

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

**APPLICATION OF GOODNIGHT PERMIAN
MIDSTREAM, LLC FOR APPROVAL OF A
SALTWATER DISPOSAL WELL, LEA COUNTY,
NEW MEXICO AND, AS A PARTY ADVERSELY
AFFECTED BY ORDER R-22869-A, FOR A
HEARING DE NOVO BEFORE THE FULL
COMMISSION, PURSUANT TO NMSA 1978,
SECTION 70-2-13.**

CASE NO. 24123

**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 GOODNIGHT MIDSTREAM
PERMIAN, LLC FOR APPROVAL OF A
SALTWATER DISPOSAL WELL, LEA COUNTY,
NEW MEXICO**

CASE NOS. 23614-23617

**APPLICATION OF EMPIRE NEW MEXICO TO
REVOKE THE INJECTION AUTHORITY
GRANTED UNDER ORDER NO. R22026 FOR
THE ANDRE DAWSON SWD #001, LEA COUNTY,
NEW MEXICO**

CASE NOS. 24018-24027

**OIL CONSERVATION DIVISION'S MOTION TO RECONSIDER THE OIL
CONSERVATION COMMISSION'S *SUA SPONTE* ORDER STRIKING OCD'S
SUPPLEMENTAL REBUTTAL DISCLOSURE**

The New Mexico Oil Conservation Division ("OCD") hereby submits its Motion to Reconsider the Oil Conservation Commission's *sua sponte* Order Striking OCD's Supplemental Rebuttal Disclosure. OCD contends that the Oil Conservation Commission's Order is manifestly unjust in that, under the Scheduling Order, Goodnight and Empire tendered no discovery upon OCD such that Goodnight and Empire's initial testimonial disclosures provided nothing to which OCD might respond, leaving OCD to linger until the filing of Goodnight and Empire's rebuttal

testimony to identify proper rebuttal. OCD *does not* seek an order to strike any strictly late-filed pleadings in this matter. OCD conferred with counsel for all parties of record – none oppose, but all disagree with OCD’s characterizations of events. OCD requests the OCC reconsider its order on the following grounds and ultimately withdraw the order, restoring OCD’s filing into the record.

I. Introduction.

OCD does not dispute the contents of the most recent scheduling order, specifically the rebuttal testimony deadline. But there is more to the story than a mere deadline, a story that merits reconsideration. OCD advised Goodnight and Empire (the parties) that OCD would file a supplemental rebuttal to substantively respond to criticisms of OCD’s case that would only be brought to light in the filing of the parties’ respective rebuttal testimony. *see* OCD’s Witness and Testimony Disclosure, OCD’s Rebuttal Disclosure, and OCD’s Supplemental Rebuttal Disclosure. OCD also advised the OCC of this issue on February 3, 2025 at the OCC meeting held that day. *See* February 3, 2025 OCC Transcript at 10:2-13. OCD notes *no party objected* to OCD’s supplemental filing.

Turning to factual concerns, during the course and scope of discovery in this matter, *neither Goodnight nor Empire served discovery or subpoenas upon OCD*. It was only upon the filing of OCD’s direct testimony pleading on or about August 26, 2024 that the parties learned of OCD’s intended position, namely to pursue a monitoring project in the EMSU to determine if hydrologic communication exists between the EMSU and the Capitan Reef *via* the Hobbs Channel or other migration pathways. Because the parties did not serve discovery upon OCD, the parties were unaware of OCD’s position in this litigation, securing an advantage over OCD in that OCD would only receive hostile party testimony upon the filing of the parties’ rebuttal, resulting in OCD being (from a strict application of the Procedural order) barred from providing a substantively responsive

rebuttal to the OCC. In other words, OCD is heavily prejudiced because OCD has now had its reasonable and logically coherent Supplemental Rebuttal pleading stricken.

One of OCD's overarching concerns here is that *all* Parties technically violated the Procedural Order at least twice, leaving OCD to ponder why its supplemental filing is now scandalous to the point of meriting a stricken pleading, while the Goodnight and Empire's cases remain unblemished by *sua sponte* action (and despite Goodnight's efforts to bring discovery issues to the attention of the OCC through motion practice, for example).

The following is a brief chronology of supplemental pleadings filed in this matter (including relevant motions filed in response thereto) that are, in strict terms and despite any agreements between the parties to the contrary, in violation of either the June 6, 2024 Prehearing Order which set a deadline of August 26, 2024 for disclosure of "[w]ritten direct testimony and exhibits" or violate subsequently amended Prehearing Order deadlines:

- On or about February 13, 2025, Goodnight filed a revised Exhibit C to its exhibits production to include Exhibits C-19 through C-27 that had been inadvertently omitted, exceeding the Prehearing Statement and Exhibit Tendering deadline by 3 days as set forth in the Second and Third Amended Prehearing Order;
- On or about January 30, 2025, Empire filed its "*Amended Notice of Revised Testimony of Empire Witnesses Galen Dillewyn and Joe McShane,*" exceeding the testimony disclosure deadline by 158 days;
- On or about January 21, 2025, Goodnight filed "*Revised Testimony and Revised Expert Report of William Knights,*" exceeding the disclosure deadline by 149 days;

- On or about January 22, 2025, Empire filed “*Supplemental Rebuttal Witness Disclosure*,” exceeding the rebuttal witness disclosure deadline of February 6, 2025, as found in the Second and Third Amended Prehearing Order, by 16 days;
- On or about December 4, 2024, Empire filed “*Revised Self-Affirmed Statement of Galen Dillewyn*,” exceeding the testimony disclosure deadline by 101 days;
- On or about December 6, 2024, Empire filed “*Revised Self-Affirmed Statement of Joe McShane*,” exceeding the testimony disclosure deadline by 103 days;

OCD, in fact, filed a pleading with the OCC a day late at some point during litigation, due to OCD counsel failing to hit “send” when he finished the service email (OCD counsel cannot seem to find that exact pleading, but for the sake of candor toward the tribunal makes this admission).

II. Argument

- a. OCD’s litigation posture put it in an unwinnable situation: move the OCC for the privilege of an extended rebuttal deadline that would reek of bias in favor of OCD or file a supplemental rebuttal of which OCD counsel apprised both the parties and the OCC on more than one occasion.

As OCD sees the situation *vis-à-vis* the order to strike, OCD had two, perhaps three, options to contend with the parties lack of discovery served upon it to reveal its position. One is to simply disclose its case during discovery without prompt, which would be an odd litigation strategy. Second, OCD could have filed a motion to seek a special accommodation to file a “sur-disclosure,” which would almost certainly be met with opposition by the parties followed by a demand for individual extension for “sur-replies,” not to mention that should such a motion be granted to OCD, the order would be facially biased and materially unfair, something OCD counsel would not support or wish to have entered as a matter of law. Third, OCD files its supplemental rebuttal, the only opportunity OCD had to rebut *any* claims made against it by either Goodnight or Empire. OCD chose the latter – no party filed a motion to strike, no party complained *ex parte* to the OCC

(to the best of OCD's knowledge). No party objected to OCD's filing. And yet, OCD's filing is the one targeted with an order to strike out of the blue.

- b. Based on the above examples of other parties strictly violating the various scheduling orders, without motion practice to address such strict violations or sua sponte striking orders, the order striking OCD's supplemental rebuttal pleading could be seen as arbitrary and/or capricious.

As listed above, late filings have unfortunately become a hallmark of this case, in large part because the case is voluminous in terms of documents, complex in its subject matter, and administrative litigation is intentionally free of the guardrails of the rules of civil procedure to promote faster and more responsive adjudication. OCD counsel understands the above all too well. On the other hand, striking a single pleading from a single party despite repeated technical violations of the various procedural order deadlines creates the appearance of improper bias in the form of an arbitrary and potentially capricious ruling. *City of Albuquerque v. State Lab. & Indus. Comm'n*, 1970-NMSC-037, ¶ 7, 81 N.M. 288, 291, 466 P.2d 565, 568. OCD sincerely doubts that was the intention of the OCC, although that remains unclear given the verbiage of the Order to Strike. To remedy the apparent defect of the order, OCD suggests the order be withdrawn and the stricken pleading be entered back into the record.

- c. What is good for the goose is good for the gander.

Because the OCC permitted serial instances of late filings in this case without *sua sponte* orders to strike, OCD sees no reason why the underlying order to strike was entered. *OCD, again, does not seek a mass of filings stricken from the case; rather, OCD wishes to be given the leeway given to Goodnight and Empire during the entire life of this case.* OCD's stricken pleading was not done to gain an advantage but was filed to maintain principles of fair play and substantial justice, to

ensure parity during the upcoming evidentiary hearing, to respond to evidence against the OCD that otherwise the OCD would not be allowed to refute.

III. Summary

Based on the above arguments, OCD requests that the OCC reconsider its order striking OCD's supplemental rebuttal pleading, ordering the pleading to be restored to the record for each of the above-captioned cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 21, 2025, this pleading was served by electronic mail on:

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