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

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN LLC FOR APPROVAL OF A SALTWATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO	**CASE NO. 24123**
APPLICATIONS OF GOODNIGHT MIDSTREAM PERMIAN LLC FOR APPROVAL OF SALTWATER DISPOSAL WELLS, LEA COUNTY, NEW MEXICO	**CASE NOS. 23614-23617**
APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN, LLC TO AMEND ORDER NO. R-22026/SWD-2403 TO INCREASE THE APPROVED INJECTION RATE IN ITS ANDRE DAWSON SWD #1, LEA COUNTY, NEW MEXICO	**CASE NO. 23775**
APPLICATIONS OF EMPIRE NEW MEXICO LLC TO REVOKE INJECTION AUTHORITY, LEA COUNTY, NEW MEXICO	**CASE NOS. 24018-24020, 24025**

EMPIRE NEW MEXICO LLC'S RESPONSE TO GOODNIGHT MIDSTREAM PERMIAN, LLC'S APPLICATION FOR REHEARING

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I. INTRODUCTION

Empire New Mexico, LLC, ("Empire"), by and through its undersigned counsel of record, submits the following response in opposition to Goodnight Midstream Permian, LLC's ("Goodnight") Application for Rehearing ("Application"). For the reasons that follow, the Application should be denied.

In its Application, as through the pendency of this matter, Goodnight continues to obfuscate the issues and change theories. Goodnight's Application is predicated on fundamental misstatements regarding a "continuous barrier" theory—a theory initially proffered by Goodnight and debunked at hearing. Despite this, Goodnight incredulously now asserts that the Commission erroneously adopted a "continuous barrier" requirement. The Commission did no such thing. It correctly applied the New Mexico Oil and Gas Act, which requires it to prevent waste and protect correlative rights,[1] and rejected Goodnight's claim that its wastewater is confined within the injection interval. Notably, Empire provided modeling completed by Dr. Buchwalter to support its position that Goodnight's wastewater is migrating outside the injection zone while Goodnight conceded it had not performed modeling and did not know where its water is going.[2] And, the Commission correctly recognized that Empire, as operator of the Eunice Monument South Unit ("EMSU") has the exclusive right to produce the Residual Oil Zone ("ROZ") within the EMSU.[3]

Additionally, Goodnight asks the Commission to disregard a five-week evidentiary hearing and start over based on evidence Goodnight could have provided the first time, including seismic data that Goodnight had at the time of the hearing but chose not to produce.[4] It only seeks to do so

[1] NMSA 1978, §§ 70-2-6, -11.
[2] Order No. R-24004 at ¶¶ 47-49; 05/19 Tr. 262:21-263:6.
[3] Order No. R-24004 at ¶¶ 14-27.
[4] 05/20 Tr. 169:6-17.

now because it is dissatisfied with the Commission's decision. It is inappropriate for Goodnight to use an application for rehearing as a mechanism to remedy its litigation strategies.

Goodnight also raises constitutional issues that have no merit, including claims that it has a vested property interest in revocable permits and claims regarding surface use agreements, ("SUAs") *when Goodnight prevailed on its objection to the introduction of any evidence regarding SUAs at hearing*. Goodnight's additional arguments regarding unitization and attempts to relitigate the Commission's factual findings are similarly without merit.

As demonstrated below, the Commission should put an end to Goodnight's gamesmanship and order it to immediately cease injection within the EMSU. Goodnight's proposed graduated implementation of the Commission's Order must also be rejected, as it effectively renders the Commission's decision meaningless and would result in irreparable harm to Empire.[5]

II. STANDARD GOVERNING MOTIONS FOR REHEARING

Rehearing is an extraordinary remedy, warranting relief only if the movant shows: (1) an intervening change in controlling law; (2) new evidence previously unavailable despite due diligence; or (3) the need to correct clear error or prevent manifest injustice. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Ankeney v. Zavaras*, 524 F. App'x 454, 458 (10th Cir. 2013). None of those circumstances exist here.

Courts have emphasized that "late revelation of the evidence does not mean that it was previously unavailable, it was simply tardy." *Derrick v. Standard Nutrition Co*., No. CIV 17-1245 RB/SMV, 2019 WL 2717150, at *3 (D.N.M. June 28, 2019). Nor is evidence "new" when it has long been in the moving party's possession. *Spring Creek Exploration & Prod. Co. v. Hess Bakken*

[5] Please see Empire's Response in Opposition to Goodnight's Motion for Partial Stay of Order R-24004 (filed Oct. 3, 2025), which is incorporated here by reference.

Inv., II, LLC, 887 F.3d 1003, 1024-25 (10th Cir. 2018) (affirming district court's denial of a motion to reconsider).

"Clear error," likewise, means a decision that is arbitrary, capricious, whimsical, or manifestly unreasonable. *Thymes v. Verizon Wireless, Inc.*, No. CV 16-66 KG/WPL, 2016 WL 9777487, at *2 (D.N.M. Sept. 28, 2016) (quoting *Wright ex rel. Tr. Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1236 (10th Cir. 2001)). "Manifest injustice" requires more than prejudice to the movant; it demands a showing that the prior ruling was fundamentally unfair in light of governing law. *Id.* (quoting *Smith v. Lynch*, 115 F. Supp. 3d 5, 12 (D.D.C. 2015)). A party may not use a motion for rehearing or reconsideration to reargue issues already decided or to submit evidence that could have been presented earlier. *Derrick v. Standard Nutrition Co.*, 2015-NMCA-103, ¶¶ 18–19, 357 P.3d 1238 (agency did not abuse its discretion by denying rehearing where movant reasserted prior arguments and presented no new evidence).

Goodnight has shown no change in law, new, previously unavailable evidence, or clear error. Its application must be denied.

III. ARGUMENT

A. The Commission did not adopt a new "continuous barrier" requirement – it correctly applied its regulations and the Oil and Gas Act in determining that Goodnight's injection wastewater is not confined within the injection interval.

Preliminarily, the Commission applied the correct burden of proof to Goodnight's "continuous barrier" defense. As in its stay motion, Goodnight again claims in its rehearing motion that the Commission shifted the burden of proof by requiring Goodnight to disprove Empire's evidence of fractures and vertical communication. *See* Rehearing Mtn. at 6-7; Stay Motion at 6–9. Reasserting the same arguments in multiple motions does not make them more persuasive. The existence of a "continuous barrier" was not part of Empire's burden to prove waste or impairment;

Goodnight itself proffered the theory and raised it as a defense to Empire's showing of fractures and vertical migration pathways. Empire rebutted that defense with core data, fracture studies, and modeling, while Goodnight's own witnesses admitted no laterally continuous barrier exists. *See* Empire Closing Br. at 16–18 (July 3, 2025); *see also Duke City Lumber Co. v. New Mexico Env't 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.").

As discussed in Empire's post-hearing briefing, New Mexico law distinguishes between the burden of persuasion and the burden of production: only the latter may shift. *See 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."). Here, the "continuous barrier" theory was Goodnight's attempt to rebut Empire's affirmative case. Goodnight therefore bore only the burden of production – the duty to come forward with competent evidence of a barrier. It failed to do so.

The Commission's Final Order reflects this point, finding that "Goodnight did not adduce substantial evidence of the existence of a continuous barrier … and therefore did not refute the potential for FUTURE impairment or waste in the EMSU." Suspension Order II(B). Far from shifting burdens, the Commission rejected a theory Goodnight proffered and failed to support.

Contrary to Goodnight's claims in its Application, *Goodnight* posited the notion of a continuous barrier at the outset. Throughout this proceeding, including at hearing, Goodnight has taken the position that a continuous containment barrier separates its "disposal zone" from the

intervals where a residual oil zone exists. Goodnight's position arose out of Mr. McGuire's exhibits, purportedly showing a continuous impermeable barrier represented by a purple color between the San Andres and the Grayburg. *See, e.g.*, Goodnight Exs. B-4 (identifying "Barrier"); B-8 (same).

In his direct written testimony, Mr. McGuire explained, "The construction of each cross-section exhibit [Exs. B-4 through B-7] uses color to indicate impermeable, tight rock within each formation that will function as a barrier to vertical transmission of injection fluids." Goodnight Ex. B at pdf 8, ¶ 22; *see id.* (identifying the colors for Grayburg as green and San Andres as "purple-gray"). When testifying on direct examination about the purple barrier at the hearing on May 19, 2025, Mr. McGuire further explained how Goodnight mapped the permeability barrier that allegedly confines its disposal zone. TR 5/19/25 at 64:23-66:18 (agreeing that the "confining layer that [he] identified in the core data [is] correlative across the EMSU," which is "reflected in [his] San Andres structure map"). Mr. McGuire then doubled down, "we're confident that this barrier is extensive across the entire EMSU," *id.* at. 70:13-14; and "given the core data that I have now, I would probably draw that as being a continuous barrier, like Mr. Drake did." *Id.* at 280:18-21; *see id.* at 263:21-23 (stating that the top purple barrier correlates "across"); *see also id.* at 266:14-15 ("[T]here's a barrier that isolates our disposal reservoir.").

Goodnight's theory was debunked after maintaining this position for more than a year, and now Goodnight claims the Commission erred. Goodnight waived any objection on this issue since it presented the theory. Nonetheless, Goodnight improperly brings to the table 50 pages of new, far-fetched, and convoluted arguments. For the reasons stated below, none have merit.

First, the Commission did not apply a new standard. An applicant seeking to inject must establish a confining zone, with upper and lower barriers. *See, e.g.*, 19.15.26.10(B) NMAC. ("The

operator of an injection project shall operate and maintain at all times the injection project, including injection wells, producing wells and related surface facilities, in such a manner as will confine the injected fluids to the interval or intervals approved and prevent surface damage or pollution resulting from leaks, breaks or spills."). This rule is consistent with the Commission's authority and obligations under the Oil and Gas Act.

Fundamental to the Commission's authority is the prevention of waste and protection of correlative rights, as set forth in NMSA 1978, § 70-2-11 (1977):

> A. The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.
> B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law.

(Emphasis added). As explained by our Supreme Court in *Grace v. Oil Conservation Comm'n of New Mexico*, 1975-NMSC-001, ¶ 29, 87 N.M. 205, "Prevention of waste is paramount."

In addition, specific to the circumstances here, the Oil and Gas Act provides that the Commission "may make rules and orders . . . 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." NMSA 1978, § 70-2-12(B)(4) (2019). As explained further below, the findings and conclusions made by the Commission are consistent with its obligations under the Oil and Gas Act to prevent waste and protect correlative rights.

Moreover, Goodnight cannot deny that it has an obligation to contain the injected wastewater within the approved injection interval and that the Commission has authority to restrict

or shut-in injection wells that fail to confine injected fluids to the authorized injection zone. 19.15.26.10(E) NMAC ("The division may restrict the injected volume and pressure for, or shut-in, injection wells or projects that have exhibited failure to confine injected fluids to the authorized injection zone or zones, until the operator has identified and corrected the failure."). This authority to shut-in an injection well is not dependent on establishing "recoverability"; nor is it outside the Commission's authority, as argued by Goodnight. Application at 40.

Goodnight's reliance on *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, 87 N.M. 205 is misplaced at best. In *Grace v. Oil Conservation Comm'n of New Mexico*, 1975-NMSC-001, 87 N.M. 205, the court made clear that use of the term "jurisdictional" in *Continental Oil* was a misnomer. *Id.* ¶ 18. The *Grace* court also recognized that the holdings in *Continental Oil* related to proration of production, which is not at issue here, and expressly held that determination of recoverable reserves was not required to enter a proration order. *See id.* ¶ 30; *see also* Empire's Closing Brief at 6-8. Thus, *Continental Oil* provides no support for Goodnight's arguments.

Review of other New Mexico case law reveals that recoverability of reserves is considered primarily in the context of considering proration, which is not at issue here. *See, e.g.*, *Santa Fe Expl'n Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶ 7, 114 N.M. 103; *Fasken v. Oil Conservation Comm'n*, 1975-NMSC-009, ¶ 1, 87 N.M. 588; *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 1975-NMSC-006, ¶ 25, 87 N.M. 286; *El Paso Nat. Gas Co. v. Oil Conservation Comm'n*, 1966-NMSC-092, ¶ 1, 76 N.M. 268; *Cont'l Oil*, 1962-NMSC-062, ¶ 8; *see also Capco Acquisub, Inc. v. Greka Energy Corp.*, 2008-NMCA-153, ¶ 12, 145 N.M. 328 (referencing recoverability in the context of drainage). Goodnight cites no cases considering recoverability in contexts other than proration of production. *See generally* Application.

As explained in the Order, the Commission, applying its expertise, "heard and weighed expert witnesses and exhibits on topics ranging from, including but not limited to, economics, engineering, geology, hydrology and petrophysics." The Commission then identified the evidence "that was most compelling and to which the Commission assigned the greatest weight as substantial evidence." Order at 4, ¶ 13. These findings, supported by substantial evidence, justify the Commission's decision. For example, the Commission found the following:

- Fractures exist in the lower Grayburg and the upper San Andres ROZ as evidenced by fracture studies, which could lead to communication between the formations. *Id.* at 8, ¶¶ 43-46.
- The model built by Dr. Buchwalter "shows to a reasonable degree that water is moving from the San Andres into the Grayburg," which could lead to communication between the formations. *Id.* ¶¶ 47-48.
- Goodnight did not offer a model to support its argument "that the water influx from the San Andres to the Grayburg will not occur in the future." *Id.* ¶ 49.
- Goodnight's Exhibit B-9 shows no barrier between Goodnight's injection zone for the Ryno well and Empire's producing Grayburg zone. *Id.* at 9, ¶ 52(a).
- Barriers shown in various EMSU wells do not correlate with barriers in other EMSU wells. *Id.* ¶¶ 52(b)-(e).
- No barrier was mappable across the wells identified in Goodnight's exhibits. *Id.* ¶ 52(f)

These findings support the conclusion that Goodnight's injection projects "have exhibited failure to confine injected fluids to the authorized injection zone." *See* 19.15.26.10(E) NMAC. Thus, the Commission properly determined that Goodnight's wells should be temporarily shut-in.

The Commission also made numerous findings supporting its decision that Goodnight's injection could impair correlative rights or cause waste of oil that exists in a ROZ in both the Grayburg and the San Andres:

- Core from two wells in the EMSU show oil saturation in the Grayburg and the San Andres formations. Order at 6, ¶¶ 28-32.

- Empire witnesses and Goodnight witnesses testified that a residual oil zone exists. In particular, Goodnight's witness Dr. Davidson "confirmed that oil saturation exists throughout the San Andres," up to 30-40 percent. *Id.* ¶¶ 35-37.

In light of this extensive evidence establishing the existence of a ROZ in both formations, the Commission properly concluded that it has authority under Sections 70-2-11 and 70-2-12 to ensure that Empire has "an opportunity to pursue oil discoveries so the oil is not left wasted or untapped undergrounds." *Id.* ¶ 38. Applying its expertise, the Commission further found that Goodnight's injection is incompatible with successful recovery of oil in the ROZ and therefore properly denied Goodnight's six applications. *Id.* ¶¶ 40-41. Goodnight's rehearing request lacks merit and should be rejected.

B. Goodnight's voluminous, belated new evidence is improper and cannot be considered.

In its Application for Rehearing, Goodnight attaches over 200 pages of exhibits, which include:

- **Exhibit 1** – Map showing all active SWDs within two miles of the EMSU, EMSU-B, and Arrowhead Grayburg Unit
- **Exhibit 2** – Diagram of the EMSU in cross section
- **Exhibit 3** – Transcript of Hearing, Case No. 8399
- **Exhibit 4** – EMSU Technical Committee Meeting Minutes (June 1, 1983)
- **Exhibit 5** – Order No. R-7766
- **Exhibits 6 & 7** – Objection of Doyle Hartman & Exhibits B-1 & B-2, Case No. 12,320
- **Exhibit 8** – Transcript of Proceedings, Case No. 12,320
- **Exhibit 9** – Self-Affirmed Statement of Jasha Cultreri
- **Exhibit 10** – Self-Affirmed Statement of David A. White, P.G.
- **Exhibit 11** – EMSU Unit Agreement
- **Exhibit 12** – EMSU Unit Operating Agreement
- **Exhibit 13** – Surface Lease
- **Exhibit 14** – Goodnight Motion to Stay
- **Exhibit 15** – Goodnight Exhibit B-9

When a party tries to take "two bites at the apple" by presenting evidence in its motion that was otherwise available at the time of hearing, a motion for reconsideration should be denied.[6] Additionally, many of these exhibits raise issues that are irrelevant to the proceedings or involve

[6] *See, e.g.*, *McCann v. St. Vincent Hosp.*, No. 32,444, 2014 WL 5092247, at *4 (N.M. Ct. App. Aug. 25, 2014) (unpublished); *Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 10, 135 N.M. 423, 89 P.3d 672 (holding that district court appropriately rejected motion for reconsideration based on a restatement of prior arguments).

matters that were excluded from the hearing *at Goodnight's request*. For these reasons, the Commission should reject Goodnight's tardy effort to add additional evidence to the record.

Exhibits 1, 2, 3, 4, 6, 7, and 13 all unquestionably predate the hearing—such evidence cannot be considered in a motion for rehearing unless the movant demonstrates that the evidence was "newly discovered" or that movant's counsel had made a "diligent but unsuccessful attempt to discover the evidence."[7] Goodnight offers no explanation for why the Commission should consider this additional evidence.[8] And indeed, it cannot, as none of these exhibits are "newly discovered" and all could have been introduced at hearing.[9] Goodnight's belated attempt to bolster or otherwise reargue its case should be denied.[10]

Likewise, the seismic data offered through the Self-Affirmed Statements in Exhibits 9 and 10 must be disregarded. At hearing, Goodnight acknowledged possessing 3-D seismic data but stated that it could not be produced due to licensing restrictions.[11] Goodnight's belated workaround by presenting the data through Geolex affiants (one of whom, David White, was a witness at the hearing) is inappropriate.[12] Evidence that was in the possession of a party at the time of hearing is not "newly discovered evidence," even if Goodnight choose not to produce the evidence at the time.[13]

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[7] *United States v. Ortega-Moreno*, No. 24-CR-378-MIS, 2025 WL 1019090, at *3-4 (D.N.M. Apr. 4, 2025).

[8] *See, e.g.*, *Derrick v. Standard Nutrition Co.*, No. CIV 17-1245 RB/SMV, 2019 WL 2717150, at *3 (D.N.M. Jun. 28, 2019), *aff'd*, *Derrick v. Standard Nutrition Co.*, 829 Fed. Appx. 857 (10th Cir. 2020) (observing that the plaintiff's "late revelation of the evidence does not mean that it was 'previously unavailable,' it was simply tardy" and therefore inadmissible in a motion to reconsider).

[9] *Grynberg v. Ivanhoe Energy, Inc.*, 490 Fed. Appx. 86, 101 (10th Cir. 2012) (affirming denial of motion to reconsider where newspaper articles the moving party sought to use predated the court's initial order and "seemingly could have been obtained . . . sooner had the [party] been more diligent").

[10] *See, e.g.*, *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (holding that it is inappropriate to "advance arguments that could have been raised in prior briefing" in a motion for reconsideration).

[11] 05/20 Tr. 169:6-17.

[12] *CGH Transp., Inc. v. Quebecor World, Inc.*, 261 Fed. Appx. 817, 824 (6th Cir. 2008) ("It is hard to imagine how an affidavit from one of its own witnesses would have been previously unavailable to CGH, and CGH has not explained why it failed to introduce this evidence in opposition to summary judgment.").

[13] *See, e.g.*, *Christ Center of Divine Philosophy, Inc. v. Elam*, 763 Fed.Appx. 740, 743-44 (10th Cir. 2019) (holding that evidence was not newly discovered where the defendant admitted being in possession of the evidence

Lastly, the "newly discovered evidence must have existed at the time of trial and therefore show facts that existed at the time of trial." *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1200 (10th Cir. 2021) (citation omitted). For these reasons, Goodnight's Motion to Stay (Exhibit 14) and exhibits (Exhibit 15) are similarly inappropriate exhibits for a motion for rehearing and should be disregarded or stricken by the Commission.

C. Goodnight's unitization argument lacks merit because the Commission's obligation to prevent waste and protect correlative rights is not contingent on unitization.

Goodnight's Application rehashes the same, stale legal question that the Commission has already repeatedly rejected: whether the San Andres formation belongs in the Eunice Monument South Unit unitized interval (the "Unitization Issue").[14] Despite the Commission's prior rulings on this issue, Goodnight nonetheless persists in raising this improper argument *ad nauseum*.

Empire has previously addressed this argument in its Response to Goodnight Midstream Permian LLC's Renewed Motion for Judgment on the Exclusion of San Andres Formation Within EMSU, filed July 18, 2025. In its Response, which is incorporated here by reference, Empire identified the procedural due process issues implicated by Goodnight's attempt to unilaterally amend the unitized interval and how such attempts were a collateral attack on the Commission's prior orders.

Moreover, even if Goodnight's belabored argument on this issue was not already foreclosed by the Commission's prior orders, the issue is ultimately a red herring, as the Commission has an

prior to the decision at issue); *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1025 (10th Cir. 2018) (holding district court correctly refused to consider documents attached to motion to reconsider where plaintiff "had these additional documents in its possession all along, but chose not to attach them to its complaint or its briefs in opposition to the motions to dismiss").

[14] *See generally* Joint Order on Goodnight's Motion to Limit Scope of Hearing on Cases within the EMSU and the Oil Conservation Division Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024 (July 2, 2024); Order Partially Amending the Commission's July 2, 2024 Order with Respect to the Scope of the Hearing (March 4, 2025).

independent duty to prevent waste and protect correlative rights regardless of unitization.[15] Here, where the evidence adduced at hearing demonstrates that the San Andres formation contains a ROZ recoverable through enhanced methods, Goodnight's continued disposal into that zone impairs Empire's correlative rights and risks the permanent loss of producible resources. The fact that Goodnight disputes whether the San Andres formation should have been included in the unitized interval in 1984 is ultimately immaterial in light of the Commission's obligations under the Oil and Gas Act. For these reasons, Goodnight's arguments on this issue should be rejected.

D. Goodnight had no constitutionally protected property interest in its revocable permits and cannot raise issues regarding surface ownership when it objected to the admission of evidence regarding surface ownership at hearing.

Goodnight's constitutional arguments also lack merit. Under New Mexico law, an agency action that imposes a reasonable restriction on the use of private property does not constitute a 'taking' of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of the property.[16]

As recognized by the orders granting Goodnight's injection authority, injection permits are revocable licenses subject to stringent conditions and ongoing Commission oversight.[17] Goodnight cites no authority for the proposition that temporarily suspending a revocable injection permit has ever been deemed a regulatory taking. Rather, Goodnight's injection permits do not constitute property interests protected by the Takings Clause of the New Mexico Constitution nor do they

[15] NMSA 1978, §§ 70-2-11, -12.

[16] *Premier Tr. of Nev., Inc. v. City of Albuquerque*, 2021-NMCA-004, ¶ 5, 482 P.3d 1261.

[17] *See, e.g.,* Order No. R-22026 at Ordering ¶ 2 ("Jurisdiction is retained by the OCD for the entry of such further orders as may be necessary for the prevention of waste and/or protection of correlative rights or upon failure of the operator to conduct operations (1) to protect fresh or protectable waters or (2) consistent with the requirements in this order; whereupon the OCD may, after notice and hearing or prior to notice and hearing in event of an emergency, terminate the disposal authority granted herein.").

entitle Goodnight to indiscriminately inject produced water into a productive zone when doing so would cause waste or impair correlative rights. Further, even if an injection permit could be deemed a constitutionally protected property interest, it would not confer any *guarantee* against future regulation and remain subject to the Act's prohibition on waste. New Mexico courts have routinely rejected takings claims in analogous circumstances.[18]

Nor does the Suspension Order violate vested rights. A vested right arises only when a party has acted in reliance on a valid permit such that revocation would be inequitable. However, even then, "a vested right may be impaired by the government whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people."[19] Here, Goodnight has not established reasonable reliance, as the injection permits do not allow Goodnight to commit waste or impair Empire's correlative rights. The Commission acted squarely within its statutory duty to prevent waste and protect correlative rights.

Lastly, to the extent that Goodnight now attempts to raise constitutional claims as to surface owners, Goodnight has waived the issue. At hearing, Goodnight objected to evidence on surface ownership on the grounds of relevancy and the Commission sustained that objection.[20] Having

[18] *See, e.g.*, *Premier*, 2021-NMCA-004, ¶¶ 2-3, 7 (rejecting takings claim where the asserted property right did not include a "protected property right in static market conditions" and the owner retained all beneficial use); *Sanchez v. City of Santa Fe*, 1995-NMSC-058, ¶ 11, 120 N.M. 395 (explaining that the Takings Clause does not guarantee use of property for all economically viable purposes and incidental economic loss is not compensable); *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 15, 100 N.M. 342, 670 P.2d 953 (holding that statutory changes reducing liquor license value were not a taking because licensees retained the rights to transfer, devise, and use the licenses); *New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶¶ 52–53, 138 N.M. 785, 126 P.3d 1149 (holding that an increased minimum wage did not constitute a taking even where business owners alleged economic destruction of their businesses); *Westland Dev. Co. v. Romero*, 1995-NMCA-136, ¶ 13, 121 N.M. 144, 909 P.2d 25 (holding that a landowner had no vested property right in traffic flow past his property).

[19] *KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶ 16, 137 N.M. 388, 395.

[20] 04/24 Tr. 86:12 – 87:10.

successfully excluded evidence on surface use agreements from the hearing, Goodnight's reliance on such evidence in an attempt to seek reversal of the decision is disingenuous and inappropriate.[21]

For these reasons, Goodnight's constitutional argument in its Application for Rehearing are without merit and should be rejected by the Commission.

E. Goodnight's attempt to relitigate findings of fact is not a proper basis for rehearing.

Goodnight spends a significant portion of its Application for Rehearing attacking various findings of fact made by the Commission.[22] However, rehearing should not be granted "where a party is using the motion for reconsideration merely to 'relitigate old matters' or to raise arguments that could have been presented before the court entered judgment."[23] Indeed, Goodnight's assertions that the Commission improperly weighed the facts or otherwise resolved conflicting facts in Empire's favor does not support its rehearing request.[24]

The Commission found that a ROZ exists within the San Andres, which Goodnight did not dispute at hearing.[25] Indeed, Goodnight's own evidence confirmed that oil saturation exists throughout the San Andres.[26] The Commission also properly found that the wastewater that Goodnight is not confined as Goodnight claims.[27] In fact, Mr. McGuire admitted that Goodnight has not determined where its injected wastewater is migrating.[28] In its Application, Goodnight

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[21] *Cf. United States v. McBride*, 94 F.4th 1036, 1041 (10th Cir. 2024) ("Generally, the invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt.") (internal quotation marks and citation omitted).

[22] Goodnight's Application for Rehearing at pp. 24-36.

[23] *CNSP, Inc. v. United States Forest Serv.*, No. 1:17-cv-00814-PJK-KK, 2019 WL 2503199, at *2 (D.N.M. June 17, 2019).

[24] *Bennett v. Watson Wyatt & Co.*, 156 F. Supp. 2d 270, 272 (S.D.N.Y. 2001) ("[P]laintiff argues that the Court improperly weighed the facts, wrongly resolved conflicting facts in defendant's favor, and made impermissible credibility determinations. Such arguments are appropriate on appeal but not on a motion for reconsideration.").

[25] *See, e.g.*, 04/25 Tr. 104:22-25 (Commissioner Ampomah recognizing that "Empire's experts and also even Goodnight's experts, they've all – they've all presented to the Commission, at least based on the evidence, there is a ROZ.").

[26] 04/21 Tr. 242:17-243:14.

[27] Empire FOF #85(a)-(r), 86, 88(a)-(d).

[28] 05/19 Tr. 262:21-263:6.

maintains that its concessions at hearing were "taken out of context"[29] and restates testimony and proposed findings that were rejected by the Commission in its decision. Such arguments do not provide a basis for the Commission to reverse or amend its decision and should therefore be rejected.[30]

IV. CONCLUSION

For the foregoing reasons, Goodnight's Application for Rehearing should be denied and the Commission should immediately require Goodnight to shut-in its injection wells.

Respectfully submitted,

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[29] Application for Rehearing at p. 31.

[30] *State Ethics Comm'n v. TNMP, Inc.*, No. 24-CV-652-WJ-LF, 2024 WL 3925412, at *2 (D.N.M. Aug. 23, 2024) (stating that motions for reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised" and denying defendant's motion because it "merely relitigates the same issues") (internal quotation marks and citation omitted).

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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 October 10, 2025.

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