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

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

CASE NOS. 24021-24024 and 24026-24027

JOINT REPLY IN SUPPORT OF MOTION TO REMAND

Goodnight Midstream Permian, LLC ("Goodnight"), Parker Energy Support Services, Inc. ("Parker Energy"), Rice Operating Company ("Rice"), Permian Line Service, LLC ("Permian"), and Pilot Water Solutions SWD, LLC ("Pilot") (collectively "Joint Movants") respectfully submit this reply in support of the joint motion to remand ("Joint Motion") the above-captioned cases to the Oil Conservation Division ("Division"). For the reasons set forth below, the Commission should grant the Joint Motion in the event it decides against dismissing Empire's applications without prejudice or continuing the stay pending Empire's CO2 flood EOR pilot project.

INTRODUCTION

The six non-EMSU cases at issue have been stayed before the Commission for approximately two years without a merits hearing after having been referred by then-Director Fuge. The original referral was predicated on consolidating these cases with active EMSU proceedings and a de novo challenge that is required to be heard by the Commission as an "efficient use of resources." Order No. R-23048. That rationale no longer exists: the EMSU and de novo proceedings concluded after an eighteen-day evidentiary hearing, the Commission issued Orders R-24004 and R-24004-A, and those orders are now on appeal. No related matter remains before the Commission. The factual predicate for the referral has been eliminated. The cases should be returned to the Division.

Empire advances three arguments—each one fails. *First*, Empire contends the word "shall" in Section 70-2-6(B) and 19.15.4.20 NMAC creates an irrevocable mandate foreclosing remand. That argument is refuted by the plain language of the governing rule and the Commission's own precedent orders. On at least two separate prior occasions—excluding the remand of aspects of Orders R-24004 and R-24004-A to the Division for implementation—the Commission has remanded cases to the Division. *Second*, Empire argues collateral estoppel is inapplicable, but that is a red herring because Joint Movants do not contend collateral estoppel compels remand. Rather, the State Court's ruling is significant for a narrower reason: it confirms the Commission's EMSU findings resolved the overarching factual predicate, leaving only case-specific issues the Division is equipped to address. *Third*, Empire asserts the Commission is "best positioned" because it presided over the EMSU hearing. That assertion is belied by the Division's institutional advantages for initial adjudication and by the Commission's own decision to remand aspects of Orders R-24004 and R-24004-A to the Division.

The Commission should grant remand. The Director retains discretionary authority to revisit referral, the Commission independently possesses remand authority as confirmed by its own precedent, and remand advances efficiency, safeguards the parties' due process rights to ensure each party has the opportunity to present well-specific evidence before subject-matter expert Division Examiners, and serves the sound administration of the Oil and Gas Act.

ARGUMENT

A. The Director Retains Discretionary Authority to Revisit Referral.

Referral authority in NMSA 1978, § 70-2-6(B) is expressly discretionary: a hearing "<u>may</u> be held before the commission if the division director, <u>in his discretion</u>, determines that the commission shall hear the matter." (Emphasis added).

The original referral, Order No. R-23048 (February 7, 2024), was predicated on consolidating the non-EMSU cases with the then-active EMSU proceedings and a de novo matter required to be heard by the Commission. That predicate no longer exists: the EMSU proceedings and de novo case have concluded after an 18-day evidentiary hearing, the Commission issued Orders R-24004 and R-24004-A, and the matter is now on appeal before the First Judicial District Court.

A fully discretionary determination is inherently revisable when circumstances change. Nothing in Section 70-2-6(B) or 19.15.4.20 NMAC renders a discretionary referral irrevocable—to hold otherwise would convert a flexible administrative tool into a one-way ratchet, a result at odds with the discretionary character of the referral authority.

B. The Commission Independently Possesses Authority to Remand.

1. Concurrent jurisdiction permits bidirectional allocation.

Section 70-2-6(A) vests plenary jurisdiction in the Division over "all matters relating to the conservation of oil and gas." Section 70-2-6(B) grants the Commission "concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law."

Concurrent jurisdiction does not create a one-way ratchet. The referral is an administrative allocation, not a permanent transfer of subject-matter jurisdiction. Just as the Director may direct the Commission to hear a matter, the allocation may be revisited when circumstances warrant. Both bodies possess authority over the subject matter; allocation is an administrative convenience, not a constitutional boundary.

2. The Commission's inherent docket-management authority encompasses remand.

Administrative adjudicatory bodies possess inherent authority to manage their dockets. The Commission routinely exercises powers not expressly enumerated—including the power to stay proceedings, limit hearings' scope, and consolidate cases. It exercised precisely these powers here, staying the non-EMSU cases and limiting its hearing to EMSU wells via a Joint Order (July 2024). Empire itself acknowledged this authority: in its Reply in Support of its Motion to Lift Stay, Empire cited *Belser v. O'Cleireachain*, 2005-NMCA-073, ¶ 3, for the proposition that "the decision to grant or lift a stay is wholly within the discretion of the adjudicatory body." This same discretionary power authorizes the Commission to remand matters to the Division. Empire cannot invoke the Commission's discretion when it favors a stay and then deny that same power when it counsels remand.

3. The Commission's own precedent orders confirm remand authority.

The Commission's precedent resolves any doubt. On at least three occasions the Commission has ordered remand—directly contradicting Empire's contention that no such authority exists.

First, Order No. R-12976-D (November 4, 2009) was titled "Order Remanding to the Division." The Commission found a Motion to Remand "well taken" and ordered that the applications in Case Nos. 14134, 14141, and 14278 "are remanded to the Division for disposition in accordance with regular administrative technical review procedure." Those cases had been referred to the Commission under the predecessor to 19.15.4.20 NMAC. Despite the same "shall" language Empire now invokes, the Commission remanded—treating the referral as an administrative allocation subject to revision, not a permanent jurisdictional grant.

Second, Order No. R-13810-A (July 17, 2014) remanded de novo appeals of Division Order No. R-13810 to the Division "for possible modifications." De novo appeals under Section 70-2-13 are proceedings that "shall be held before the commission" under 19.15.4.20 NMAC. If the Commission possesses remand authority over such proceedings—where the mandatory language is strongest—then *a fortiori* it possesses remand authority over cases referred at the Director's discretion.

Empire cites no contrary authority. Its argument rests entirely on a negative inference from statutory silence—an inference directly contradicted by the Commission's consistent practice.

4. The Commission has already effectively remanded aspects of this dispute.

The third example is the Commission's treatment of the EMSU proceedings. In Order R-24004-A, the Commission delegated implementation authority to the Division, concluding that "OCD has the authority, and may at its discretion, implement the 'suspension'" on "any schedule OCD deems necessary." Order R-24004-A at ¶ 24. The Commission further clarified that "Empire must follow all relevant and applicable regulations and permitting processes." Order R-24004-A at ¶ 25. Acting on this delegation, the Division issued detailed Implementation Directions on January 15, 2026. This delegation was, in practical effect, a partial remand: the Commission resolved the policy question and returned operational details to the Division.

If the Commission possesses the greater power to delegate substantive implementation to the Division, it necessarily possesses the lesser power to remand unheard matters. Empire acquiesced in the delegation in Order R-24004-A; it has no principled basis to object to remand.

C. Empire's "Shall" Argument Is Inconsistent with the Statutory Framework.

1. The "shall" prescribes the forum while referral is in effect, not the permanence of the referral.

Empire's central argument is that "shall" in Section 70-2-6(B) and 19.15.4.20 NMAC creates an irrevocable mandate. Empire cites *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 53, for the proposition that "shall" is typically mandatory. But Empire conflates two distinct questions: (a) whether the hearing must be held before the Commission while the referral remains in effect, and (b) whether the referral itself may be revisited. The "shall" answers only the first question. The statute is silent on the second, and silence cannot be converted into a prohibition.

The mandatory language operates prospectively on the hearing's conduct, not retroactively on the referral's continued validity. Once a referral is withdrawn before any hearing occurs, there is no mandate left for "shall" to enforce. Empire treats the referral as the subject of "shall," when the statute's text makes clear the hearing is the subject—a textual mismatch fatal to Empire's position.

2. Empire's reading is incompatible with concurrent jurisdiction.

Under Section 70-2-6(A), the Division "shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas." This plenary jurisdiction is unqualified. Empire's reading—that a discretionary referral permanently strips the Division of authority—would convert concurrent jurisdiction into exclusive Commission jurisdiction, eliminating the concurrence the moment a referral is made. That is not what the statute says.

The Division retains subject-matter jurisdiction regardless of the referral. The referral directs only which body will conduct the hearing—it does not extinguish the Division's underlying authority. When the referral predicate no longer exists, the Division's plenary jurisdiction resumes its ordinary operation.

3. Empire's reading produces absurd results.

Empire argues the Commission is "best positioned" because any losing party will seek Commission review under Section 70-2-13. This "inevitable appeal" rationale, if accepted, would justify referring every Division case to the Commission in the first instance—an absurdity the Legislature could not have intended. *See Nguyen v. Bui*, 2023-NMSC-020, ¶ 15.

Empire's reading would also freeze administrative allocations regardless of changed circumstances: even though the referral predicate has been eliminated, the non-EMSU cases must remain before the Commission in perpetuity. The Commission is "a creature of statute, expressly defined, limited and empowered by the laws creating it," *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 11. Locking cases before a body that has completed its work on related proceedings, while the Division stands ready to adjudicate, frustrates the statute's purposes.

The practical consequences of Empire's rule are equally untenable. Under Empire's view, the Commission would be compelled to conduct full hearings in cases it has identified as more appropriately handled by the Division, regardless of resources or docket conditions. This is not the law—it is a litigation position the Commission should decline to adopt.

4. The omitted-language canon does not help Empire.

Empire invokes the omitted-language canon, arguing that because the Legislature did not expressly provide for remand, the Commission lacks authority. *See Duran v. Xerox Corp.*, 1986-NMCA-124, ¶ 17. But statutory silence is not a prohibition. The Oil and Gas Act is equally silent on stays, consolidation, scope limitation, and scheduling—yet the Commission exercises each routinely. The Commission's authority to do all these things is implied, not express; taken to its logical conclusion, Empire's canon would strip the Commission of every procedural tool not expressly enumerated.

Empire's selective deployment is telling—it cites the canon to prohibit remand but not to prohibit the stays and consolidations that have governed this proceeding since inception. *Cf. Autovest, L.L.C. v. Agosto*, 2024 N.M. LEXIS 154, ¶ 12, 563 P.3d 811. Orders R-12976-D and R-13810-A confirm the Commission has long understood its remand authority is implied.

D. Remand Is the Appropriate Outcome

The factual predicate for the original referral no longer exists. The EMSU proceedings are complete and on appeal; no active Commission proceedings remain for consolidation. Meanwhile, Empire has filed thirteen new revocation applications with the Division—Case Nos. 26255, 26264, 26267, 26269, 26273–26275, 26277–26281, and 26284. If the six non-EMSU cases are remanded, all nineteen pending cases can be heard together by the Division—accomplishing precisely the consolidation efficiency that motivated the original referral.

The Division is institutionally better suited to adjudicate these cases: it maintains a dedicated hearing examiner, holds hearings biweekly, and possesses technical expertise in well-specific disputes. The Commission meets only monthly and has no dedicated hearing officer. Additionally, Empire remains out of compliance: the Division rejected Empire's C-101 submission on July 17, 2026, for failure to comply with 19.15.5.9 NMAC and 19.15.16.9 NMAC. The Division is the appropriate body to address all 19 cases in the context of Empire's ongoing compliance failures.[1]

Remand also better serves due process. Rice Operating Company, Permian Basin Oil & Gas, Owl Resources, and Parker Drilling were not parties to the EMSU hearing and have never received an initial merits hearing. The Oil and Gas Act contemplates contested matters first heard

[1] The Division rejected Empire's C-101 ON July 17, 2026, noting it had 25 wells on the inactive well list. As of September 7, 2026, Empire is up to 27 wells on that inactive well list. *See* **Exhibit A**.

at the Division level, with Commission review available thereafter. Requiring these operators to proceed directly to Commission adjudication without Division-level development of their well-specific records would deprive them of that process—an independent and sufficient reason to order remand.

Finally, Joint Movants do not argue collateral estoppel requires remand—Empire's extended treatment is a red herring. The Fifth Judicial District Court's August 27, 2026, summary judgment in Goodnight's favor confirms the preclusive effect of the Commission's findings. More telling is the denial of summary judgment on other claims—confirming factual questions remain as to non-EMSU wells. Those unresolved disputes are what Division-level proceedings are designed to develop. The Commission's findings provide a factual roadmap; the Division need only adjudicate new questions specific to non-EMSU wells, which fall squarely within its expertise.

CONCLUSION

The Commission has authority to remand, as its own precedent unambiguously confirms. The concurrent-jurisdiction framework requires flexible allocation. The rationale for the original referral no longer exists. The EMSU proceedings are complete and on appeal, the Commission has delegated implementation authority to the Division, and the Division stands ready to adjudicate the six non-EMSU cases alongside thirteen additional applications Empire has filed. The Division, with its dedicated hearing examiner and technical expertise, is the appropriate forum.

For the foregoing reasons, Joint Movants respectfully request that the Commission grant the Joint Motion to Remand and remand Division Case Nos. 24021–24024 and 24026–24027 to the Division for hearing and adjudication in the first instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2026, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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EXHIBIT A

Inactive Well List

Total Well Count: 670 Inactive Well Count: 27
Printed On: Monday, September 07 2026

District	API	Well	ULSTR	OCD Unit	Ogrid	Operator	Lease Type	Surface Owner	Well Type	Last Production	Formation/Notes	Status	
1	30-025-25624	A L CHRISTMAS NCT C #012	2-18-22S-37E	E	330679	Empire New Mexico LLC	P	P	O	05/2025	06/16/11 ACIDIZED		
1	30-025-23949	ARROWHEAD GRAYBURG UNIT #108	I-25-21S-36E	I	330679	Empire New Mexico LLC	P	P	O	09/2023			
1	30-025-08733	ARROWHEAD GRAYBURG UNIT #149	4-01-22S-36E	D	330679	Empire New Mexico LLC	F	F	O	03/2025	GRAYBURG		
1	30-025-34842	ARROWHEAD GRAYBURG UNIT #329	M-36-21S-36E	M	330679	Empire New Mexico LLC	S	S	O	04/2025	GRAYBURG		
1	30-025-35423	ARROWHEAD GRAYBURG UNIT #359	P-02-22S-36E	P	330679	Empire New Mexico LLC	S	S	O	05/2025	GRAYBURG		
1	30-025-37284	ARROWHEAD GRAYBURG UNIT #391	4-07-22S-37E	M	330679	Empire New Mexico LLC	P	P	O	10/2024	GRAYBURG		
1	30-025-32956	COOPER LOVE #002	1-05-20S-37E	A	330679	Empire New Mexico LLC	P	P	G	05/2025	QUEEN		
1	30-025-30320	DAURON #004	7-01-21S-37E	G	330679	Empire New Mexico LLC	P	P	O	07/2024	ABO 04/08/2010 PLUGBACK DHC 430		
1	30-025-09511	EUGENE COATES #007	L-03-24S-36E	L	330679	Empire New Mexico LLC	P	P	O	10/2004		T	12/13/2024
1	30-025-04484	EUNICE MONUMENT SOUTH UNIT #001	O-04-21S-36E	W	330679	Empire New Mexico LLC	F	P	S	03/2025	SAN ANDRES		
1	30-025-04324	EUNICE MONUMENT SOUTH UNIT #109	H-25-20S-36E	H	330679	Empire New Mexico LLC	P	P	O	05/2025			
1	30-025-30277	EUNICE MONUMENT SOUTH UNIT #122	M-25-20S-36E	M	330679	Empire New Mexico LLC	F	P	O	09/2024			
1	30-025-04427	EUNICE MONUMENT SOUTH UNIT #165	L-36-20S-36E	L	330679	Empire New Mexico LLC	S	S	O	04/2009		T	9/26/2025
1	30-025-29912	EUNICE MONUMENT SOUTH UNIT #172	O-31-20S-37E	O	330679	Empire New Mexico LLC	S	S	I	05/2025	REPAIR INJ RWTI 11/9/11		
1	30-025-35461	EUNICE MONUMENT SOUTH UNIT #560	O-36-20S-36E	O	330679	Empire New Mexico LLC	S	S	O	06/2024	GRAYBURG-SAN ANDRES		
1	30-025-35454	EUNICE MONUMENT SOUTH UNIT #622	K-05-21S-36E	S	330679	Empire New Mexico LLC	S	S	I	05/2025	GRAYBURG-SA WFX 858 03/16/10 CONVT TO IN		
1	30-025-04213	EUNICE MONUMENT SOUTH UNIT B #859	J-11-20S-36E	J	330679	Empire New Mexico LLC	F	P	O	04/2025			
1	30-025-04206	EUNICE MONUMENT SOUTH UNIT B #863	P-10-20S-36E	P	330679	Empire New Mexico LLC	F	F	O	02/2019		T	3/21/2025
1	30-025-04266	EUNICE MONUMENT SOUTH UNIT B #890	P-14-20S-36E	P	330679	Empire New Mexico LLC	F	P	O	05/2025			
1	30-025-04292	EUNICE MONUMENT SOUTH UNIT B #902	D-23-20S-36E	D	330679	Empire New Mexico LLC	F	P	O	10/2023			
1	30-025-25081	H T MATTERN NCT D #014	C-07-22S-37E	C	330679	Empire New Mexico LLC	P	P	O	04/2025	DRINKARD/TUBB/BLINEBRY		
1	30-025-10131	J L GREENWOOD #010	P-09-22S-37E	P	330679	Empire New Mexico LLC	P	P	O	03/2025	BLINEBRY		
1	30-025-10136	J L GREENWOOD #015	M-09-22S-37E	M	330679	Empire New Mexico LLC	P	P	O	04/2025	BLINEBRY		
1	30-025-30455	J L GREENWOOD #016	N-09-22S-37E	N	330679	Empire New Mexico LLC	P	P	O	03/2025	BLINEBRY		
1	30-025-34560	MONUMENT 36 STATE #001	P-36-18S-36E	P	330679	Empire New Mexico LLC	S	P	O	11/2015	ABO - 12/11/2009 PLGBCK DRINKARD	T	12/18/2025
1	30-025-34561	MONUMENT 36 STATE #002	I-36-18S-36E	I	330679	Empire New Mexico LLC	S	P	O	12/2024	ABO INT REPAIR PUMP 10/5/2011		
1	30-025-06462	NEW MEXICO FO STATE #001	O-10-21S-37E	O	330679	Empire New Mexico LLC	S	S	O	01/2025	SAN ANDRES / RECLASSIFY GAS TO OIL		

WHERE Operator:330679, County:All, District:All, Township:All, Range:All, Section:All, Production(months):15, Excludes Wells Under ACOI, Excludes Wells in Approved TA Period