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'S BRIEF IN RESPONSE TO ORDER ON LIMITED REHEARING

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Empire New Mexico, LLC ("Empire"), by and through its undersigned counsel of record, submits the following brief as directed by the New Mexico Oil Conservation Commission's ("Commission") Order Partially Granting Goodnight's Motion for Rehearing; Denying Empire's Motion for Rehearing; Granting Goodnight's Motion for Stay; Holding Empire's Motion to Enforce in Abeyance (hereinafter "Rehearing Order"), dated October 17, 2025.

I. INTRODUCTION

The Rehearing Order directs the parties to address two questions:

1. Does the Commission have the legal authority to "Suspend[] existing Goodnight's injection wells . . . in order to provide Empire with the opportunity to establish the CO2 EOR pilot project" given that "there was insufficient evidence presented at hearing to prove whether the ROZ is recoverable?" Commission Order R-24004 pages 13 and 10, respectively; and

2. Does Commission Order R-24004 provide OCD with discretion in managing the "Suspen[sion of] existing Goodnight[] injection wells . . . [and] to provide Empire with the Opportunity to establish the CO2 EOR pilot project"? Commission Order R-24004 page 13.[1]

The answer to Question No.1 is "absolutely." The answer to Question No. 2 is "yes," in part. The Division's regulations establish requirements regarding the filing of paperwork to discontinue injection, and the Division has authority to implement its regulations. However, Order R-24004 does not give the Division discretion to determine whether or when to implement the suspension. The Division has authority under the Oil and Gas Act and its regulations to approve and oversee Empire's CO_2 EOR pilot project.

The evidentiary record in this matter is voluminous. The parties presented their cases before the Commission over approximately 18 days from February until May 2025. This was followed by extensive post-hearing briefing, including competing motions for rehearing. By the

[1] Rehearing Order at 3, ¶ 9(i)-(ii).

Commission's own estimation, there are approximately 1.3 gigabytes of information in the Commission's filing management system[2]—to put that to scale, if printed and stacked, the record in this case would reach the top of a telephone pole.[3]

Notwithstanding Goodnight Midstream Permian LLC's ("Goodnight") protestations to the contrary, this 30 foot plus-high mound of evidence overwhelmingly favors Empire's position, which the Commission recognized in its Order Denying Goodnight's Applications and Partially Granting/Partially Denying Empire's Applications[4] ("Suspension Order") dated September 12, 2025. And, while Empire disagrees with the Commission's assessment of whether Goodnight's wastewater disposal constitutes waste and impairs correlative rights in the present sense (it does) or whether recoverability of the ROZ is a dispositive question (it is not), Empire respectfully submits that the Commission's Suspension Order should stand: Goodnight's applications must be denied and its present SWD operations must be suspended as the viability of the ROZ is dependent on the cessation of wastewater disposal into the EMSU. To hold otherwise will forever doom the recoverability of more than a billion dollars in royalties and taxes to the State of New Mexico.

II. ARGUMENT

A. Issue 1: The Commission has legal authority to suspend Goodnight's existing injection permits to provide Empire with the opportunity to establish a CO_2 EOR pilot project even if there was insufficient evidence presented at hearing to prove the ROZ is recoverable.

As an initial matter, Empire disagrees that there is insufficient evidence to prove the ROZ is recoverable; as summarized below, Empire presented extensive evidence on that issue. Regardless, even if there was insufficient evidence to demonstrate that the ROZ is recoverable, Empire did not have to prove recoverability as Goodnight's existing permits must be suspended

[2] Rehearing Order at 2, ¶ 5.
[3] https://www.digitalwarroom.com/blog/how-many-pages-in-a-gigabyte (last accessed October 21, 2025).
[4] OCC Order No. R-24004.

because Goodnight's injected wastewater is not confined to its injection interval and is escaping into other strata in violation of the Commission's regulations and the Oil and Gas Act.

New Mexico law also authorizes the Commission to suspend Goodnight's existing permits to allow Empire to develop the San Andres ROZ. The Commission is obligated to prevent waste and protect correlative rights and has broad authority to regulate injection to prevent harm to New Mexico's natural resources, including oil and gas. If Goodnight's injection is not stopped, there will be no San Andres ROZ development and any chance of recovering those hydrocarbons for the benefit of the State, United States, and interest owners will be irretrievably lost. This would be an absurd result that is contrary to New Mexico's public policy as set out in the State's Constitution, Oil and Gas Act, and Statutory Unitization Act. As the Commission has rightfully ordered, Goodnight's existing permits must be suspended.

1. Empire established the San Andres ROZ is recoverable.

The Rehearing Order does not specify whether by "recoverability" the Commission means technically recoverable or economically recoverable. If the question is whether the ROZ is technically recoverable, the parties, including Goodnight, agree that it is. And, while the governing law does not require proof of economic recoverability, Empire demonstrated economic recoverability at hearing.

With respect to technical recoverability, all parties agree the ROZ is technically recoverable, including Goodnight's economic witness, John McBeath.[5] Additionally, Empire presented several successful tertiary recovery projects within the San Andres, including:

- The Seminole field has similar properties to the EMSU, is located approximately 45 miles from the EMSU, and yielded approximately 68 million barrels from a ROZ; and

[5] 4/11 Tr. 186:25 – 188:1; 04/23 Tr. 137:13-22.

- The Tall Cotton field, located about 45 miles from the EMSU, produced approximately 2,000 bopd.[6]

At hearing, Empire's witness, William West, testified that the Seminole field is as "good [an] analogy as what we can get" for a CO_2 recovery project in the EMSU.[7]

With respect to economic recovery, there is no requirement that Empire prove "production in paying quantities" to demonstrate waste or impairment of correlative rights. "Production in paying quantities" was recently defined by the Division in its methane gas rule as "the production of a quantity of oil and gas that yields revenue in excess of operating expenses."[8] 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."[9]

A project that has not been implemented yet cannot be subject to a "production in paying qualities" analysis. Mr. McBeath, Goodnight's own witness, agrees. At hearing, Mr. McBeath testified that he does not believe production in paying quantities applies to "a future project like a ROZ."[10] According to Mr. McBeath, "paying quantities is a term of art and only applies to whether or not that well can hold a lease."[11] Mr. McBeath further conceded that production in paying quantities would actually require the "exclusion of all capital expenditure and consideration be given only to recurrent revenue against recurrent expense, both actual and anticipated."[12] Mr.

[6] 02/27 Tr. 802:9:804:19, 848:20-849-9, 856:14-857:7.
[7] 04/11 Tr. 57:11-20.
[8] 19.15.27.7(Q) NMAC.
[9] *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.
[10] 04/11 Tr. 169:16-20.
[11] *Id.* 188:13-15.
[12] 04/11 Tr. 171:3-10.

McBeath also admitted that he did not conduct any economic analysis that excludes the capital expenditures of a tertiary recovery project.[13]

Moreover, even if the Commission were to conclude that an economic recoverability analysis applies, Empire proved at hearing that hydrocarbons from the ROZ are economically recoverable. The following testimony so demonstrates:

- Revenue of $6.7 billion dollars can be expected from the San Andres ROZ, less $1.2 billion in capital expenditures, leaving a net recovery of $5.5 billion dollars.[14]
- Based on these figures, the State would receive $1.1 billion in royalties plus another half a billion dollars in tax, and the federal government would receive about 0.37 billion dollars.[15]
- Goodnight's expert John McBeath agrees that using Goodnight's volumes and Empire's cost of CO2 and WTI deck, the ROZ project is profitable.[16]

As further provided herein, because Empire has demonstrated waste and impairment of correlative rights, the Commission is authorized to, and properly did, suspend Goodnight's existing permits without an additional showing of production in paying quantities. While Empire is not required under New Mexico law to prove the economics of its tertiary recovery project to prevail, it has nonetheless provided sufficient evidence and demonstrated that the ROZ in the EMSU is sufficiently oil saturated to be recoverable through CO_2 flooding, and that a CO_2 flooding project in the EMSU should conservatively yield 15% and may be closer to 30% recovery from the ROZ.[17]

As summarized above, Empire's economic modeling shows that a tertiary recovery project in the EMSU would be profitable.[18] It is undisputed that no person will invest in Empire's proposed

[13] *See id.* 171:23-172:3.
[14] 04/09 Tr. 154:23-155:3; *see* Empire Ex. I-29.
[15] 04/09 Tr. 155:3-7.
[16] 04/23 Tr. 168:24-169:3.
[17] 02/27 Tr. 862:20-864:6; 02/28 Tr. 1164:2-19; 04/09 Tr. 154:17-156:18.
[18] *See* 04/09 Tr. 154:17-156:18.

tertiary project while Goodnight's injection is ongoing.[19] Goodnight's injection must cease for Empire to pursue its project without waste and provide the resulting economic benefits to the State of New Mexico.

2. The Commission must suspend Goodnight's permits because its injected wastewater is migrating into the Grayburg and is therefore not confined to the approved injection interval.

The Commission has the authority "to prevent crude petroleum oil, natural gas or water from escaping from strata in which it is found into other strata."[20] The Commission also has authority "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*."[21] Additionally, the injection rule at 19.15.26.10(E) NMAC authorizes the restriction of injection wells "that have exhibited failure to confine injected fluids to the authorized injection zone or zones" without a showing that the injected fluids are interfering with production. Where, as here, there is no dispute that the Grayburg is a producing reservoir and is included within the EMSU unitized interval,[22] the Commission can, and should, suspend Goodnight's permits.

At hearing, Empire demonstrated by a preponderance of the evidence that Goodnight's injection into the San Andres is migrating to the Grayburg. Dr. Lindsay's fracture studies and permeability analysis demonstrates that communication between San Andres and Grayburg occurs through fractures and vertical plumes within the EMSU.[23] Further, Dr. James Buchwalter's model

[19] 04/08 Tr. 187:15-21
[20] NMSA 1978, § 70-2-12(B)(2) (2019).
[21] § 70-2-12(B)(4) (emphasis added).
[22] Empire Ex. A-4.
[23] 02/24 Tr. 28:16-30:13, 29:22-30:3.

shows to a reasonable degree of scientific probability that water is moving from San Andres into Grayburg.[24] This modeling and scientific data is confirmed by real-time production, which shows the extraction of more water than expected from the Grayburg.[25] These additional unanticipated volumes are coming from the San Andres.[26] Goodnight's commercial disposal has already increased the expense of, and lowered production from, Empire's Grayburg producers. The damage has been done and is continuing.[27]

Additionally, Chevron's 1996 water chemistry work indirectly shows communication between the San Andres and the Grayburg.[28] Current water samples show that the Grayburg contain higher concentrations of ions—such as chloride, calcium, and magnesium—than typically found in the unitized formations.[29] This shows that wastewater injected into the San Andres is moving into the Grayburg.[30] Further, Grayburg water chlorides (salinities) are increasing from normal levels, indicating Delaware Basin disposal water is entering the Grayburg in present day.[31]

Because there is no confinement of the injected wastewater to the authorized zone (i.e., lack of a barrier or seal), Goodnight's injected wastewater is migrating and causing waste throughout the unitized formations by reducing or tending to reduce recoverable hydrocarbons. The commercial volumes of injected wastewater are resulting in scale, corrosion, and pressure increases that impede Empire's planned tertiary recovery project within the San Andres ROZ, are

[24] 02/27 Tr. 766:6-11; Empire Exhibit E.
[25] Empire Ex. N-23; 04/10 Tr. 156:21-158:5; 04/11 Tr. 62:25-64:25.
[26] *Id.*; *see also* 04/09 Tr. 163:14-16 (Mr. West testifying that "there is no other explainable way that water is getting into the Grayburg than through these plumes or fractures in the San Andres"); Empire Ex. I-5.
[27] 04/11 Tr. 43:7-25.
[28] *See* 04/24 Tr. 160:7-23; *see also* 02/24 Tr. 34:12-21 (Dr. Lindsay, testifying that water chemistry shows that injected wastewater is moving from San Andres into Grayburg); Empire Exhibit I-7.
[29] 04/09 Tr. 182:9 – 189:1.
[30] *Id.*
[31] 04/09 Tr. 180:20-182:17; Empire Ex. N-9.

watering out the producing Grayburg reservoir, and adding economic barriers that may be prohibitive to a tertiary recovery project.[32]

Because Goodnight's injection of wastewater is migrating out of the disposal zone, the Commission appropriately suspended its permits and should re-affirm that determination on rehearing.

3. New Mexico law authorizes the Commission to suspend Goodnight's permits to allow Empire to proceed with its CO_2 project within the San Andres.

a. *The New Mexico Constitution requires protection of the State's natural resources, including oil and gas, for the benefit of the State's citizens.*

Article XX, section 21 of the New Mexico Constitution provides that:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

In line with that policy, the Legislature created the Oil Conservation Commission and Division to prevent the waste of hydrocarbons and protect correlative rights.[33] To that end, "the Division and the Commission are 'empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of [the Oil and Gas Act], whether or not indicated or specified in any section hereof.'"[34]

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[32] 02/24 Tr. 38:13-39:15; 04/09 Tr. 160:7-17, 180:20-188:18, 190:15-191:17; 04/11 Tr. 43:7-25.
[33] § 70-2-11; *see also Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 2, 146 N.M. 24, 206 P.3d 135.
[34] *Santa Fe Expl. Co. v. Oil Conservation Comm'n of State of N.M.*, 1992-NMSC-044, ¶ 28, 114 N.M. 103, 35 P.2d 819 (quoting NMSA 1978, § 70-2-3(A)).

It is axiomatic that oil and gas must be conserved for the benefit of New Mexico's citizens.[35] Goodnight can point to no corollary right because its injection of wastewater is not a protected activity under the New Mexico Constitution.

b. ***The Oil and Gas Act and the Statutory Unitization Act demonstrate the Commission is obligated to suspend Goodnight's permits to allow Empire to proceed with its CO2 project to develop the San Andres ROZ.***

i. New Mexico Statutory Construction Principles

In discerning the Legislature's intent, the Commission should "examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish."[36] In general, the plain language of a statute is the "primary indicator of legislative intent."[37] However, "[i]f the plain meaning of the statute is doubtful, ambiguous, or [if] an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will construe the statute according to its obvious spirit or reason."[38] It is well recognized that these "canons of statutory construction apply to regulatory and rule interpretation as well."[39]

Based on these principles of statutory construction, the Oil and Gas Act must be applied in a manner that effectuates the legislature's intent to protect oil and gas resources and the Commission must take all steps reasonably necessary to do so. For these reasons, the Commission's decision to suspend Goodnight's permits aligns with the legislative directive to

[35] *See, e.g.*, *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 17, 123 N.M. 220, 937 P.2d 979 (citing Section 70-2-12(B)(4) and observing that, among other things, the Commission is concerned about water injection operations and "their impact upon oil conservation as it affects the public interest").
[36] *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934*; see also N.M. Mining Ass'n*, 2007-NMCA-010, ¶ 12 ("We also consider the history and background of the statute, as we harmonize the language in a manner that facilitates the operation of the statute and the achievement of its goals.").
[37] *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (internal quotation marks and citation omitted).
[38] *Id.* (internal quotation marks and citation omitted).
[39] *Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327; *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d 991.

prevent the waste of hydrocarbons and protect correlative rights. Where, as here, the constitutional, statutory, and regulatory language are clear as to meaning and intent, the Commission should reject Goodnight's efforts to rewrite such plain language and explicit purpose to create a preferential status for wastewater disposal operations that is not recognized anywhere in New Mexico law.

ii. The Oil and Gas Act authorizes the Commission to suspend Goodnight's permits to allow Empire the opportunity to pursue its CO_2 project.

The Commission has broad and plenary authority to prevent waste, protect correlative rights, and regulate wastewater injection. As identified below, the statutory support for the Commission's intended actions in this matter is both comprehensive and clear:

> The Commission has authority to—
>
> - prevent crude petroleum oil, natural gas or water from escaping from strata in which it is found into other strata.[40]
> - 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.*[41]
> - require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties.[42]
> - regulate the disposition, handling, transport, storage, recycling, treatment and disposal of produced water during, or for reuse in, the exploration, drilling, production, treatment or refinement of oil or gas, including disposal by injection pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and fresh water resources.[43]

[40] § 70-2-12(B)(2).
[41] § 70-2-12(B)(4) (emphasis added).
[42] § 70-2-12(B)(7).
[43] § 70-2-12(B)(15).

Section 70-2-11 empowers the Commission to "do whatever may be reasonably necessary to carry out the purpose of this act," which necessarily includes the broad discretion to prevent waste and protect correlative rights, and to remedy injuries thereto.[44]

"Underground waste" is defined in Section 70-2-3(A) as:

> those words are generally understood in the oil and gas business, and in any event to embrace 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, and the use of inefficient underground storage of natural gas.

(emphasis added).

New Mexico law is clear that precise proof of a specific volume of hydrocarbons is not required to establish waste,[45] and evidence demonstrating that wastewater operations will *tend to reduce* recovery meets the definition of waste.[46] Thus, waste includes not only actual, ongoing waste, but any practice that prevents an interest owner from producing without waste his just and equitable share of oil in the pool.[47] "[T]he primary concern of [the Oil and Gas Act is] eliminating and preventing waste in the pool so far as it can practicably be done, and next the protection of the correlative rights of producers from the pool."[48]

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[44] §§ 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.").
[45] § 70-2-17(A); *Grace v. Oil Conservation Comm'n*, 1975-NMSC-001, ¶ 27, 87 N.M. 205, 531 P.2d 939.
[46] § 70-2-3(A).
[47] §§ 70-2-3(A), -33(H).
[48] *El Paso Natural Gas Co. v. Oil Conservation Comm'n*, 1966- NMSC-092, ¶ 4, 76 N.M. 268.

Under New Mexico law, "correlative rights" mean the fair opportunity of each owner in a common source to produce its just share *without waste*.[49] More specifically, the Oil and Gas Act defines "correlative rights" as follows:

> [T]he opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce *without waste* the owner's just and equitable share of the oil or gas or both in the pool, being an amount, so far as can be practicably 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 the property bears to the total recoverable oil or gas or both in the pool and, for such purpose, to use the owner's just and equitable share of the reservoir energy.[50]

The concepts of waste and correlative rights are intertwined, and both statutory provisions provide ample support for the suspension of Goodnight's permits in this case.

Goodnight argues the Commission is barred from regulating injection unless an SWD well will inject into an actively producing reservoir that is producing in paying quantities. Goodnight's argument is based on its mistaken reliance on the language of one subpart of Section 70-2-12(B)(4), taken in isolation and out of context. Section 70-2-12(B) identifies different matters over which the Division or Commission may make rules and orders. Specifically, Goodnight asks the Commission to read one subpart of Section 70-2-12(B)(4), the portion on production in paying quantities, in isolation and out of context, as the only portion of the entire Oil and Gas Act applicable to the cases before the Commission. However, that is not what these provisions say. Goodnight's position wrongly ignores the latter half of Section 70-2-12(B)(4), as well as the overriding requirements of the Commission to prevent waste and protect correlative rights. New Mexico law requires the Commission to preclude injection if the fluid will "escape into other

[49] § 70-2-33(H) (emphasis added).
[50] *Id.*

strata," is causing injury to other leases or properties, or "tends to" reduce recovery of hydrocarbons.[51] Correlative rights are "the opportunity to produce" without waste.[52]

These provisions conclusively demonstrate that the Commission has authority to suspend Goodnight's permits to protect correlative rights and allow Empire to proceed with its CO_2 project. And, this is already supported by the Commission's Suspension Order:

- "injection of hundreds of thousands of barrels a day conflicts with Empire's exclusive rights to extract oil in the EMSU because in order to perform a successful CO2 flood EOR project, the injection of CO2 and water must be monitored closely and adjustments made based upon design."[53]

- "the injection of hundreds of thousands of barrels a day [by Goodnight] conflicts with Empire's exclusive rights to extract oil in the EMSU because approval of the proposed new wells would contradict the responsibility of the Commission and Division to prevent drowning by water of any stratum or part thereof capable of producing oil."[54]

Based on these findings, the Commission appropriately denied Goodnight's six applications before it: de novo appeal of new well (Piazza), four applications for new wells (Gooden, Hernandez, Hodges, and Seaver), and application to increase injection into an existing well (Dawson).[55]

As the Commission observed, its denial of the six applications was consistent with the Division's denial of Goodnight's application for authority to inject produced water into the San Andres Formation using the proposed Piazza SWD Well No. 1.[56] In that matter, the Division stated that approval of the Piazza Well would contradict the responsibility of the Division "to prevent the drowning by water of any stratum or part thereof capable of producing oil or gas or both oil and

[51] § 70-2-12(B).
[52] § 70-2-33(H).
[53] Suspension Order ¶ 40.
[54] Suspension Order ¶ 41 (emphasis added).
[55] Suspension Order ¶¶ 40-41
[56] Order No. R-22869-A at 8, ¶ 1.

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."[57]

The Commission and Division's denials of Goodnight's efforts to expand its wastewater operations should also be determinative of whether Goodnight should continue its existing wastewater operations in the EMSU—indeed, to hold otherwise would be incongruous with the Commission and Division's prior findings that a ROZ exists in the San Andres and Grayburg, that the injection of wastewater is migrating throughout (i.e., migrating outside of the injection zone), and that continued injection of wastewater will prevent recovery of oil within the ROZ. Contrary to Goodnight's arguments, there is no statutory or regulatory requirement that Empire must make some sort of additional showing under the law to support the revocation of existing permits.

At hearing, Empire presented evidence that the CO_2 project would result in massive economic benefit to the State. As previously noted, the San Andres ROZ is anticipated to generate revenue of approximately $5.5 billion after capital expenditures.[58] This would result in $1.1 billion in royalties and a half billion in tax dollars to the State.[59] In addition, the federal government would receive about 0.37 billion dollars.[60] If Goodnight's injection is not stopped so correlative rights can be protected and Empire can pursue its project, the loss of revenue would be detrimental not just to Empire but also to the state and federal government.

[57] *Id.* ¶ 11.
[58] 04/09 Tr. 154:23-155:3; *see* Empire Ex. I-29.
[59] 04/09 Tr. 155:3-7.
[60] *Id.*

iii. The Statutory Unitization Act demonstrates that the Commission has authority to suspend Goodnight's permits to allow Empire to pursue its CO2 project.

The Commission's broad authority in this case is further corroborated by the Statutory Unitization Act, [61] which the Commission is statutorily required to administer.[62] 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 therefrom, waste prevented, and correlative rights protected of all owners and mineral interests in each unitized area."[63]

The EMSU was approved on December 27, 1984.[64] The Commission defined the unitized interval as "100 feet below mean sea level or at the top of the Grayburg formation, whichever is higher, to a lower limit at the base of the San Andres formation."[65] The Commission also extended the vertical limits of the Eunice Monument Oil Pool within the EMSU.[66] As such, the Unitized Formation consists of the Grayburg and the San Andres. Section (i) of the Unit Agreement defines "Unitized Substances" to include all "oil, gas, gaseous substances . . . within and produced from the Unitized Formation." *Id.* Thus, Unitized Substances include the oil and gas within the Grayburg and the San Andres in the EMSU.

Empire acquired the Unit in March of 2021. As a result, the EMSU Unit Agreement vests Empire with the "exclusive right, privilege and duty of exercising any and all rights of the parties hereto including surface rights which are necessary or convenient for prospecting for, producing,

[61] NMSA 1978, §§ 70-7-1 to -21 (1975, as amended through 2024).
[62] § 70-7-3.
[63] § 70-7-1.
[64] *See* Order No. R-7765.
[65] *See id.*
[66] *See* Order No. R-7767.

storing, allocating and distributing the Unitized Substances."[67] Thus, Empire alone is lawfully authorized to operate wells within the EMSU's unitized interval. Significantly, no witness has been able to identify any other oil unit, in the history of New Mexico, where commercial saltwater disposal wells have been authorized by the Division.[68]

The Commission's decision appropriately recognizes Empire's exclusive rights under the Unit Agreement:

- The "exclusive right, privilege and duty of exercising any and all rights of the parties hereto including surface rights which are necessary or convenient for prospecting for, producing, storing, allocating and distributing the Unitized Substances are hereby delegated to and shall be exercised by the Unit Operator."[69]

- "Empire purchased the EMSU . . . to start a new project to extract oil from the San Andres formation via a CO2 flood as part of an Enhanced Oil Recovery (EOR) project."[70]

- "Based on the 1984 Commission Order, Empire has the exclusive rights to decide how to best extract oil in the EMSU."[71]

Based on these findings, which are supported by the evidentiary record, the Commission correctly found that Goodnight's "injection of hundreds of thousands of barrels a day" of wastewater conflicts with Empire's exclusive rights under the Unit Agreement.[72]

The Division made similar findings in its denial of Goodnight's application for authority to inject produced water into the San Andres Formation using the proposed Piazza Well.[73] In that matter, the Division found that the approval of Unit Agreement was "concordant with the authority

[67] *See* Empire Ex. A-4 (Unit Agreement) at Section 10.
[68] *See, e.g.*, 02/24 Tr. 166:16-25; 04/09 Tr. 38:21-39:18; 04/11 Tr. 182:3-183:11; 04/22 Tr. 117:10-16; 04/24 Tr. 57:14-23, 88:12-21; 05/20 Tr. 138:9-24.
[69] Suspension Order ¶ 18.
[70] *Id.* ¶ 26.
[71] *Id.* ¶ 27.
[72] *Id.* ¶¶ 40-41.
[73] Order No. R-22869-A.

provided to the OCC under the provisions of NMSA 1978, §70-7-7(J) which states that the Division order providing for unitization and unit operation of a pool or part of a pool shall include '*such additional provisions as are found to be appropriate for carrying on the unit operations and for the protection of correlative rights and the prevention of waste.*'"[74] Such approval was further "consistent with the OCC recognition of this formation as critical element for a successful waterflood operation and for the potential of undeveloped hydrocarbon resources."[75]

Because the Commission approved the EMSU under the Statutory Unitization Act, it must protect the interests of the State, BLM, and interest owners within the unitized interval. To hold otherwise sets a dangerous precedent that will endanger the oil units of operators across the State of New Mexico and result in waste of the State's precious natural resources. Accordingly, the Commission should reaffirm its prior findings and conclusions on this issue.

iv. Goodnight's arguments ignore New Mexico law and would lead to an absurd result.

In its briefing, Goodnight argues that the Commission can only prevent wastewater injection into a reservoir that is actively producing in paying quantities. However, no such limitation is found in the Oil and Gas Act and, as noted above and throughout its post-hearing briefing in this matter, Goodnight's own witness disagrees with that position.[76] Goodnight's attempt to rewrite the Oil and Gas Act to include an "actual recovery" requirement misstates the statutory definitions of waste and correlative rights and ignores the Commission's broad authority to regulate injection. Rather, the questions under the Act are whether Goodnight's injection fluid is escaping the approved injection interval; whether the injection is drowning strata capable of producing hydrocarbons; whether Goodnight's disposal wells will "reduce or tend to reduce" the

[74] *Id.* ¶ 9.
[75] *Id.*
[76] 04/11 Tr. 169:16-20, 188:13-15.

total quantity of oil ultimately recovered; and/or whether Goodnight's wells are drilled or operated in a manner that is causing injury to neighboring leases or properties. Although the Commission would only have to answer one of these questions in the affirmative to exercise its authority and suspend Goodnight's existing injection permits, as discussed above and demonstrated by the evidentiary record, the answer to all of these questions is a resounding "yes." Adopting Goodnight's argument would result in bad policy that would limit the Commission's authority to regulate injection in the future. The Commission should decline to so constrain itself.

Empire's showing of present and future threat to the recoverability of the ROZ demonstrates precisely the "underground waste" that the Oil and Gas Act prohibits:

- There is a ROZ in the San Andres and Grayburg;[77]
- The wastewater Goodnight is injecting into the San Andres is migrating up through the entire San Andres and into the Grayburg;[78] and
- Goodnight's wastewater operations are impacting oil recovery by creating scale, cementing, corrosion, and pressure increases that negatively impact Empire's planned CO_2 project and are watering out the producing Grayburg reservoir.[79]

On that evidence, the Commission rightly found that Goodnight's continued injection both threaten to impair Empire's correlative rights in the ROZ and make it impossible to conduct a CO_2 project.

For these reasons and based on the overwhelming evidentiary record in support of Empire's position, the Commission should reject Goodnight's attempts to rewrite the Oil and Gas Act to support its improper wastewater operations. Such an interpretation would limit the Commission's ability to carry out the Act's purpose, would lead to an absurd result, and must be rejected. It is

[77] Suspension Order ¶ II.B.
[78] *Id.* ¶¶ III.B
[79] Empire's Findings of Fact and Conclusions of Law, ¶¶ 53-54, 60, 87, 89, 90.

well recognized that oil and gas must be conserved for the benefit of the state's citizens[80] and Empire has established that Goodnight's wastewater operations, which are not afforded protection under the Oil and Gas Act, threaten the significant oil and gas resources sitting in the San Andres and Grayburg. The Commission must act immediately and decisively to allow Empire to recover these resources for the benefit of the State and its citizens.

B. Issue 2: Authority and Discretion of the Division Under Order R-24004.

1. Commission Order No. R-24004 suspends Goodnight's existing permits and requires the Division to implement the suspension.

The Commission's Suspension Order suspends Goodnight's permits. Rule 19.15.26.12 NMAC specifies requirements regarding discontinuance of injection and states that "within 30 days after discontinuance of injection operations into any other well, the operator shall notify the division of the date of the discontinuance and the reasons for the discontinuance." This is sufficient regulatory authority for the Division to implement the suspension. Order R-24004 does not, however, give the Division discretion to determine whether or when to implement the suspension, or to allow curtailment.

Goodnight's misapplication of 19.15.26.10(E) NMAC should be rejected by the Commission.[81] That rule provides that "[t]he division may restrict the injected volume and pressure for, or shut-in, injection wells or projects that have exhibited failure to confine injected fluids to the authorized injection zone or zones, until the operator has identified and corrected the failure." This rule does not require a showing of actual, present-day "failure to confine" before suspension. Rather, it is a permissive grant of authority to the Division and does not impose any sort of

[80] *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 17, 123 N.M. 220, 937 P.2d 979 (citing Section 70-2-12(B)(4) and observing that, among other things, the Commission is concerned about water injection operations and "their impact upon oil conservation as it affects the public interest").
[81] Goodnight's Stay Request at 7.

prerequisite to limit the Division's broad statutory duty under Sections 70-2-11 and 70-2-3(A) to prevent waste and protect correlative rights. Goodnight's reliance on this fragment of the rule to narrow the Division's authority to implement a suspension is misplaced. And, in any event, as discussed above, Goodnight's injected wastewater is not confined and is escaping the injection interval.

Accordingly, the Division can and should approve filings necessary under Rule 19.15.26.12 NMAC to effectuate the suspension ordered by the Commission.

2. The Division has authority to approve Empire's CO_2 EOR pilot project under its existing rules.

Like the Commission, the Division is empowered "to make and enforce rules, regulations and orders, and to do *whatever may be reasonably necessary* to carry out the purpose of [the Oil and Gas A]ct, *whether or not indicated or specified in any section*[.]"[82] This broad mandate empowers the Division to approve and oversee Empire's CO_2 EOR pilot project. Additionally, there are regulations governing enhanced oil recovery projects, such as the kind proposed by Empire, which establish approval criteria and other requirements[83]—the Division unquestionably has the authority to evaluate, approve, and monitor the project under its regulations.

III. CONCLUSION

The Commission should decline Goodnight's invitation to severely hamstring its own authority to regulate the injection of wastewater. Not only does the Commission have authority to suspend Goodnight's permits to protect correlative rights and allow Empire to proceed with its CO2 project, it is obligated to do so. New Mexico law makes this clear through the Constitution, Oil and Gas Act, and Statutory Unitization Act. Furthermore, the Commission is separately

[82] § 70–2–11(A) (emphasis added).
[83] NMAC 19.15.26.8(F).

authorized to regulate all aspects of wastewater injection to protect the state's natural resources, including to prevent it from escaping into other strata or harm neighboring leases. The Commission's decision to suspend Goodnight's permits, as set out in Order R-24004, is correct and should stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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