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

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

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

DIVISION CASE NO. 24123
ORDER NO. R-22869-A

EMPIRE PETROLEUM'S RENEWED MOTION TO CLARIFY SCOPE OF HEARING AND BURDEN OF PROOF

Empire New Mexico, LLC ("Empire") renews its August 26, 2024, Motion for Clarification on Scope of Hearing and Burden of Proof ("Motion to Clarify"). In the Motion to Clarify, Empire addressed the following questions: (1) the issues to be adjudicated at the hearing

(*i.e.*, the scope of the hearing); and (2) the parties' respective evidentiary burdens.[1] The Commission heard argument on the Motion to Clarify but did not issue a decision.

As a result, Empire renews its request for an order clarifying that: (1) as to the hearing's scope, the salient issue is "the existence, extent of[,] and possible interference with a residual oil zone the Eunice Monument South Unit ("EMSU") by produced water injection activities undertaken by [Goodnight Midstream Permian, LLC ("Goodnight")];"[2] and (2) at the hearing, Empire and Goodnight will each bear the burden of persuasion on their respective applications.

I. INTRODUCTION

This consolidated proceeding arises from Goodnight's current and proposed injection of produced water into the San Andres formation within the 14,189.84-acre Eunice Monument South Unit ("EMSU") operated by Empire. Both the San Andres and Grayburg formations are included within the unitized interval. The EMSU has existed since 1984, when it was approved by the Commission via Order Nos. R-7765, R-7766, and R-7767. Empire also operates an expanded area adjacent to the northwest corner of the EMSU, denoted as EMSU-B, and the Arrowhead Grayburg Unit ("AGU"), which is located approximately 1 mile to the southeast of the EMSU, under Order No. R-9482. Chevron and XTO operated the units before Empire's acquisition in 2021.

The issue to be addressed at hearing is whether Goodnight's produced water injection activities are resulting in the waste of hydrocarbons within the EMSU. If so, then Goodnight is impairing or encroaching on Empire's correlative rights, as the Oil and Gas Act defines them,[3] and

[1] *See* Motion to Clarify at 2-6.

[2] *See Joint Order on Goodnight Midstream Permian LLC's Motion to Limit Scope of Hearing On Cases Within the Eunice Monument South Unit and the Oil Conservation [Division's] Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024* (Jul. 2, 2024) (the "Scope Order").

[3] *See* NMSA 1978 § 70-2-33(H) (defining "correlative rights") & NMSA 1978, Section 70-2-3(A) (defining "underground waste").

Goodnight's injection operations in the EMSU should not be permitted. *See 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.").

Contrary to Goodnight's claims, the Scope Order, Statutory Unitization Act, and Oil and Gas Act do *not* require Empire to prove that Empire's extraction of residual hydrocarbons with the San Andres would yield "paying quantities" or a particular profit margin. Indeed, the Oil Conservation Division correctly determined that evidence justifying "continued assessment" of a unitized interval for recovery of hydrocarbons was sufficient to deny Goodnight's application to inject into its proposed Piazza Well No. 1. Order No. R-22869-A at 8, ¶ 11 (quoting NMSA 1978, Section 70-2-12(B)(4)).

Despite the above, Goodnight has repeatedly advocated its flawed view of the Scope Order and controlling law, effectively seeking to use the hearing as a referendum on economic matters. As set forth below, the Commission should reject Goodnight's attempt to limit the Commission's ability to protect correlative rights by determining whether Goodnight's extensive injection operations "tend[] to reduce the total ultimate recovery" of hydrocarbons from the San Andres and/or Grayburg formations within the EMSU. *See* Section 70-2-12(B)(4).

Goodnight continues to exacerbate its mischaracterization of the relevant issues by confusing the parties' respective evidentiary burdens. That is, Goodnight bears the burden of proving the relief sought in its injection applications but attempts to shift that burden to Empire. As set forth below, this contravenes universally accepted New Mexico law on the burden of proof in administrative proceedings and at common law; namely, that (1) a permit applicant bears the

burden of proving that it meets all permitting requirements;[4] (2) this burden never shifts to the permit opponent;[5] and (3) while the burden of production or of "going forward" with evidence may shift over the course of an administrative proceeding, it does not require the permit opponent to disprove or "rebut" every aspect of the permit applicant's case. Rather, the permit opponent need only raise a *question of fact* as to the applicant's entitlement to the ultimate relief. [6]

As a result of these fundamental errors, and to avoid unnecessary argument at hearing, Empire requests that the Commission issue an order confirming the scope of the hearing and the burden of proof.

II. ARGUMENT

A. **The critical issue in these cases is whether Goodnight's injection operations are interfering with correlative rights and/or resulting in waste.**

The New Mexico Oil and Gas Act requires the Commission to prevent "waste" of hydrocarbons and protect "correlative rights." NMSA 1978, §§ 70-2-6 and 70-2-11; *see also Continental Oil Co.*, 1962-NMSC-062, ¶ 27 ("Our legislature has explicitly defined both 'waste' and 'correlative rights' and placed upon the commission the duty of preventing one and protecting the other."). The Act broadly defines both "underground waste" and "correlative rights" in a manner that precludes injection operations that tend to reduce the total quantity of oil ultimately recovered from any pool. *See* NMSA 1978, §§ 70-2-3(A), 70-2-12(B)(4).

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[4] *See Int'l Minerals & Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-032, ¶ 10, 81 N.M. 280 (administrative proceedings are subject to the common-law rule that the moving party bears the burden of proof).

[5] *See id.*; Trial Handbook for New Mexico Lawyers § 9:1 ("It is almost universally held that the burden of proof or persuasion…does not shift. In the strict sense, the burden of proof remains with the party with the affirmative on an issue whereas the burden of going forward with the evidence may shift at various times from one party to the other as the respective parties produce evidence.")

[6] *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.").

Similarly, the Statutory Unitization Act was created to provide for "greater ultimate recovery" from the "unitized management, operation and further development" of oil and gas properties to which the act applies. NMSA 1978, § 70-7-1. Like the Oil and Gas Act, this statute was enacted with the goal of "substantially increas[ing] the recovery of oil above the amount that would be recovered by primary recovery alone." *Id*. Reading these statutes together, it is clear that Empire's ability to recover from the ROZ within the EMSU is precisely the type of "greater ultimate recovery" that the legislature intended to protect.

Notwithstanding this unambiguous language, Goodnight seeks to constrain the Commission's authority to protect correlative rights by limiting those rights to operations that, in Goodnight's view, are "capable of producing in paying quantities under either Section 70-2-12(B)(4) or Section 70-7-6(A)(3)." *See* Goodnight Response to Motion to Clarify at 9. However, neither party has filed an application for statutory unitization under Section 70-7-6. *See* Reply in Support of Motion to Clarify at 3. Therefore, the "[m]atters to be found by the division precedent to issuance of a unitization order" under Section 70-7-6(A) do not apply to the applications currently before the Commission. Further, while Empire will be able to show that the costs of conducting tertiary recovery will "not exceed the estimate value of the additional oil and gas so recovered plus a reasonable profit" if and when Empire applies to the Division to amend the Unit, Empire does not need to show at hearing in the instant matters that the "San Andres ROZ is capable of producing in paying quantities, and, therefore, protectable." *Id.*

Goodnight relies heavily on Section 70-2-12(B)(4) – outlining the Commission and Division's rulemaking and adjudicatory powers – to support Goodnight's contention that, to defeat Goodnight's applications *or* carry its burden on its own applications, Empire must prove that hydrocarbons in the San Andres ROZ are recoverable in paying quantities. *See, e.g.*, Goodnight

Response to Motion to Clarify at 4, 9, 15-16. For the reasons set forth in Empire's reply brief, this reliance is misplaced. *See* Reply in Support of Motion to Clarify at 4-5 (explaining that if the Commission were to read Section 70-2-12(B)(4) as Goodnight suggests, it "leads to absurdities [and] …conflict[s] with the legislative intent") (citing *Rutherford v. Chaves Cnty*., 2004-NMSC-010, ¶ 24).

In reviewing all applications, the Commission must prevent waste and protect correlative rights. Section 70-2-11(A). This foundational requirement must be read in conjunction with Section 70-2-12(B), not in isolation. Moreover, Section 70-2-12(B)(4) must be read as a whole:

> The oil conservation division may make rules and orders for the purposes and with respect to the subject matter stated in this subsection . . . (4) 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*[.]

(emphasis added); *see State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, 127 N.M. 272 (recognizing that a statute providing authority to an agency "must be read as a whole and harmonized with other statutes concerning the same subject matter."). The plain language of Section 70-2-12(B)(4) expressly recognizes that the Commission is authorized to prevent the encroachment of water caused by Goodnight here, which "reduces or tends to reduce the total ultimate recovery of . . . oil or gas . . . from any pool." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24 (stating that, in construing a statute, a court must determine and give effect to the legislature's intent by looking first to the plain language of the statute).

Thus, Goodnight's contrived misreading of Section 70-2-12(B) to support its "in paying quantities" requirement violates principles of statutory interpretation, as well as Division and Commission practice. *See, e.g.*, Order No. R-22869-A at 8, ¶ 11 (denying Goodnight's injection

application where Empire provided evidence supporting the *continued assessment* of the Unitized Interval for *potential recovery* of any additional hydrocarbons). The Commission should enter an Order clarifying that, in establishing interference with its correlative rights at the hearing, Empire does not have to prove that its operations within the San Andres will yield hydrocarbons "in paying quantities."

B. Goodnight has the burden of proof on its applications to demonstrate that injection into its proposed SWDs will not result in waste or impair correlative rights.

In New Mexico, administrative proceedings are subject to the common-law rule that the moving party bears the burden of proof. *Int'l Minerals & Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-032, ¶ 10, 81 N.M. 280; Order No. R-21420-A at 6 (stating that the applicant has the burden of proof). The "burden of proof" is often used imprecisely "to describe two distinct concepts": "the burden of persuasion, *i.e.*, the burden to persuade the fact[-]finder" and "the burden of production, *i.e.*, the burden to produce evidence." *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 24, 304 P.3d 409. In this instance, the party bringing the application before the Commission bears the burden of persuasion on that application; *i.e.*, of proving, by a preponderance of the evidence, that it is entitled to the relief requested in the application. *See* 22.600.1.18 NMAC ("Unless otherwise specified by statute, the burden of proof in an administrative proceeding before the administrative hearings office is the preponderance of evidence.").[7]

Additionally, "[i]t is almost universally held that the burden of proof or persuasion…does not shift. In the strict sense, the burden of proof remains with the party with the affirmative on an

[7] Goodnight does not cite, and Empire has not located, any support for Goodnight's threadbare assertion that Empire must prove its case "beyond a preponderance of the evidence." *See* Goodnight's Motion to Strike Empire's Rebuttal Witness Disclosure (Jan. 15, 2025) at 3 ("Empire has the initial burden of establishing beyond a preponderance of the evidence in its case in chief.") (emphasis in original).

issue whereas the burden of going forward with the evidence may shift at various times from one party to the other as the respective parties produce evidence." Trial Handbook for New Mexico Lawyers § 9:1; *see also Gemini Las Colinas, LLC v. N.M. Taxation & Rev. 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.").

Goodnight appears to take the position that, if it makes a *prima facie* case on its applications,[8] the burden of proof shifts to Empire to "rebut" Goodnight's entire case. *See* Goodnight Response to Motion to Clarify at 6 ("[I]t is also true that having made out a *prima facie* case in support of its applications the evidentiary burden shifts to Empire to rebut Goodnight's evidence."). Preliminarily, Goodnight relies on a 1980 case, *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, which analyzed the burden of proof in a petition for a variance from an air quality control regulation. Unlike the EIB, which has since promulgated a regulation setting forth the applicable burden of proof in adjudicatory proceedings before it [*see* 20.1.2.302 NMAC], the Division has adopted no such burden-shifting scheme. Thus, in a Commission proceeding, it is not clear that the burden of production ever shifts.

Moreover, even if Goodnight can establish a *prima facie* case on some of its applications, Goodnight overstates the impact of establishing a *prima facie* case. That is, in construing other agencies' burden-shifting regimes, courts have uniformly held that establishing a *prima facie* case only shifts the burden of production in the proceeding. *See, e.g.*, *Gemini Las Colinas*, 2023-

[8] A *prima facie* case requires "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10 (quoting *Goodman v. Brock*, 83 N.M. 789, 792-93 (1972)); *see also* Trial Handbook for New Mexico Lawyers § 9:1 (establishing a *prima facie* case means that "sufficient evidence has been introduced to warrant submission to the [fact finder] of the issue to which the evidence is directed")

NMCA- 039, ¶ 27, 531 P.3d 622. It does not turn the entire proceeding on its head and require the permit opponent to disprove the applicant's case.

In *Gemini*, the New Mexico Supreme Court considered a burden shifting scheme in the context of an administrative tax protest. *Id.* ¶¶ 26-27. Under that regime, if a taxpayer overcomes a statutory "presumption of correctness" of a tax assessment, the taxpayer shifts "the burden to the [d]epartment to show the correctness of the tax assessment." *Id*. The issue was whether the "burden" that shifted to the agency was the burden of persuasion or the burden of production. *Compare id. with* 20.1.2.302 NMAC ("Following the establishment of a prima facie case by the petitioner, any person opposed to the relief sought in the petition *has the burden of going forward with any adverse evidence* and showing why the relief should not be granted.") (emphasis added).

The Court held that the term "burden" referred to the burden of production, not the burden of persuasion. *Id.* ¶ 29. It further held that to fulfill its burden of production, the department *only needed to produce evidence sufficient to create an issue of fact about the correctness of its assessment*. *Id.* ("If the department's evidence creates a question of fact about the correctness of the assessment, it has fulfilled its burden of production, and the case is ripe for the hearing officer to resolve factual disputes and decide the protest on the merits."), citing UJI 13-304 NMRA (noting that "[e]venly balanced evidence is not sufficient" to carry the burden of persuasion). *Gemini* should guide the Commission's analysis of the burden of proof here. *See id.* ¶ 28 (holding that "we have not found, any statute or regulation stating, or even suggesting, that New Mexico law deviates from general burden of persuasion principles" and declining "to infer …that this Court intended to deviate from the general rule that burdens of persuasion do not shift").

In this case, Goodnight bears the burden of persuasion in its several applications for the approval of new saltwater disposal wells ("SWD") and its application to increase an injection rate;

i.e., Case Nos. 24123, 23775, and 23614-23617. It cannot be disputed—as the applicant, Goodnight bears the burden to prove that injected water will be contained within the injection zone, that injected water is compatible with the receiving formation, and that its injection operations will not result in waste or impair correlative rights. *See* Application for Authorization to Inject, Form C-108, Parts III(B)(5), VII(4-5); 19.15; *see also* NMSA 1978, Sections 70-2-2 (1949), 70-2-3(A) (1965); 19.15.26.8(B)(1) NMAC ("The operator shall apply for authority to construct and operate an injection well by submitting form C-108 complete with all attachments to the division."). *See generally* NMSA 1978, Sec. 70-2-11 (1977) (stating the commission's duty to prevent waste and protect correlative rights).

Even assuming Goodnight could establish a *prima facie* case on its applications, which it cannot, and that the burden of production shifts to Empire, then all Empire must do is raise a *question of fact* as to Goodnight's applications. *See Gemini*, 2023-NMCA-039, ¶ 29. As the Court noted in *Duke City Lumber*, an opposing party is not required to "prove a negative" in discharging its burden of production. *See Duke City Lumber Co. v. N.M. Envtl. Imp. Bd.*, 1980-NMCA-160, ¶ 15, 95 N.M. 401 ("A party is not required to make plenary proof of a negative averment. It is enough that he introduces such evidence as, in the absence of counter testimony, will afford reasonable ground for presuming the allegation is true; and when this is done the onus probandi will be thrown on his adversary."). Goodnight alone bears the burden of proof on its applications and its attempt to shift the burden of proof to Empire is contrary to law and should be rejected.

III. CONCLUSION

For the foregoing reasons, the Commission should issue an order clarifying that each party bears the burden of proving its respective applications will prevent waste and protect correlative

rights, *i.e.,* whether Goodnight's injection tends to reduce the total ultimate recovery of hydrocarbons within the EMSU.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record by electronic mail on February 7, 2024.

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