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 NOS. 23775**

APPLICATIONS OF EMPIRE NEW MEXICO LLC TO REVOKE INJECTION AUTHORITY,
LEA COUNTY, NEW MEXICO **CASE NOS. 24018-24020, 24025**

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN, LLC FOR APPROVAL OF A SALTWATER DISPOSAL WELL
LEA COUNTY, NEW MEXICO **CASE NO.24123**
ORDER NO. 22869-A

GOODNIGHT MIDSTREAM PERMIAN LLC'S MEMORANDUM OF LEGAL ISSUES FOR CLOSING

Goodnight Midstream Permian, LLC ("Goodnight") (OGRID No. 372311) through undersigned counsel hereby files it legal memorandum in support of its Proposed Findings of Fact and Conclusions of Law, which are being filed contemporaneously herewith.

Section 1: The SADR should be excluded from the EMSU and EMSU Special Pool

The San Andres should be excluded from the Eunice Monument South Unit (the "EMSU") and its special pool because the Commission lacked authority to include the San Andres in the EMSU and its pool when it created the unit for any one of the following four independent reasons. *First*, the Commission does not have authority to unitize an aquifer. *Second*, the Commission does not have authority to unitize geologically separate formations that are not "a pool or part of a pool." *Third*, the Commission does not have authority to include the San Andres in the EMSU because it was included specifically as a water source for waterflood operations, not as a source of oil or gas production, and has never been reasonably defined by development. *Fourth*, the Commission has a continuing obligation under statute to review Order Nos. R-7765 and R-7767, as amended, to determine whether further orders are necessary, including to cure legal defects.

A. The Commission has never had authority to unitize an aquifer.

The Commission "is a creature of statute, expressly defined, limited and empowered by the laws creating it," which means its authority is prescribed by law. *Cont'l Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 11, 373 P.2d 809. Under the Statutory Unitization Act, NMSA 1978, § 70-7-1 *et seq*. (the "Act"), the Commission is authorized only to issue orders providing for unitization and unit operation "of a pool or part of a pool." *Id.* § 70-7-7. A pool is defined as "an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both." *Id*. at § 70-7-4(A). A pool "is synonymous with common source of supply" and with a "common reservoir" of crude petroleum oil or natural gas or both. *Id*. Moreover, the pool or portion thereof involved in an application for statutory unitization must have been shown to be "reasonably defined by development." § 70-7-5(B); *see infra* Section C.

The Act does not authorize the Commission to unitize formations or reservoirs that are not a "pool or part of [a] pool." *Id*. § 70-7-7. In particular, the Act does not vest the Commission with authority to unitize non-hydrocarbon bearing formations, such as aquifers. An aquifer is not an oil and gas property, does not give rise to claims under the correlative rights doctrine, and is not subject to statutory unitization. *Id.* § 70-2-33(H) (providing that "correlative rights" are applicable only to oil and gas rights). As a non-hydrocarbon-bearing aquifer, the San Andres does not qualify for inclusion in a "pool." *See* Ex. 1, NMAC 19.27.26 (Office of State Engineer Rule declaring lands within the EMSU to be within the Capitan Underground Water Basin). Unitization of an aquifer, geologically distinct from a pool, is not "reasonably necessary" to protect the correlative rights of owners with an interest in the oil and gas minerals. NMSA 1978, § 70-2-11(A). As important, because the San Andres, as an aquifer, has never been "reasonably defined by development[,]" the Commission lacked statutory authority to unitize it or include it within the definition of a pool. *Id*. at § 70-7-5(B).

As an aquifer, the San Andres is not subject to unitization by the Commission for any purpose. *See* Ex. 1. Under the New Mexico Constitution, unappropriated groundwater within the state belongs to the public. *See* N.M. Const. Art. XVI, § 2; *see also McBee v. Reynolds*, 1965-NMSC-007, ¶14, 399 P.2d 110 (confirming that "waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are public" and "included within the term 'water' as used in Art. XVI, §§ 1-3, of our Constitution."). Interpreting the Act to authorize unitization of the San Andres aquifer that has not been reasonably defined by development forecloses appropriation and use of the San Andres aquifer by the public and facially conflicts with the New Mexico Constitution. *See* NMSA 1978 § 70-7-1. To avoid conflict over management and control of subsurface resources, the Legislature limited the

Commission's authority under the Act to unitizing oil and gas pools that have been reasonably defined by development. The Commission has no authority to unitize a public source of groundwater.

B. The Commission has never had authority to include the San Andres in a unit with the Grayburg and Penrose formations because the San Andres is a distinct reservoir that is geologically separate from those overlying formations and not part of the same pool or reservoir.

The Commission lacked authority to include the San Andres in the EMSU unitized interval because the San Andres formation is a functionally distinct reservoir that is geologically separate from the Grayburg and Penrose formations and, therefore, does not meet the statutory definition of "a pool or part of a pool." NMSA 1978, § 70-7-7; *see supra* Section 1.A. A pool is defined as "an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both" that "is completely separate from any other zone in the structure." *Id*. § 70-7-4(A); *see also* § 70-2-33(B). The San Andres is not part of the same pool as the Grayburg and Penrose formations. The water-bearing San Andres lies below, and is geologically and functionally separate from, the oil-producing zones of the Grayburg and Penrose formations and acts as a distinct and separate reservoir. The lower limit of the oil-producing zone, or "oil column," is within the Grayburg formation between about -325 feet subsea and -350 feet subsea, whereas the upper limit of the San Andres is even deeper. Not only is the San Andres deeper than the lower limit of oil production, but the San Andres has long been known to be a distinct reservoir that is geologically and functionally separate from the oil-bearing Grayburg.

This physical and functional separation between the two formations, with the San Andres being the water source for waterflood operations in the Grayburg and Penrose formations and the zone for disposal of produced water, was foundational to Gulf's operational plan in the 1980s and later EMSU operators. It enabled Gulf and its successors to extract **hundreds of millions of**

barrels of water from the San Andres for make-up water to enact waterflood operations in the Grayburg and Penrose (oil reservoirs of the EMSU) to build the pressure needed to conduct the enhanced oil recovery operations in the EMSU oil reservoirs. If the San Andres and Grayburg formations were not geologically and functionally distinct, and did not act as separate reservoirs, withdrawal from the San Andres reservoir for waterflood operations in the Grayburg would not have been possible. Geologic separation is further proven by the fact that the Grayburg has been successfully re-pressurized and enhanced oil recovery operations have taken place in that reservoir for nearly four decades. Although this geologic separation supports EMSU operations, including the San Andres in the unitized interval contravened the Commission's statutory authority. As separate geologic formations, and reservoirs, they are not "an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both" that **together** are "completely separate from any other zone in the structure." *Id.* § 70-7-4(A); *see also* § 70-2-33(B). Since the San Andres and Grayburg and Penrose are not **together** a pool or part of **the same** pool, the Commission lacked authority to include the San Andres in the unitized interval with the overlying Grayburg and Penrose formations. *Id*. § 70-7-7(A).

Simply stated: the San Andres is a separate reservoir from the Grayburg/Penrose and cannot be deemed to be part of a pool or part of the same pool. This conclusion is confirmed by the long, well-documented, and vastly disparate production histories within the EMSU between the San Andres—having produced more than 350 million barrels of water with no depletion and no documented oil production, and having received approximately 450 million barrels of produced water through disposal largely on vacuum with a de minimis increase in pressure—and the

Grayburg/Penrose, which at the very same time produced about 150 million barrels of oil[1] with substantial depletion and pressure drawdown. The San Andres and Grayburg are unmistakably separate formations and distinct reservoirs.

C. The Commission lacked authority to include the San Andres in the EMSU because it is not reasonably defined by development, and it would not yield more production than primary recovery alone.

With respect to the San Andres, two other requirements for unitization under the Act have never been established. To include a pool or part of a pool within a secondary recovery unit, the Act requires both that the area to be included within the unit (1) be reasonably defined by development and (2) that the proposed unitization of the pool or part of a pool will substantially increase recovery beyond the amount of hydrocarbons that would be recovered by primary recovery alone.

To be considered "reasonably defined by development," the proposed pool must have a history of primary recovery of oil and/or gas. NMSA 1978, §§ 70-7-1 & 70-7-5(B); *see also* 6 Williams & Meyers, OIL AND GAS LAW, § 913.8 ("Only so much of a common source of supply as has been defined and determined to be productive of oil and gas by actual drilling operations may be so included within the unit area.").[2] The San Andres in the EMSU is not "reasonably defined by development" because it has never produced any reported volumes of oil and/or gas through primary recovery. Previous operators conducted two well tests, at most, that were **abandoned after generating less than 10 barrels of oil and more than 7,000 barrels of water**,

[1] *See* W. West, Dir. Testimony, Empire Exhibit I, ¶ 39; J. Wheeler, Dir. Testimony, Empire Exhibit A, ¶ 11.

[2] Industry standard similarly defines the phrase "reasonably defined by development," as the area or acreage "that can reasonably be considered to be **economically productive of secondary reserves** in the reservoir that is being unitized." H. Philip Whitworth, Jr., *Onshoring Pooling and Unitization*, 1997 ROCKY MT. MIN. L. INST., 5F-26 (discussing statutory requirements for fieldwide unitization in Texas) (emphasis added).

which demonstrates that the San Andres in the EMSU is not a commercial source of oil or gas production. Empire's own expert, William West, confirmed that there has never been any reported production of hydrocarbons from the San Andres in the EMSU. *See* Self-Affirmed Statement of William West at ¶ A.6 ("No wells have produced from the San Andres at EMSU"); *id.* at Ex. I-4 ("no production was made from the San Andres interval")[3]; *see also* Ex. 2, EMSU Secondary Recovery Unit Royalty Owners Overview at 3 (describing the San Andres as a "non-productive" formation). Without a history of primary hydrocarbon recovery, inclusion of the San Andres formation in the EMSU violated the express language and purpose of the Act. This cannot be disputed and remains true today.

Including the San Andres in the Unit was also improper at the time the Commission approved Order No. R-7765 for a separate and independent reason: incorporating the non-hydrocarbon-producing aquifer would not yield more recovery than primary recovery alone. Under the Act, statutory unitization is **not for exploration or primary recovery**; it is for increasing the oil and gas recovery **after primary recovery**. *See* NMSA § 70-7-1 (explaining that unitization is for "any type of operation that will substantially increase the recovery of oil above the amount that would be recovered by primary recovery alone").

The initial Unit Operator, Gulf Oil, never intended to produce oil from the San Andres. *See* Ex. 3, November 7-8, 1984, Commission Hearing Transcript at 53:23-54:2 (explaining that the unit interval was defined to target the "entire oil column in the Grayburg," not the San Andres). Gulf Oil merely sought to include the San Andres as an aquifer in the Unit as a source of water supply for its waterflood operations. *See* Ex. 4, Technical Committee Report, April 1, 1983, at 29 ("The total water requirement will be provided by . . . make-up water provided by nine San Andres

[3] Exhibit I-4 is an attachment to William West's testimony.

supply wells."); Ex. 5, Meeting Minutes of EMSU Technical Committee and Working Interest Owners' Committee at 28 ("The bottom of the interval must be the base of the San Andres formations to include the area's most prolific water production zone"). Such inclusion was improper because the San Andres itself did not—and could not—contribute to increased hydrocarbon production. Indeed, it is undisputed there was not and has never been reported oil or gas production, let alone commercial production, from the San Andres in the EMSU. *See* Self-Affirmed Statement of William West, at ¶ A.6. The Commission lacked authority to include the San Andres in the EMSU unitized interval because it was not shown that it would substantially increase recovery of oil and gas from the San Andres beyond the amount of hydrocarbons that would be recovered by primary recovery alone.

D. The Commission retained jurisdiction to fix its error.

In the Order establishing the EMSU, the Commission retained jurisdiction "for the entry of such further orders as the Commission may deem necessary. *See* Ex. 6, Order No. R-7765 at 11. The Commission also has a continuing obligation under statute to "reclassify wells and pools" and to "redetermine the limits" of any pool from time to time, as may be necessary. NMSA 1978, §§ 70-2-12(B)(11) & (12). Given its continuing jurisdiction and statutory obligations, the Commission is required to review Order Nos. R-7765 and 7767 to determine if further orders are necessary. Here, further orders are necessary to cure the legal defect the Commission caused by erroneously including the San Andres aquifer in the EMSU and its special pool even though the aquifer (1) has never been reasonably defined by development; (2) is a geologically and functionally distinct reservoir from the Grayburg and Penrose reservoirs above; and (3) even though such inclusion at the time would not increase production from the San Andres.

Section Two: Requirements to Show Prohibited Waste

New Mexico's comprehensive oil and gas conservation law requires the Commission to regulate the production of oil and gas to prevent waste.

The law prohibiting waste states: "The production or handling of crude petroleum oil or natural gas of any type or in any form, or the handling of products thereof, **in such manner or under such conditions or in such amounts as to constitute or result in waste is each hereby prohibited**." NMSA 1978, § 70-2-2 (emphasis added).[4] The law unambiguously prohibits the production or handling of oil and gas "in such manner," "under such conditions," or "in such amounts" that constitute waste or result in waste. *Id*. The prohibition of waste does not, however, precisely define the manner, conditions, and amounts of oil and gas production that constitute or result in waste.

A leading oil and gas treatise, Williams and Meyers, candidly explained that the term "waste" is "too broad and has too many meanings for a one- or two-sentence definition." Williams & Meyers, *supra* at 6; *see also* Ex. 7, Joseph A. Schremmer, *Regulating Natural Gas Venting and Flaring as Waste: A Review of the New Mexico Approach*, 20 OIL, GAS & ENERGY LAW INTELLIGENCE LAW JOURNAL, 11 (2022) (describing the precise definition of waste under the New Mexico Oil and Gas Act as "elusive"). In New Mexico, the statutory definition of "waste" lists multiple categories of waste and is more than 500 words long. *See* Ex. 8, NMSA 1978, § 70-2-3.

New Mexico's Statutory Unitization Act defines "waste" to include "*both economic* and physical waste resulting, or that could reasonably be expected to result, from the development and

[4] The law was enacted "for the purpose of the prevention of waste of oil and gas resources, the encouragement of the conversation of oil and gas deposits, and the protection of the correlative rights of individual owners in a common source of supply and the administration thereof." *Humble Oil & Refining Co. v United States*, 198 F.2d 753, 755 (10th Cir. 1952).

operation separately of tracts that can best be developed and operated as a unit." NMSA 1978, § 70-7-4(C) (emphasis added). The definition of waste encompasses not only physical waste of oil and gas but also economic waste. First, the Act specifies that both "underground waste" and "surface waste" are to be defined and used as those words are generally understood "**in the oil and gas business**." *Id*. §§ 70-2-3 (A-B) (emphasis added); *see also* § 70-7-4(C) (expressly incorporating economics in the definition of waste). Second, the Act defines waste as being the production of oil or gas "in excess of the reasonable market demand," a definition that necessarily contemplates economic factors and impact. *Id*. § 70-2-3(C). According to the New Mexico Court of Appeals, the Oil and Gas Act "vests the Oil Conservation Division with the duty to make whatever rules, regulations, and orders that are necessary to carry out the provisions of the Oil and Gas Act, and in so doing, 'the division shall give due consideration to the economic factors involved.'" *Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Comm'n*, 2016-NMCA-055, ¶ 27, 374 P.3d 710 (quoting Section 70-2-19(C)). In affirming the Commission's consideration of economic factors in promulgating a rule, the Court of Appeals continued, "the Oil Conservation Division must allocate oil production efficiently and economically and must 'consider the economic loss caused by the drilling of unnecessary wells[.]'" *Id.* (quoting Section 70-2-17(B)).

Given the definition of "waste" is broad and multi-faceted, we look to common law and administrative orders to understand how courts and the Commission delineate permissible production from impermissible waste. The common law history of waste "illuminates that implicit in the concept's definition is a sort of cost-benefit analysis." Schremmer, *supra* at 11.

A. *Oil and gas must be recoverable to constitute or result in waste*.

Under the plain language of the Act, and consistent with the Commission's long-standing administrative construction, crude petroleum oil or natural gas must be recoverable to constitute waste. The definition of "underground waste" explicitly limits waste to "the total quantity of crude petroleum oil or natural gas **ultimately recovered**." NMSA 1978, § 70-2-3 (emphasis added). It follows that oil or gas that cannot be recovered is not waste if it is not produced. *See* Williams & Meyers, *supra*, at "W Terms" (defining "waste" as "the loss of oil or gas that could have been recovered and put to use.").[5]

Courts have similarly required that oil and gas be shown to be recoverable to be considered waste. *See Kuykendall v. Corporation Comm'n*, 1981 OK 105, ¶ 12, 634 P.2d 711 (considering the "practicable recoverability of minerals" in determining whether its order created waste); *Big Piney Oil & Gas Co. v. Wyoming Oil & Gas Conservation Comm'n*, 715 P.2d 557, 562 (Wyo. 1986) (affirming a Commission order that shut in certain wells, in part, because it prevented waste caused by oil migrating into the gas cap and rendering it unrecoverable). If oil and gas is not practicably recoverable, operating in a manner that does not recover such oil or gas does not violate the Act and does not constitute prohibited waste.

The Commission has had many opportunities to decide whether an application will create waste and has repeatedly highlighted the recoverability of hydrocarbons in its analysis. For example, in Case No. 12905, the Commission considered an application for a permit to dispose of produced water in the San Andres and Glorieta formations. *See* Ex. 9, Order No. R-11855-B, at

[5] The Statutory Unitization Act also incorporates the concept that unavoidable loss is not waste. Orders providing for unitization must include an allocation of "all the oil and gas that is produced from the unit area and is saved, **being the production that is not used in the conduct of operations on the unit area or not unavoidably lost**." NMSA § 70-7-7(C) (emphasis added).

¶ 3. An operator opposed the application, arguing that the proposed injection operations would create waste due to "the **potential productivity** of the San Andres and Glorieta formations." *Id*. at ¶ 14 (emphasis added). After hearing testimony that the injection formations contained "some hydrocarbons," the Commission granted the application and permitted the proposed SWD operations, in part, because the testimony revealed that the "relative permeability of the rock and the [high] water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered." *Id*. at ¶ 15. The Commission noted that the party opposing the application "failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas," and concluded, "[i]t thus appears that the Glorieta and San Andres are wet and will not produce commercial quantities of oil or gas in the vicinity of the proposed injection well." *Id*. at ¶¶ 16-17. Where an applicant for disposal operations produces evidence that the geological characteristics of a potentially impacted formation make hydrocarbons unrecoverable, and the opposing party fails to produce evidence to the contrary, the Commission has granted the application and permitted injection operations. *Id*. at ¶¶ 15-16 and ¶ 27. Thus, oil or gas that is unrecoverable is not considered waste.

In two of the examples above, the Commission also considered economic conditions surrounding the proposed operations and whether such operations would create waste in an economic context. In Case No. 12905, the Commission found that a proposed disposal well would not impede a yet-to-be-drilled production well because the proposed production zones "will not produce **commercial quantities** of oil or gas." *See* Ex. 9, at ¶ 17 (emphasis added). In the *Kuykendall* case, the Oklahoma Supreme Court considered whether changing economic conditions altered the feasibility of development. *See Kuykendall*, 1981 OK 105, ¶ 17. In considering the formation of the EMSU itself, the Commission included a cost-benefit analysis in the Unit Order.

See Ex. 6 ("EMSU Unit Order"). As required, the Commission considered the **investment costs, operations costs, and net profitability** before finding that the proposed secondary recovery operations "will not exceed the estimated value of the additional oil and gas . . . plus a reasonable profit." *Id*. at 4, ¶ 20-22; *see also* NMSA 1978, § 70-7-6(A)(3).

B. To constitute waste, the oil and gas must be produced in sufficient quantities to be commercial.

The Act also prohibits companies from producing or handling oil or gas "in such amounts as to constitute waste." NMSA 1978, § 70-2-2. This means that the loss of small volumes of oil and gas that are not commercial does not necessarily constitute waste when such volumes could not be produced for a profit. *See* § 70-2-3(C). Similarly, the definitions of underground waste prohibit the "excessive" dissipation or loss without beneficial use. *Id*. §§ 70-2-3 (A) & (B). For example, a small volume of gas that is lost during transportation via pipelines or that falls out in the treatment process are not considered "waste" when the amount lost is insignificant or when such losses are necessary. *See, e.g.*, 19.15.28.8.B(2) NMAC (identifying activities that are exempted from the natural gas gathering "waste rule" that either result in a de minimis loss of gas or are necessary as part of normal operations).

Similarly, the Commission does not consider saltwater disposal to cause "waste" where such liquids are disposed into reservoirs that are not proven to be capable of producing in paying quantities. *See* NMSA 1978, § 70-2-12(B)(4); *see infra*, Section 4 (for a discussion of Empire's burden of proof). In Case No. 15059, for instance, the Division determined that its authority to prevent waste does not extend to formations that are not proven to be capable of producing commercial amounts of oil or gas. *See* Ex. 10, Order No. R-13889. In considering whether to approve a SWD well over the objection of an oil and gas operator, the Division explained, "under Section 70-2-12(B)(4) NMSA Laws of 1978, the Division is required to prevent the drowning by

water any stratum or part thereof **capable of producing 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 from any pool. Under the Oil and Gas Act, the Division's authority to prevent 'the drowning by water any stratum' **does not extend into formations that are not the targeted hydrocarbon reservoirs or pools**." Ex. 10, at ¶ 7 (emphases added). The Division's analysis and decision to permit the SWD well shows that no waste occurs if hydrocarbons are not shown to be recoverable in paying quantities (i.e., quantities that are commercial or economic) from the target reservoir. *Id*. at 6, ¶ 4 ("If significant hydrocarbon shows indicate the potential for the permitted interval to be classified as a stratum capable of producing hydrocarbons in paying quantities, then this disposal order shall be terminated *ipso facto* under Section 70-2-12.B(4) NMSA Laws of 1978."). Notably, the Division required the operator to notify it of "significant hydrocarbon shows" and stated that its order would be terminated if "significant hydrocarbon shows" indicate the permitted interval is "capable of producing in paying quantities." *Id*. The Division did not say its order shall be terminated if the hydrocarbon shows indicate a small amount. The volumes must be significant to be commercially economic.

For at least 40 years, whether the injection interval targeted by a proposed disposal well contains commercial amounts of oil and gas production has been integral to the Commission's conservation considerations regarding waste. In 1984, the Commission authorized a SWD well, in part, because "no commercial oil and gas production has been found in the 'C' or 'D' zones in the immediate area of the said proposed disposal well." Ex. 11, Order No. R-7637 at 2, ¶ 4. The Commission further found that "the disposal of produced water into the proposed disposal interval will not cause the premature drowning by water of any zone capable of producing commercial

quantities of oil and gas in the area." *Id*. at ¶ 6. Similarly, in 2014 the Division considered an opposed application for approval to convert a stripper well to a SWD well. The party opposing the application argued that the Division should not allow the applicant to convert a well to a SWD well because it was capable of producing in paying quantities. *See* Ex. 12, Order No. R-13922. The Division nevertheless concluded that "the well is truly a stripper well, and the cost of producing the well to abandonment will be greater than the revenues generated [by authorizing the proposed disposal injection]." *Id*. at ¶12. The Division continued, "[t]he evidence submitted by the Applicant also demonstrates that if the well is not converted to a salt water disposal well, the cost of disposing the Bone Spring water from these new wells will be great." *Id*. at ¶13; *see also* Ex. 13, Order No. R-13958 at 2, ¶¶5(h) & 7 (ordering that a stripper well be converted to a SWD well because the "[stripper] well is uneconomic to produce" and "therefore [the operator] has the right to use the well for other beneficial purposes"). Thus, the Division balanced the competing interests the potential loss of a small volume of oil and gas, which was nevertheless being produced in paying quantities, against the more substantial economic benefit of supporting new offsetting production. It determined that approving the proposed disposal operations weighed more favorably in the interest of prevention of waste and, overall, prevented waste. Accordingly, the Division granted the application.

These examples demonstrate that a loss of small volumes of oil and gas does not constitute or result in waste where the target formation is not capable of producing in paying quantities or the quantities of oil and gas are not commercially or economically producible. But even where oil and gas are capable of being produced in paying quantities, disposal should be approved where it will result in a greater economic benefit and an overall prevention of waste by supporting offsetting production.

Thus, to determine whether the production or handling of oil and gas will be done "in such manner," "under such conditions," or "in such amounts" that constitute waste or result in waste, the Commission considers whether oil and gas is practicably recoverable, both in terms of physical and economic limitations.

Section Three: Requirements to Show Impairment of Correlative Rights

In addition to preventing waste, the Commission is required to protect correlative rights. NMSA 1978, § 70-2-11. The term "correlative rights" is defined as:

> The opportunity afforded, as 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 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 the purpose to use the owner's just and equitable share of the reservoir energy.

Id. § 70-2-33(H). As an initial matter, correlative rights apply to oil and gas interests. A person asserting correlative rights must show they are an owner of property in an oil and/or gas pool. *Id*. When parties own oil and gas interests in the same pool, the "correlative right is having the opportunity to produce, not having a guaranteed share of production. Once the state has afforded that opportunity, it has protected the correlative rights of a party; it need not ensure a share of production to a party." Williams & Meyers, *supra* § 204 (quotation omitted and emphasis added). Correlative rights can be summarized as "(1) an opportunity to produce, (2) only insofar as it is **practicable** to do so, (3) **without waste**, (4) a proportion, (5) insofar as it can be **practically determined** and obtained **without waste**, (6) of the gas in the pool." *Cont'l Oil Co.,* 1962-NMSC-062, ¶ 27 (emphases added).

Before correlative rights may be effectively protected, the Commission must make certain basic findings. *See id.* The four most salient findings "**without which the correlative rights of**

the various owners cannot be ascertained," are: "(1) the amount of recoverable gas under each producer's tract; (2) the total amount of recoverable gas in the pool; (3) the proportion that (1) bears to (2); and (4) what portion of the arrived at proportion can be recovered without waste[6]." *Id*. ¶ 12. "**That the extent of the correlative rights must first be determined before the commission can act to protect them is manifest.**" *Id*. Once the extent of an owner's correlative rights are determined that owner's will have an opportunity to produce their proportionate share of the pool.

Determining the extent of correlative rights is a threshold issue that precedes the Commission's ability to protect those rights, but such determination must be practicable. *See* NMSA, § 70-2-33(H) (defining correlative rights as the opportunity afforded to owners in a pool "so far as it is practicable to do so" to recover an amount of oil and gas "so far as can be practicably determined" and "practicably obtained"). To "comply with the mandate of the statute," Empire must establish, "so far as can be practicably determined," that there is a "**certain amount**" of oil in the pool, a "**certain amount**" of oil within the EMSU, and that "a **determined amount**" of oil "could be produced and obtained without waste." *Cont'l Oil Co.,* 1962-NMSC-062, ¶ 28 (emphasis added).

When waste does not occur, correlative rights are often un-impaired, and both the Commission and Division have issued orders supporting such a position.[7]

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[6] Illustrative of this requirement, in Case No. 15159 the Division granted an application for a SWD well, despite contentions that the existing well was still producing in paying quantities, because "the cost of producing the well to abandonment [would] be greater than the revenues generated." Ex. 12, ¶ 12.

[7] For example, in Case No. 8234, the Commission found that when "no commercial oil and gas production has been found in the 'C' or 'D' zones in the immediate area of the said proposed disposal well" there was no waste, nor was there any impairment on correlative rights. Ex. 11 at 2, ¶ 4. The same goes for the Division's ruling in Case No. 15159 when it made more economic

Section Four: Evidentiary Burden for Administrative Applicants

Empire acquired the EMSU in 2021 (37 years after its creation) to conduct tertiary recovery operations in the unit and now seeks to prevent Goodnight's permitted salt water disposal operations nearby. To that end, Empire filed four Applications to Revoke Injection Authority under four orders, which authorized Goodnight to operate multiple SWD wells in the EMSU (the "Orders"). As the applicant, Empire bears the burden of proof to show that Goodnight's existing permits to operate SWD wells must be revoked. *See Duke City Lumber Co. v. N.M. Envt'l. Improvement Bd.*, 1980-NMCA-160, ¶ 4, 622 P.2d 709 (explaining the common-law rule that a moving party bears the burden of proof). To satisfy its burden, Empire must make the following showings:

A. Empire Must Show Changed Circumstances Supported by New Evidence

The Commission's power to regulate oil and gas production to prevent waste and protect correlative rights is "a continuing one and its orders are subject to change or modification where conditions have changed materially, new and unforeseen problems arise or mistakes are discovered." 1 Bruce M. Kramer & Patrick H. Martin, THE LAW OF POOLING AND UNITIZATION, § 14.02 (3d ed. 2025) (citation omitted). Typically, a unit order may not be modified or revoked "unless there is a change of circumstances, such as new evidence becoming available regarding geologic and engineering conditions of the reservoir or common source of supply." *Id*. Orders can be modified "when it is shown that modification is necessary in order to conserve oil or gas or bring about a fair and equitable production of the oil or gas." *Id.*

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sense to convert a stripper well to a SWD well, the Division concluded that the SWD well would prevent waste, and there would be no impairment of correlative rights. Ex. 12, ¶ 18.

If, however, the Commission lacks new information, changing an order without supporting evidence is tantamount to the Commission changing its mind about a point it already decided. According to Bruce Kramer and Patrick Martin,

> If the existing order is binding, it is binding on the agency as well as the parties. It is a derogation of the rights of a party under an order to change the order without there being some basis for the change. **Just as parties cannot collaterally attack an order of an agency in a judicial proceeding that is not a proper review of the order, so too must an agency refrain from setting aside an order without a basis founded in changed conditions or changed knowledge of conditions.** Otherwise, the agency would be collaterally attacking its own order or acting arbitrarily.

Id. (emphasis added).

B. Empire must show it has correlative rights and that those rights are impaired by Goodnight's operations.

Empire must establish that it has correlative rights to be protected. To make this showing, Empire must provide evidence of the total quantity, as well as its share, of recoverable hydrocarbons. If Empire can establish that it has correlative rights, it must prove that Goodnight's activity impairs those rights, namely by hindering Empire's opportunity to recover the purported residual hydrocarbons.[8]

For the Commission to analyze any alleged impact to Empire's correlative rights, Empire must provide evidence of the volume of recoverable hydrocarbons that lies beneath the entire pool, the volume of recoverable hydrocarbons that lies specifically beneath the EMSU, and the volume of recoverable hydrocarbons that make up Empire's own "just and equitable" share. These findings, even "insofar as can be practically determined," are necessary for the Commission to protect correlative rights. *See Cont'l Oil Co.,* 1962-NMSC-062, ¶¶ 16, 20. In other words, before the analysis shifts to Goodnight's role in Empire's claims, Empire must adduce legally-sufficient

[8] *See* Section 3, *supra*, for the substantive requirements to show correlative rights.

evidence quantifying the recoverable, residual hydrocarbons that Empire alleges it will capture from the purported residual oil zone.

If Empire adduces evidence establishing its correlative rights, it must next prove that Goodnight's activity impairs those rights. To show impairment, Empire must show its opportunity to recover residual hydrocarbons has been prevented by Goodnight's operations.

C. Empire must show its share of hydrocarbons can be recovered without waste.

If Empire can adduce evidence of its just and equitable share of recoverable hydrocarbons, it must then evidence what portion of its share can be recovered **without waste**. *Id*. Because waste has both a physical and economic component, Empire's recovery must be practicable.[9]

Practically speaking, "the usual explanation given by the courts enjoining . . . wasteful conduct is that each landowner has correlative rights at common law in the oil and gas or in the producing formation and that wasteful conduct of one landowner which injures the correlative rights of another may be enjoined." Williams & Meyers, *supra*, § 204. In application, the Commission utilizes its power to protect correlative rights in situations where landowners (or operators) have competing rights and/or interests in the same resource. It makes sense then that the Commission should use its power to ensure that all parties are given their fair opportunity to capture what each has a right to produce. But in this instance, Empire is looking to expand the application of that power. Empire is asking the Commission to revoke its own pre-existing orders on the speculative grounds that Goodnight's operations will impact Empire's opportunity to possibly recover an uncertain volume of alleged residual hydrocarbons, but also the quantity of such hypothetical recovery. That does not amount to the legally required proof of impairment to correlative rights.

[9] *See* Section 2, *supra*, for a more thorough analysis of the Act's use of the term "waste."

SECTION 5: Nothing in the EMSU Unit Order, Agreement, or Operating Agreement prohibits Operation or Approval of Existing or Future SWDs

The Commission's order approving the EMSU authorized a 14,189.84-acre unit to be created for statutory unitization pursuant to the Statutory Unitization Act. *See* Ex. 6 ("EMSU Unit Order"). The EMSU Unit Order authorized the applicant to "institute a **secondary recovery project** for the recovery of oil and all associated and constituent liquid or liquified hydrocarbons within the unit area." EMSU Unit Order at 9, ¶ 4 (emphasis added). The "unitized formation" is limited to "the entire oil column under the unit area permitting the efficient and effective recovery of **secondary oil therefrom**." *Id*. at 3, ¶ 10 (emphasis added). The "unitized formation" means the Grayburg and Penrose formations because the secondary oil column is limited to those formations only. *See* Ex. 3, at Tr. Vol. 1, 52:6-7; 53:1-4, & Vol. 2, 224:22-25 (explaining that the oil column in the Unit area is in the Grayburg and Penrose formations). The unit operator proposed a waterflood project to conduct the secondary recovery operations and identified the San Andres as the water source for the waterflood. *See* EMSU Unit Order at 3, ¶ 14 (explaining the proposed waterflood operations); *see also* Ex. 3, at 214:23-215:4 (identifying the San Andres as the "primary source of injection water"). The EMSU Unit Order does not authorize other forms of recovery beyond what secondary waterflood operations can recover, which effectively limits EMSU production operations to the Grayburg/Penrose waterflood producing interval.[10]

Accordingly, nothing in the EMSU Unit Order prohibited pre-existing salt-water disposal operations within the San Andres portion of the EMSU's unitized interval, nor did it prohibit the

[10] This does not preclude Empire or other mineral interest owners and/or operators from developing additional minerals in the San Andres, but they cannot do so under the existing Unit order because there has been no primary production, and the Commission never approved carbon dioxide injection in the Unit order. If Empire desires to develop additional minerals in the San Andres, it must do so under a voluntary agreement or by force pooling a spacing unit, because such development would be exploratory and not authorized under the Statutory Unitization Act.

Commission from approving future applications for disposal operations within the EMSU's portion of the San Andres. Indeed, the Division previously found that the "Unit Order does not specifically prohibit, or even address, potential injection operations within the Unit Area." Ex. 14, Order on Motion to Dismiss, Case No. 22626, at 2, ¶ 8. The Division continued, "[t]he existence of a Unit, established under the Statutory Unitization Act, does not, by itself, prohibit the operation of a disposal well within the Unit." *Id*. at ¶ 9. The Division's findings could not be clearer: the Unit Order does not address, much less prohibit, Goodnight's SWD injection operations within the Unit Area.

Similarly to the Unit Order, neither the Unit Operating Agreement nor the Unit Agreement prohibit SWD injection operations within the Unit Area. In fact, the Unit Operating Agreement specifically states that the drilling of any well for injection, saltwater disposal or for any other Unit purpose is a decision that remains exclusively with the Working Interest Owners, not the Unit Operator. *See* Ex. 15, Unit Operating Agreement, ¶ 3.2.2. This provision demonstrates that the original parties to these agreements contemplated the drilling of SWD wells and specifically set them apart from the Operator's rights to operate the unit. *Id*.

SECTION 6: Section 10 of the EMSU Unit Agreement

The Unit Agreement for the EMSU (the "Unit Agreement") provides the general framework governing operations within the unit. It specifies which lands are within the Unit Area, how production and royalties will be allocated to royalty and working interest owners, and addresses other operational details.

Section 10 of the Unit Agreement defines the Unit Operator's rights and obligations. *See* Ex. 16, Unit Agreement, § 10. This section establishes that, **with respect to the other working interest owners who are parties to the Unit Agreement**, the Unit Operator has the **exclusive**

right to prospect for, produce, allocate and distribute oil and gas produced from the unit area. This exclusive right applies to the Unit Operator and all other parties to the Unit Agreement; it does not, however, affect the rights or obligations of any non-parties. Its purpose is to establish that working interest owners who are parties to the Unit Agreement have delegated their executory/operational rights to the Unit Operator so only the Unit Operator has those powers and obligations within the Unit Area **as between the parties to Unit Agreement**. It does not preclude third-party activities within the Unit Area that do not otherwise cause waste or impair correlative rights. Section 10 also does not grant new, additional, or expanded rights to the Unit Operator that did not already exist under the individual leaseholds that were contributed to the Unit. All oil and gas leases that were contributed to the Unit define the underlying oil and gas mineral rights. Those leasehold rights remain in full force and effect and are modified only if they conflict with statutory provisions. According to the Law of Pooling and Unitization treatise, "existing contracts are to be amended or modified only to the extent necessary to conform to the applicable statutory provisions, the [Commission's] order, or the Unit Operating Agreement. In all other respects, preexisting contracts remain in full force and effect." Kramer & Martin, *supra*, § 13.08; *see also Buchholz v. Burlington Res. Oil & Gas Co. LP*, 2008 ND 173, ¶ 20 ("[P]rior contracts are amended or modified by the order creating the unit only when there is an actual conflict between their provisions and modification is necessary to prevent waste or the denial of correlative rights.").

To further understand Section 10, we analyze each sentence:

> **Sentence 1**: "Except as otherwise specifically provided herein, 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** as herein provided."

The first sentence of Section 10 delegates to the Unit Operator all rights individually held by the parties to the Unit Agreement. These rights and obligations are "exclusive" to the Unit Operator

vis-à-vis the other parties to the Unit Agreement, because it precludes any of the other working interest owners from exercising those rights that previously belonged to them under their individual leasehold instruments. *See* Kramer & Martin, *supra*, § 19.04 (3d ed. 2025) (explaining that "the exclusive appointment of the operator negates *joint* control") (emphasis in original). Such delegation of power gives the Unit Operator sole authority to develop and operate the EMSU on behalf of all parties who contributed oil and gas interests to the EMSU without risk of interference from conflicting operations conducted by the other working interest owners. In other words, this provision confirms that the Unit Operator acts as a proxy to exercise any rights separately held by the interest owners within the Unit. According to the Williams & Meyers treatise, this provision is similar to customary provisions in pooling and unitization agreements that give the Unit Operator the right "to make use of the surface of the affected premises." *See* Williams & Meyers, *supra*, § 921.14.

This provision does not—and cannot—preclude others who may have a valid and legal right to make use of the surface or subsurface within the EMSU from doing so. Moreover, where there is a potential conflict over property rights or competing uses between mineral interest owners and other interest owners that does not implicate waste or impact correlative rights, the courts, not the Commission, have jurisdiction to adjudicate the rights as between the parties and their competing interests. *See Harvey E. Yates Co. v. Cimarex Energy Co.*, No. 12-587, 2014 U.S. Dist. LEXIS 183891, at *38 (D.N.M. Mar. 5, 2014); *see also Snyder Ranches, Inc. v. Oil Conservation Comm'n*, 1990-NMSC-090, ¶ 8, 798 P.2d 587.

> **Sentence 2**: "Upon request, acceptable **evidence of title to said rights** shall be deposited with said Unit Operator, and together with this Agreement, **shall constitute and define the rights, privileges and obligations of Unit Operator**."

The second sentence simply explains that the Unit Operator's rights, privileges, and obligations are defined by the Unit Agreement and the parties' oil and gas leases that were contributed to the Unit. To determine the Unit Operator's rights, a party may review the "evidence of title to said rights," which means the Unit's underlying oil and gas leases. This makes clear that the "rights, privileges and obligations of the Unit Operator" are derived solely from the underlying leasehold instruments.

> **Sentence 3**: "**Nothing herein, however, shall be construed to Transfer title** to any land or to any lease or operating agreement, it being understood that under this Agreement the Unit Operator, in its capacity as Unit Operator, shall exercise the rights of possession and use vested in the parties hereto only for the purposes herein specified."

The third sentence in Section 10 clarifies that delegating the rights, privileges, and obligations to the Unit Operator does not transfer any right to title in lands, leases, or operating agreements that the parties contributed to the EMSU. Each party retains their individual right to title in the lands or leases they contributed; they merely authorize the Unit Operator to operate the EMSU on their behalf. This provision is similar to provisions identified in Williams & Meyers that are designed to negate any cross-conveyance of title in pooling and unitization agreements. *See* Williams & Meyers, *supra*, § 921.6 ("Customary provisions of pooling and unitization agreements: Titles unaffected").

Section 10 delegates to the Unit Operator the exclusive right to work, so that Unit Operations are uniform. Section 10 does not exclude surface owners' right to work within the unit, nor does it reduce their right to use their own property rights.

* * *

If the Commission determines that Empire has not proffered sufficient evidence to demonstrate Goodnight's SWD operations are causing waste or impairing Empire's correlative rights, the Commission should preserve the status quo and reject Empire's request to revoke

Goodnight's SWD authorization. In that circumstance, the Commission retains its jurisdiction over these matters and all disposal operations in and around the EMSU because it has a continuing duty to prevent waste and protect correlative rights. If or when Empire obtains objective, engineering-based data or evidence showing that an economically recoverable ROZ exists and/or that Goodnight's disposal injection is causing waste or impairing correlative rights, the Commission has the authority—and obligation—to revisit the issue to consider new evidence or data. *See* NMSA 1978, § 70-7-3 (The Division "is vested with jurisdiction, power and authority and it shall be its duty to make and enforce such orders and do such things as may be necessary or proper to carry out and effectuate the purposes of the Statutory Unitization Act."); *see also* Kramer & Martin, *supra*, § 14.03 (explaining that commissions retain jurisdiction to, *inter alia*, interpret commission orders and determine whether its orders have been violated). An adverse ruling against Empire in this matter due to a lack of evidence therefore does not necessarily foreclose Empire or the Commission from re-evaluating the issue in the future.

Respectfully submitted,

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