this basic division.

Goodnight argues that because the Commission previously approved its injection wells, Empire must now show “changed circumstances” to justify denying expanded injection. That argument fundamentally misconstrues the posture of the case. Goodnight is asking the Commission to grant *new* relief; namely, authority to inject additional volumes into the San Andres. Each new injection application triggers a fresh statutory duty to evaluate waste, correlative rights, and environmental risk.<sup>24</sup> Empire does not have to show “changed circumstances” to oppose this relief. That burden remains with Goodnight.

Nor do Goodnight’s cited authorities support its position on “changed circumstances”. Section 14.02 of *The Law of Pooling and Unitization* addresses the authority of other state

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<sup>21</sup> See NMSA 1978, § 70-2-3.

<sup>22</sup> See NMSA 1978, § 70-2-11(A); *Int’l Minerals & Chem. Corp. v. N.M. Pub. Serv. Comm’n*, 1970-NMSC-032, ¶ 10 (placing the burden of proof on the party seeking affirmative relief).

<sup>23</sup> See, e.g., *Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue Dep’t*, 2023-NMCA-039, ¶ 27, 531 P.3d 622 (“[W]hile the burden of production often shifts (or even disappears) during civil litigation, the burden of persuasion generally remains on the party who bears it initially.”).

<sup>24</sup> See § 70-2-11(A).

commissions, principally Oklahoma's and Texas's, to modify existing fieldwide rules or spacing regulations.<sup>25</sup> It says nothing about how New Mexico adjudicates individual injection applications, let alone about Empire's distinct burden on its own competing applications. Indeed, the cited paragraph does not discuss saltwater disposal wells, underground injection, or correlative rights in any meaningful way. Goodnight bears the burden of persuasion on its own applications.

**B. Goodnight misstates Empire's evidentiary burden regarding correlative rights and waste.**

Next, Goodnight tries to complicate the evidentiary standard by suggesting that Empire has to quantify the hydrocarbons at risk or prove that recovery from the San Andres is "practicable." That is not the law. The Oil and Gas Act defines "waste" broadly to include any practice that "tends to reduce the total quantity of oil or gas ultimately recovered."<sup>26</sup> The statute does not demand volumetric proof or economic modeling. It permits the Commission to act when credible evidence shows that a proposed activity, like Goodnight's injection, will interfere with hydrocarbon recovery. Empire has more than made that showing here.

*Continental Oil* confirms, not contradicts, this approach. It holds that the Commission must protect correlative rights "so far as it is practicable to do so," based on the record.<sup>27</sup> *Continental* never says a party must determine the precise quantity of oil that can be recovered without waste.<sup>28</sup> At bottom, Goodnight seeks to complicate and heighten Empire's evidentiary burden, insisting that Empire must prove that tertiary recovery is not only technically feasible, but economically viable according to some unknown metric. But Empire's decision to pursue

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<sup>25</sup> See Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization* § 14.02 (3d ed. 2012 & Supp. 2023).

<sup>26</sup> See NMSA 1978, § 70-2-3(A).

<sup>27</sup> See 1962-NMSC-062, ¶ 27.

<sup>28</sup> Goodnight's reliance on *Williams & Meyers* fares no better. The quoted passage discusses *wanton* waste, not the evidentiary burden in contested injection proceedings.

enhanced recovery does not hinge on Goodnight's cost-benefit analysis. Empire presented credible, un rebutted testimony that Goodnight's injection would raise pressure in the San Andres ROZ and impair recovery and also presented evidence to demonstrate its proposed project will result in profit. That is sufficient to support denying Goodnight's applications and granting Empire's.

**V. The Unit Agreements Do Not Authorize Goodnight's Injection—and They Do Not Override the Commission's Statutory Duties**

**A. The Commission's paramount obligation is to prevent waste and protect correlative rights.**

Goodnight devotes an entire section of its brief to dissecting the EMSU Unit Agreement and Operating Agreement from 1984, as though private contracts override statute. They cannot. Under NMSA 1978, §§ 70-2-11 and 70-2-12, the Commission must deny any application that would impair correlative rights or tends to reduce the total quantity of oil ultimately recovered. That duty does not vanish because of silence or ambiguity in the unit agreement as to third-party injection wells.

Goodnight concedes as much, noting that Section 10 of the Unit Agreement “does not preclude third-party activities within the Unit Area *that do not otherwise cause waste or impair correlative rights.*”<sup>29</sup> The inverse is also true: if waste or impairment would occur, the Commission must act to prevent it. This obligation exists regardless of what the Unit documents permit. Accordingly, if Goodnight's injection is flooding Empire's recoverable residual oil zone, which is the case, the injection must cease.

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<sup>29</sup> Goodnight Closing Brief at 23 (emphasis added).

## **B. Goodnight misreads the Unit Agreements.**

Goodnight's interpretation of the EMSU Unit Agreement and Operating Agreement is selective and incomplete. It lifts isolated clauses out of context to argue that third-party injection into the San Andres is somehow permitted. Neither agreement supports that claim.

The Unit Agreement, executed by the United States, the State of New Mexico, and the lessees, delegates to the Unit Operator "the exclusive right, privilege and duty of exercising any and all rights of the parties...necessary or convenient for prospecting for, producing, storing, allocating and distributing the Unitized Substances."<sup>30</sup> Goodnight is not a party and has no rights under it.<sup>31</sup> Nothing in the Unit Agreement grants third-party injection rights or limits the Commission's duty to prevent waste or protect correlative rights.

The Operating Agreement reinforces the point. It gives the Working Interest Owners – not non-parties – supervisory control over "the drilling of any well for injection, salt water disposal or for any other Unit purpose."<sup>32</sup> That provision confirms that working interest owners, not interlopers, control unit operations. It does not open the door to outside injection by non-parties like Goodnight. Goodnight's claim that the agreements somehow allow its proposed activity ignores the structure, purpose, and express limitations of both documents.

## **CONCLUSION**

Goodnight's closing brief rehashes failed arguments and ignores controlling procedure. Based on the extensive evidence presented during the five-week hearing, the Commission should

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<sup>30</sup> Unit Agreement § 10.

<sup>31</sup> *Charter Bank v. Francoeur*, 2012-NMCA-078, ¶ 13, 287 P.3d 333 ("As a general rule, a member of the public is not an intended third party beneficiary and cannot enforce a government contract unless the contract's terms provide for liability.").

<sup>32</sup> Operating Agreement § 3.2.2.

deny Goodnight's injection applications and revoke Goodnight's existing injection permits within the EMSU.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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