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

APPLICATIONS OF FRANKLIN MOUNTAIN ENERGY 3, LLC FOR COMPULSORY POOLING AND NOTICE OF OVERLAPPING SPACING UNIT, LEA COUNTY, NEW MEXICO

CASE NOS. 23833, 23835, 23838, 23839

APPLICATIONS OF FRANKLIN MOUNTAIN ENERGY 3, LLC FOR COMPULSORY POOLING AND, TO THE EXTENT NECESSARY, APPROVAL OF AN OVERLAPPING SPACING UNIT, LEA COUNTY, NEW MEXICO

CASE NOS. 24110-24112, 24115

FRANKLIN MOUNTAIN ENERGY 3, LLC'S POST-HEARING BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Franklin Mountain Energy 3, LLC ("FME3") submits this Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law, pursuant to the Hearing Examiner's direction at the February 8, 2024 hearing. FME3's Proposed Findings of Fact and Conclusions of Law are attached hereto as Attachment 1. FME3 met its burden to show that co-developing the Cross State wells with the Satellite State wells will prevent waste and protect correlative rights, which MRC Permian, LLC ("MRC") neither refuted nor advocated for an alternative development plan. . FME3 respectfully requests that its applications in the above captioned cases (the "Cross State cases") be granted, that FME3 be designated operator of FME3's proposed Cross State horizontal spacing units ("Cross State Units"), and that MRC's objections be dismissed.

INTRODUCTION

These cases originally involved competing development plans for the Bone Spring and Wolfcamp formations underlying Section 36, Township 18 South, Range 34 East, and Section 1, Township 19 South, Range 34 East. N.M.P.M., Lea County, New Mexico filed by filed by FME3

and MRC. FME3 seeks to dedicate these units to its Cross State wells and FME3 has designated this area as its Cross State Development Area. FME3's Cross State Development Area is part of a larger comprehensive development plan in the area planned by FME3. FME3 is the designated operator of its four Satellite Wolfcamp units, which overlap the Cross State Units in the N/2N/2 of Section 36 (the "Overlap Area"). *See* FME3 Proposed Findings of Facts, ¶¶ 23-24, 26 ("FOF"). FME3 proposes to place shared surface facilities in the Overlap Area, which would support the Cross State wells, drilled from the N/2N/2 of Section 36 south to a bottom hole location in Section 1, and would support the Satellite State wells, also drilled from the N/2N/2 of Section 36 but north to a bottom hole location in Section 24, Township 18 South, Range 34 East. FOF ¶ 22. Viewed as a whole, FME3's Cross State and Satellite State Units will cover a total of four sections (2560 acres) and will develop the Bone Spring and Wolfcamp formations from a single set of surface facilities located in the N/2N/2 of Section 36. *See* FOF ¶¶ 26, 46-49.

A week before the hearing, MRC in its prehearing statement stated that it "intends to dismiss [its Wolfcamp] Cases 24142-24145 in favor of applications that seek to create Wolfcamp spacing units that do not include the N/2N/2 of Section 36." However, just three days before the hearing, MRC filed notices of dismissal for all of its cases without contacting the parties who had appeared in the case.[1] MRC then appeared at the hearing conceding in its opening statement that it could not prevail on its competing applications because FME3's evidence demonstrated it had secured working interest control in the proposed spacing units that far exceeded MRC's. *See* FOF ¶ 3. MRC did not call any witnesses in support of its withdrawn applications and withdrew all of

[1] MRC and COG Operating LLC entered their appearance in FME3's cases and objected to their being heard by affidavit. Two other parties, Slash Exploration LP and Armstrong Energy Corporation also entered their appearance in these cases and they were set for contested hearing on February 8, 2024.

its proffered testimony and exhibits, save that of one witness who performed no study to support his testimony in opposition to FME3's applications.

MRC's Notices of Dismissal did not seek the concurrence of FME3 or any of the other parties who entered an appearance nor was the notice signed by all of the parties. The Oil Conservation Division's ("Division") rules require that "[p]rior to ruling on a motion, the director or division examiner shall give written or oral notice to each party who has filed an appearance in the case and who may have an interest in the motion's disposition (except a party who has indicated that it does not oppose the motion), and shall allow interested parties an opportunity, reasonable under the circumstances, to respond to the motion." *See* Rule 19.15.4.15(C) NMAC. Indeed, when MRC recently moved to continue the hearing date, the Division required MRC to provide the parties' position concerning the motion.[2] MRC therefore should not be allowed to circumvent this rule by filing a notice unilaterally dismissing its cases set for hearing in which parties have appeared, filed prehearing statements and devoted substantial resources in preparing for hearing.

Although MRC abandoned its competing applications, MRC still seeks to preclude FME3 from developing acreage where FME3 has substantially higher working interest and working interest control than MRC—in fact, MRC's working interest in the Wolfcamp is less than 4% and its working interest in the Bone Spring is less than 13%. *See* FOF ¶¶ 16-20.

MRC's sole challenge to FME3's Cross State development plan is MRC's unsupported and insupportable argument that FME3's decision to co-develop the Cross State wells with the Satellite State wells will adversely impact the correlative rights of the owners in the Cross State Units who do not own interests in the N/2N/2 of Section 36 claiming that each tract must contribute

[2] Unlike it has done in other cases, MRC's Notices of Dismissal for these cases did not state that it was dismissing its cases "without prejudice to refile new applications at a later date." *See* Notice of Dismissal in Case Nos. 23248-23253.

equally to production, even though that is not a requirement of the compulsory pooling statute and is completely at odds with the Division's setback rules and proximity tract rule for horizontal wells.

As demonstrated herein, and as established at the hearing, FME3 met its burden[3] to show that its co-development plans will prevent waste and will protect correlative rights, which MRC did not refute. FME3 established that FME3's co-development plans will prevent waste by allowing FME3 to access reserves in the N/2N/2 of Section 36 that would otherwise be inaccessible if the Cross State Units were not co-developed with the Satellite State Units. *See* FOF ¶¶ 26-34. FME3 also demonstrated that its development plan will prevent surface waste by reducing surface facilities due to the co-development of the Cross State and Satellite State Units from a single set of surface facilities. *See* FOF ¶¶ 46-48. FME3's witnesses also demonstrated that co-developing the Cross State and Satellite State Units will be a net benefit to all of the owners in the units due to the lower costs by virtue of shared facilities and infrastructure. *See* FOF ¶¶ 22, 50.

Turning to correlative rights, FME3 established that co-developing the Cross State wells with the Satellite State wells will not negatively impact correlative rights. FME3 demonstrated both that the Cross State wells will perforate the N/2N/2 of Section 36 and, in so doing, will access reserves inaccessible by the Satellite State wells. *See* FOF ¶¶ 26-37. In addition, and admitted by MRC, FME3 demonstrated that there are regulatory and technological constraints that limit where a well can first access oil and gas along the well bore, which undermines MRC's argument that each tract along a lateral must contribute equally to a well or that FME3's co-development plan will improperly dilute MRC's and other interest owners' correlative rights. *See* FOF ¶¶ 29-45.

[3] With few exceptions not applicable here, "the standard of proof applied in administrative proceedings is a preponderance of the evidence." *See Foster v. Bd. of Dentistry of State of N.M.*, 1986-NMSC-009, ¶ 10, 714 P.2d 580. "Preponderance of the evidence simply means the greater weight of the evidence[.]" *Campbell v. Campbell*, 1957-NMSC-001, ¶ 24, 310 P.2d 266; *see also* UJI 13-304 ("To prove by the greater weight of the evidence means to establish that something is more likely true than not true."). FME3, through its witnesses' testimony and exhibits satisfied this burden.

From a regulatory perspective, the Division's rules require, as is relevant to these cases, a well's first take point[4] to be 100 feet from the outer boundary of the spacing unit for oil wells. *See* Rule 19.15.16.15.C NMAC. Thus, the tract within which the first take point lies (the "heel") will always have, by regulation, 100 feet of undeveloped acreage due to the regulatory setback.[5] The same is true for the tract within which the last take point lies (the "toe")—it will have 100 feet of undeveloped acreage due to the regulatory setback. As a result, the tracts at the heel and toe of a well cannot, from a regulatory perspective, contribute precisely equally to the production from the well bore.[6]

From a technical perspective, FME3's unrefuted evidence demonstrated because oil and gas wellbores cannot bend at 90 degree angles, the first take point at the heel of a horizontal well will be located well beyond the 100' setback requirement. *See* FOF ¶¶ 29-45. Instead, it takes vertical and horizontal distance to make the turn from vertical to horizontal. *Id.* The calculation to determine the vertical and horizontal distance is known as the "build rate." *Id.* As FME3 testified, the industry standard build rate, based on current day technology, is ten degrees per 100 feet, which means that it takes approximately 500 feet for a well bore to transition from vertical to horizontal. *Id.* As a result, it takes a minimum of 500 feet to reach a well's first take point. This is true for any operator and was admitted by MRC's witness. *See* FOF ¶ 42.

[4] The Division's regulations define "first take point" as "the shallowest measured depth of the well bore where the completed interval starts." Rule 19.15.16.1.E NMAC.

[5] The Division's regulations provide an administrative process for an operator to request a first and last take point closer to the outer boundary than allowed by the setback provisions. *See* Rule 19.15.16.15.C(6).

[6] Until the enactment of the horizontal well rule in 2018, the setbacks for the first and last take points were 330' for oil wells and 660' for gas wells, meaning that there would be 330' of undeveloped acreage in each of the heel and toe tracts. During the horizontal well rule proceeding, a witness for NMOGA, represented by MRC's counsel in this case, testified that the "drainage from the heel or toe or the first take point and last take point is far less than the drainage from the side of the complete interval." Case No. 15957, Hearing Transcript Vol. 2, page 58, lines 11-20.

Assuming an "on-lease" surface hole location, *i.e.*, a surface hole location within the horizontal spacing unit's boundary, the first take point will be a minimum of 500 feet from the surface hole location.[7] Thus, and admitted by MRC, without a workaround, no operator can drill a horizontal well with a first take point at 100 feet from the outer boundary of the spacing unit, which means stranding a minimum of 500 feet of reserves. This situation is compounded when units are built "heel-to-heel", because each well within the units will have a first take point a minimum of 500 feet from the unit boundary, leaving 1000 feet (500 feet times 2) undeveloped and undevelopable per well. *See* FOF ¶ 32. MRC did not and cannot dispute these facts.

Operators have found various ways to address the waste of resources presented by this undisputed, technological limitation. One way operators have addressed this limitation is to "back-build," which is where an operator locates the surface hole location further into the spacing unit and then builds the curve back towards the outer boundary of the spacing unit, which gives the operator the necessary vertical and horizontal distance for the well bore to be closer to horizontal at the regulatory limit of 100 feet for the first take point. Another option is to have the surface hole location off-lease, *i.e.*, outside the horizontal spacing unit's boundary. Even with an off-lease surface hole location, a well must comply with the Division's setback requirements unless an operator obtains a non-standard well location approval. *See* Rule 19.15.16.15.C(2). Both the back-build and off-lease surface hole location options have limitations. Both of those options assume surface availability, either on-lease or off-lease, which is not always the case due to existing infrastructure or other constraints. Off-lease surface hole locations also require additional authorizations from the surface and from the mineral estate owner. In New Mexico, given State and federal surface and mineral ownership, off-lease surface hole locations could require approval

[7] The distance from the surface hole location to the first take point is likely more than 500 feet because even siting surface facilities immediately adjacent to the outer boundary of a spacing unit requires an allowance for the pad.

from the New Mexico State Land Office or the Bureau of Land Management ("BLM"). FME3 testified that it is unworkable for FME3 to back-build the Cross State Wells due to infrastructure constraints present on Section 36. *See* FOF ¶ 45. FME3 also testified that it would need to apply for additional surface rights to utilize an off-lease surface hole location. *See* FOF ¶ 45.

FME3' development plan utilizes a better option—co-developing two sets of units from shared surface facilities within overlapping spacing units, which are specifically authorized by the Division's rules. *See, e.g.*, Rule 19.15.16.15.A(4) ("Subject to Paragraph (9) of Subsection B of 19.15.16.15 NMAC, horizontal spacing units can overlap other horizontal spacing units or vertical well spacing units."); *see also* Rule 19.15.16.15.B(9)(b). The Division's rules also contemplate multi-lateral wells, where multiple laterals branch off from a common well bore, which can include laterals that head in opposite directions from the common well bore. *See* Rule 19.15.16.15.B(7). Consistent with these concepts, FME3 proposes to place shared surface facilities in the Overlap Area, which would support both the Cross State and Satellite State Units.

FME3's witnesses demonstrated that, even without co-developing the Cross State wells, the Cross State wells would have a first take point in substantially the same location due to the technological limitations discussed above. *See* FOF ¶¶ 35-37. Thus, FME3's co-development plans does not impair MRC's correlative rights because the Cross State wells will perforate the N/2N/2 of Section 36 in substantially the same amount as if FME3 developed the Cross State wells as a typical development plan. Beyond being substantially equal in terms of the first take point location, FME3 demonstrated that placing the shared facilities within the Overlap Area will allow FME3 to access the reserves that would otherwise be inaccessible due to the technological constraints that currently exist when drilling a horizontal well. *See* FOF ¶¶ 29-34. FME3 showed that co-

developing the units is beneficial to the interest owners in both sets of units because the wells in each set of units will be accessing reserves in the Overlap Area. *Id.*

In addition, demonstrated that interest owners in both sets of units will benefit by substantially reduced costs, due to the shared facilities. *See* FOF ¶¶ 22, 50. Another benefit of FME3's co-development plan is the reduction in surface impacts—if FME3 were to build traditional heel-to-heel units, FME3 would need double the set of pads, one set of pads for each unit. *See* FOF ¶¶ 46, 48, 50. The surface locations for each unit would be on New Mexico State Trust Lands, so FME3's co-development plan not only minimizes surface impacts generally, it reduces impacts to State Trust Lands.

ARGUMENT

I. FME3'S DEVELOPMENT PLAN PREVENTS WASTE AND PROTECT CORRELATIVE RIGHTS

FME3 met its burden and established by a preponderance of the evidence that FME3's development plans will prevent waste and protect correlative rights. MRC's single witness, with no substantive evidence, failed to refute FME3's showing.

A. Overview of the Oil and Gas Act

FME3's testimony and exhibits demonstrated that FME3's development plans for the Cross State Units will prevent waste and protect correlative rights. As the New Mexico Supreme Court has recognized, "the basis of [the Division's] powers is founded on the duty to prevent waste and to protect correlative rights. ***Actually, the prevention of waste is the paramount power***, inasmuch as this term is an integral part of the definition of correlative rights." *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 11, 373 P.2d 809 (emphasis added); *see also El Paso Natural Gas Co. v. Oil Conservation Comm'n*, 1966-NMSC-092, ¶ 4, 76 N.M. 268, 414 P.2d 496 ("[T]he primary concern of [the Oil and Gas Act is] eliminating and preventing waste in

the pool so far as it can practicably be done, and next the protection of the correlative rights of producers from the pool.").

New Mexico courts have also noted that the Oil and Gas Act includes a "practicable" standard, which MRC reads out of the Act.[8] *See, e.g.*, *Grace v. Oil Conservation Comm'n*, 1975-NMSC-001, ¶ 27, 531 P.2d 939. Section 70-2-17(A) of the Oil and Gas Act states:

> The rules, regulations or orders of the division shall, *so far as it is practicable to do so*, afford to the owner of each property in a pool *the opportunity* to produce his just and equitable share of the oil or gas, or both, in the pool, being an amount, *so far as can be practically determined*, and *so far as such can be practicably obtained* without waste, *substantially in the proportion* that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for this purpose to use his just and equitable share of the reservoir energy.

(Emphasis added). The Oil and Gas Act's definition of "correlative rights" mirrors the language in Section 70-2-17(A). It defines correlative rights as:

> [T]he opportunity afforded, so 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 or both 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 such purpose, to use the owner's just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H). As the New Mexico Supreme Court has stated, correlative rights are "not absolute or unconditional." *Continental Oil Co.*, 1962-NMSC-062, ¶ 27. Rather, under the Oil and Gas Act, correlative rights "consist[] of merely (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 [oil or] gas in the pool." *Id.*

[8] MRC's counsel in argument and in questioning of witnesses repeatedly referred to a standard not found in the compulsory pooling statute—that each tract along the well bore must "contribute proportionately to production." *See, e.g.*, Tr. p. 15, lines 4-8, p. 30, lines 14-24.

The New Mexico Supreme Court has noted that correlative rights must give way to prevention of waste. For example, in a case where an interest owner claimed that its ownership would be diluted by the creation of a non-standard spacing unit, the New Mexico Supreme Court quoted the Oklahoma Supreme Court with favor:

> We [have] concluded that it has been the policy of the Legislature to tolerate the lesser hazard (i.e., the possibility that some production, or production proceeds, may be taken from some owners rightfully entitled to it, and transmitted to others not so entitled)…in preference to the greater hazard to the greater number of owners, and the State, in the dissipation of its natural resources by excessive drilling.

Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 1975-NMSC-006, ¶ 25, 532 P.2d 582 (quoted authority omitted); *see also Grace*, 1975-NMSC-001, ¶ 29.

The Oil and Gas Act specifically authorizes pooling when, as here, "two or more separately owned tracts of land are embraced within a spacing or proration unit….[and] such owner or owners have not agreed to pool their interests, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply…." NMSA 1978, §70-2-17(C). Under these circumstances, "the division, to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, ***shall pool*** all or any part of such lands or interests or both in the spacing or proration unit as a unit." *Id.* (emphasis added). Here, it is undisputed that FME3 proposes to create spacing units embracing two or more separately owned tracts of lands, FME3 has the right to drill and operate the wells it proposes to dedicate to the common source of supply, and the interest owners in those tracts have not agreed to pool their interests. Consistent with the Oil and Gas Act, then, the Division "*shall pool*" the interests in the units, including MRC's interests.

Section 70-2-17(C) further provides that pooling orders "shall be upon such terms and conditions as are just and reasonable and will afford to the owner or owners of each tract or interest

in the unit the opportunity to recover or receive without unnecessary expense ***his just and fair share of the oil or gas, or both.***" (Emphasis added.) "For the purpose of determining the portions of production owned by the persons owning interests in the pooled oil or gas, or both, such production shall be allocated to the respective tracts within the unit in the proportion that the number of surface acres included within each tract bears to the number of surface acres included in the entire unit." *Id.*[9]

Viewed against this legal backdrop, FME3's development plan more than meets the Oil and Gas Act's requirements of preventing waste and protecting correlative rights.

B. It Is Undisputed that FME3's Development Plan Prevents Waste by Increasing the Amount of Reserves that Can Be Accessed and By Reducing Surface Impacts.

The Oil and Gas Act requires the Division to prevent underground and surface waste. *See* NMSA 1978, § 70-2-11(A). The Oil and Gas Act defines "underground waste" as "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool[.]" NMSA 1978, § 70-2-3(A). The Oil and Gas Act defines "surface waste" as "the unnecessary or excessive surface loss or destruction without beneficial use, however caused . . . resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resulting from the use of inefficient storage." *Id.* § 70-2-3(B). MRC did not challenge FME3's development plan on the basis of waste through the submission of exhibits or testimony. Even if MRC had supported its contentions by testimony or exhibits, FME3 met its burden to show that its plans to co-develop the Cross State Units with the Satellite State Units prevents both the waste of resources and economic waste.

[9] The Commission appears to have adopted the surface acreage formulation as a practical proxy for other allocation methods given the challenges of actual measurement of production from each tract. *See, e.g.*, *Grace*, 1975-NMSC-001, ¶ 23.

FME3 demonstrated that its plan to co-develop the Cross State Units with the Satellite State Units prevents waste because doing so will allow FME3 to access reserves that would otherwise be undeveloped. FME3 demonstrated that the industry standard build rate, based on current day technology, is ten degrees per 100 feet, which means that it takes approximately 500 feet for a well bore to transition from vertical to horizontal. *See* FOF ¶¶ 29-34. FME3 established that, without a workaround, no operator can drill a horizontal well with a first take point at the regulatory setback distances (100 feet) from the outer boundary of the spacing unit, which means stranding a minimum of 500 feet of reserves. *Id.* FME3 demonstrated that this situation is compounded when units are built "heel-to-heel", because each well within the units will have a first take point a minimum of 500 feet from the unit boundary, leaving 1000 feet (500 feet times 2) undeveloped and undevelopable per well. *Id.* Put another way, if FME3 were to build the Cross State Units and the Satellite State Units as standalone units, *i.e.*, heel to heel, that would mean leaving approximately 1000 feet undeveloped and undevelopable across each formation. *Id.* FME3's plan remedies this underground waste by proposing to drill wells north and south from the same pad, which, in turn, allows the wells to access reserves that would otherwise be inaccessible.[10]

Thus, co-developing the Cross State and Satellite State Units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Cross State wells that would otherwise be inaccessible to the Satellite State wells. *See* FOF ¶¶ 29-34. Similarly, co-developing the Cross State and Satellite State Units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Satellite wells that would otherwise be inaccessible to the Cross State wells. *Id.*

[10] Drilling wells from the same pad will result in a limited overlap (approximately 90-100') between the Cross State wells' completed laterals and the Satellite State well's completed laterals. Trans. P. 154, Lines 13-24.

In addition, FME3 is ready, willing, and able to develop this acreage in the near term. FME3 acquired its first lease in the Cross State Development Area in 2022 and has been diligently working to develop this acreage since then, including acquiring additional leases and interests and invested substantial resources to eliminated constraints for disposition of produced water and gas takeaway. FOF ¶ 15, 22, 51-55. FME3 has majority working interest control and is the only entity proposing to operate this acreage. *See* FOF ¶¶ 14, 16-18, 21-24, 51-55. FME3 is taking a holistic, thoughtful approach to developing not only the Cross State and Satellite State Units, but also immediately adjacent units, the Gold and Parallel units. *See* FOF ¶¶ 22-24. FME3 is committed to long-term solutions to oil, gas, and water take-away in this area, which will require infrastructure improvements. *See* FOF ¶¶ 51-55. FME3 has identified the necessary improvements and has committed to making those improvements in its current capex budget. *Id.* FME3 operates 41 wells within a six-mile radius of the Cross State Units. FME3 has turned on production of 13 wells between October 2023 and January 2024. The Satellite and Cross wells are on its 2024 drilling schedule. FOF ¶ 58.

Approving FME3's applications will thus allow the prompt development of this acreage, which, in turn, prevents waste. MRC presented no alternative plan of development and there is no other operator ready or able to operate the acreage comprising the Cross State Units and thus there will be waste if FME3's applications are not granted.

As FME3 demonstrated at the hearing, FME3's development plan will reduce surface waste by reducing the number of surface facilities required because FME3 will be able to use a single set of surface facilities to operate FME3's Cross State wells and FME3's Satellite Wells. *See* FOF ¶¶ 46-50. MRC's sole contention on this point was that FME3 could commingle production from the Cross and Satellite Units in a single central tank battery. *See* Tr. p.70, lines

14-21. FME3 does not disagree with that, but that contention entirely disregards the other surface impacts that FME3 will be avoiding, which are the additional pads that would be necessary if FME3 developed the Cross and Satellite units as stand-alone units. That contention also ignores the substantial infrastructure upgrades that FME3 has already evaluated and is committed to implementing to advance prudent, efficient development in this area, which will be a benefit to all of the owners in the Cross State Units, as well as the owners in the other units in this area. FOF ¶¶ 52-55. MRC thus did not refute FME3's evidence that co-developing the Cross State and Satellite State Units will reduce surface impacts.

In sum, FME3 established that its proposal to co-develop the Cross State and Satellite State Units will result in net positive reserves being produced, will reduce surface impacts, and will be more efficient and cost-effective than doing two sets of stand-alone units.

C. FME3's Development Plan Does Not Impair Correlative Rights

As FME3's witnesses established, co-developing the Cross State and Satellite State Units will not impair correlative rights because co-developing allows FME3 to access reserves in the Overlap Area that would otherwise be inaccessible. *See* FOF ¶¶ 29-34. As discussed above, FME3 presented evidence that co-developing the Cross State and Satellite State Units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Cross State wells that would otherwise be inaccessible to the Satellite State wells.

In addition, and as acknowledged by MRC,[11] if FME3 were to build the Cross State Units as standalone units, the first take points would be at approximately 600' from the north line of Section 36 due to the vertical and horizontal distance required to bend the well bore. *See* FOF ¶¶

[11] MRC's witness agreed that "[w]ithout a back-build," any well's first take point is going to be "substantially beyond" the 100 foot regulatory setback for first take points. *See* Tr. p. 204, lines1-10 ("Correct. Without a back-build, if you're just going straight down, then yes, that limitation does exist.").

29-37, 42. In other words, without back building or using off-lease surface locations, FME3 demonstrated that the closest the Cross State first take points could be is approximately 600 feet from the north line of the Cross State unit boundary. *Id.* As FME3 established, its proposed Cross State first take points under its co-development plan would be at approximately 600 feet—which is the same first take point if FME3 developed the units as standalone units. *Id.* Thus, under either development scenario, FME3's first take point for the Cross State wells would be approximately 600 feet from the north line of the unit boundary. As a result, MRC has not and cannot show that FME3's co-development plan impairs MRC's correlative rights.[12]

MRC's argument that each tract must contribute equally to production from the spacing unit is wrong both legally and factually. *See* Transcript, p. 31, lines 21-25 ("That's the provision that requires under pooling orders to be shared on a straight-acreage basis."). MRC's argument is legally insupportable because, contrary to MRC's contention, the Oil and Gas Act does not require each tract along a well bore to contribute precisely equally to the well. Instead, the Oil and Gas Act incorporates a "practicable" standard, which MRC entirely reads out of the statute. The Oil and Gas Act includes practical caveats, recognizing that a working interest owner is only entitled to his or her share of the oil and gas that can be "***practicably obtained*** without waste, ***substantially*** in the proportion" to the interest owner's acreage. NMSA 1978, § 70-2-17(A). FME3's proposed development plan meets these requirements and MRC's objections must be denied.

The Division's regulations also negate MRC's argument that each tract much contribute equally to a well bore. First, as discussed above, any tracts at the heel and toe will not contribute equally to a well because the Division's regulations require a 100 foot setback for the first and last

[12] MRC's argument seems to be that FME3 should locate its surface hole locations off-lease or back-build. However, those options are not available to FME3 given existing infrastructure on the surface and given that FME3 would need to obtain additional authorizations for off-lease surface hole and subsurface easements.

take point, which, in turn, reduces the amount of perforated lateral in those tracts. *See* Rule 16.15.16.15.C. The 100 foot setback applies even if an operator back-builds or uses an off-lease surface hole location—under all circumstances, unless an operator applies for a non-standard location approval of a well, the tracts at the heel and toe will not contribute precisely proportionally to the well because 100' feet of potential well bore is undeveloped due to the set back. Second, the Division's regulations also authorize operators to enlarge a spacing unit to include adjoining tracts that are within 300 feet of a horizontal well's completed lateral. *See* Rule 19.15.16.15.B(1)(a) (the "proximity tract rule). Given that the proximity tracts will not be ***penetrated at all***, there is no way those tracts can contribute equally to production along the well bore. In addition, the Division's regulations nowhere require precise proportionality—instead, the regulations require that, for a unit to be standard, it must be comprised of "one or more contiguous tracts that the horizontal oil well's completed interval penetrates," Rule 19.15.16.15.B(1)(a), unless an operator includes proximity tracts, which, again, are tracts that will not be penetrated by the well bore, will not contribute equally, and yet can be included within a standard spacing unit into which interest owners can be pooled.

Simply put, nothing in the Oil and Gas Act or the Division's regulations require that each tract contribute equally to a well bore—in fact, the opposite is true. The Division's regulations specifically expressly limit the amount a tract at the heel or toe can contribute, and authorize the inclusion of tracts in a spacing unit that are not penetrated under certain circumstances, which entirely undercuts MRC's argument that each tract must contribute equally to production in order for the Division to issue a pooling order. MRC's opposition to FME3's development plans must be rejected and FME3's Cross State applications should be granted.

As applicable here, even if FME3 could build its well bores to reach the first take point at the 100 foot setback requirement, which it cannot due to technological and surface constraints, Section 36 would still not contribute equally due to the Division's mandatory set back of 100 feet, as well as due to the fact that the 40-acre tract where the heel and toe of a horizontal well do not contribute as much to a well as the lateral of the well. Again, MRC did not provide any evidence or calculation supporting its dilution claim—rendering that argument merely speculative and unsupported. MRC's dilution argument thus fails as a matter of law and as a matter of fact.

In addition, any purported dilution of MRC's correlative rights must be weighed against the Oil and Gas Act's paramount goal of preventing waste, especially in light of MRC's limited interest in this acreage. As discussed above, correlative rights are "not absolute or unconditional." *Continental Oil Co.*, 1962-NMSC-062, ¶ 27. Rather, under the Oil and Gas Act, correlative rights "consist[] of merely (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 [oil or] gas in the pool." *Id.*

FME3 met its burden of demonstrating that co-developing the Cross State Units with the Satellite State Units will prevent both underground and surface waste, which MRC did not challenge or refute. It is undisputed that FME3 will be able to access more reserves from the Overlap Area by co-developing the units than if FME3 developed the units as standalone units. The net benefit of accessing additional reserves outweighs any purported impact to MRC's correlative rights. FME3's applications should be granted and MRC's objections denied.

II. FME3 PROVIDED ADEQUATE NOTICE OF THE OVERLAP

To the extent MRC re-raises issues pertaining to notice of the overlap between the Cross State and Satellite State Units, the Hearing Examiner previously rejected MRC's notice arguments,

ruling that MRC had notice of the overlapping spacing units at issue in these cases. *See* Order Denying MRC's Motion to Vacate Pre-Hearing Order. Thus, that issue is not properly before the Division. And, in any event, it is undisputed that MRC had actual notice. The Hearing Examiner also ruled that MRC does not have standing to raise issues on behalf of other working interest owners. To the extent MRC purports to raise objections on behalf of other working interest owners, those objections must be rejected. Beyond that, no other working interest owners have raised an issue with the sufficiency of notice.

As FME3 demonstrated in its Response to MRC's Motion to Vacate, which FME3 incorporates herein, OCD's rules regarding overlapping spacing units do not require specific language to identify the existing spacing unit. *See* Rule 19.15.16.15.B(9)(b); Rule 19.15.15.12.B. To date, MRC has never identified an OCD order or an OCD rule that requires specific language. Rule 19.15.16.15.B(9)(b) requires an operator proposing to drill a well partially within an existing well's spacing to unit to provide notice of the operator's intent to drill such a well to owners and operators in the existing and new well's spacing unit. The record is clear that FME3 provided such notice in its applications.

It bears repeating that at the time FME3 filed its applications, there were no existing spacing units in Section 36 and, thus, no existing spacing unit to trigger the requirements of Rule 19.15.16.15.B(9)(b) (rule applies to "subsequent wells in *existing spacing units*" (emphasis added). Nevertheless, FME3's Cross State applications provided notice that FME3's proposed Cross State wells would partially overlap a spacing unit in Section 36. FME3's Cross Applications state: "Franklin also hereby provides notice that the spacing unit proposed in this application will partially overlap a spacing unit in Section 36, Township 18 South, Range 34 East, N.M.P.M. Lea County, New Mexico." This language, along with the caption of the cases, the request for relief,

the information published on the OCD's docket, and FME3's newspaper publication makes clear that FME3 provided notice in its Cross Applications that the Cross State wells were proposed to partially overlap with a spacing unit in Section 36. FME3's Satellite State Wolfcamp applications were published on the Division's docket and identify that FME3 was providing notice of an overlapping spacing unit and seeking approval, to the extent necessary, of an overlapping spacing unit in Section 36. *See* FOF ¶ 25.

FME3 mailed copies of its Cross Wolfcamp to MRC on September 15, 2023. *See* FOF ¶ 66. It is undisputed that MRC ***never once*** reached out to FME3 with any questions about the Cross State applications, despite the applications identifying the overlap in multiple places although MRC's sole witness testified that it was common practice to do so. *See* FOF ¶ 67

Additionally, approval of an overlapping spacing unit is not a prerequisite to compulsory pooling. The Division's rules set forth an administrative process, separate from the compulsory pooling process, to seek approval of an overlapping spacing unit. *See* Rule 19.15.15.12.B. In addition, the Division's rules governing pooling applications do not require notice of overlapping spacing units as part of the compulsory pooling process. *See* Rule 19.15.4.12.A(1)(a) (setting forth the notice requirements for compulsory pooling applications). Rule 19.15.4.12.A(1)(b) outlines the evidence necessary to provide in support of pooling applications—and it does not require any notice or evidence regarding overlapping spacing units.

Finally, it is undisputed that MRC ***had actual knowledge*** of the overlap with the Satellite units in the N/2 of Section 36, as the Hearing Examiner previously ruled. Also, as the Hearing Examiner previously rule, MRC lacks standing to challenge notice on behalf of third-parties.

Since MRC did not submit any evidence supporting any other development plan, the Division must grant FME3's applications. Moreover, since MRC chose not to file any testimony

or exhibits in support of its competing applications, seeking to unilaterally[13] dismiss them on the eve of the hearing just 3 days before the hearing, the Division should either: (1) dismiss its applications with prejudice, precluding it from re-filing new applications involving the same acreage, or (2) require MRC to pay FME3's costs in presenting its cases and defending against MRC's competing cases before proceeding on any new applications it may file. *See* Rule 1-041(A)(2) and (D), NMRA (providing if a plaintiff does not obtain the consent of all parties who have appeared in the case to a stipulation of the dismissal of its claims, the action cannot be dismissed without an order "upon such terms as the court deems proper" and allowing for an order requiring the payment of costs of the action previously dismissed if a new action is commenced based upon of including the same claim against the same party).

The rule is designed "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Phillips USA, Inc. v. Allflex USA, Inc*., 77 F.3d 354, 357 (10th Cir. 1996) (citations omitted). "When considering a motion to dismiss without prejudice, 'the important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties.'" *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993) (quoting *Barber v. General Elec. Co*., 648 F.2d 1272, 1275 (10th Cir. 1981)).

In *Zagano v. Fordham Univ*., 900 F.2d 12, 14 (2d Cir. 1990), the Second Circuit, in upholding the dismissal of plaintiff's claims with prejudice where dismissal, like MRC's proposed dismissal, occurred on the eve of trial, stated the relevant factors used by the courts:

> Voluntary dismissal without prejudice is thus not a matter of right. Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and

[13] Under the Rules of Civil Procedure, if a plaintiff does not obtain the consent of all parties who have appeared in the case to a stipulation of the dismissal of its claims, the action cannot be dismissed without an order "upon such terms as the court deems proper." *See* Rule 1-041(A)(2) NMRA.

> expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss. ***
>
> The circumstances here amply justified the district judge's denial of the Rule 41(a)(2) motion. Under any test, the motion was made far too late. The action had been pending for over four years, during which it was contested vigorously, if sporadically, and extensive discovery had taken place. Zagano's counsel had affirmatively indicated at the January conference that she intended to pursue the Title VII action, and a firm trial date was set. Only when the trial was less than ten days away did Zagano seek dismissal without prejudice.

Given MRC's 11th hour attempt at dismissal, coupled with its cryptic explanation for seeking dismissal, all of these factors weighs in favor of finding that FME3 would suffer "legal prejudice" if MRC is permitted to dismiss its cases without prejudice. Although the Rules of Civil Procedure do not apply to these proceedings, the Division has ample authority to control its docket and prevent parties from gaming the Divisions' rules to file piecemeal applications. Additionally, the Division in compulsory pooling cases is similarly required to enter pooling orders "upon such terms and conditions as are just and reasonable…" NMSA 1978, § 70-2-17(C).

CONCLUSION

For the foregoing reasons, and for reasons demonstrated at the Hearing and in the Hearing record, FME3 requests that its proposed Findings of Fact and Conclusions of Law be adopted, and that FME3's compulsory pooling applications in these cases be granted, and that FME3 be designated operator of the Cross State wells.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

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CERTIFICATE OF SERVICE

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

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Proposed Findings of Fact

Overview of Applications and Hearing

1. In Case Nos. 23833, 23835, 23838, 23839, FME3 seeks orders for the Division pooling all uncommitted interests in four Wolfcamp horizontal spacing units, underlying Section 36, Township 18 South, Range 34 East, Section 1, Township 19 South, Range 34 East, N.M.P.M., Lea County, New Mexico, and together comprising approximately 1280 acres. These four Wolfcamp units will be dedicated to the Cross State Com 703H and Cross State Com 803H wells (W/2E/2); Cross State Com 701H and Cross State Com 801H wells (W/2W/2); Cross State Com 704H and Cross State Com 804H wells (E/2E/2); and the Cross State Com 702H and Cross State Com 802H wells (W/2E/2) respectively. *See* Applications Exhibits B.17-B.20.[1]

2. In Case Nos. 24110, 24111, 24112, and 24115, FME3 seeks orders from the Division pooling all uncommitted interests in four Bone Spring horizontal spacing units, underlying Section 36, Township 18 South, Range 34 East, Section 1, Township 19 South, Range 34 East, N.M.P.M., Lea County, New Mexico, and together comprising approximately 1280 acres. The four Bone Spring units will be dedicated to the Cross State Com 304H and Cross State Com 504H wells (E/2E/2); Cross State Com 303H and Cross State Com 503H wells (W/2E/2); Cross State Com 301H and Cross State Com 501H wells (W/2W/2); and the Cross State Com 302H and Cross State Com 502H wells (E/2W/2) respectively. *See* Applications Exhibits B.21-B.24.

3. MRC Permian LLC ("MRC") had filed competing applications but dismissed those applications given FME3's higher working interest and higher working interest control in the proposed units. *See* Transcript of February 8, 2024 Examiner Hearing ("Tr."), p. 9, lines 18-25, p. 10, lines 1-6.

4. These cases were heard at a special OCD hearing docket on February 8, 2024. Both FME3 and MRC presented witnesses and exhibits. No other party presented witnesses. Each of the witnesses were sworn, were qualified to present expert testimony, and were subject to cross-examination by the other party and by the OCD Hearing Examiners. *See generally* Tr., pp. 37-212, and FME3 Revised Exhibits.

5. In support of its Applications, FME3 presented testimony and exhibits from: Lee Zink (land); Ben Kessel (geology), and Cory McCoy (engineering). *See generally* Tr. pp. 37-173, and FME3 Revised Exhibits.

6. MRC presented testimony and exhibits from Tanner Schulz (reservoir engineer). *See generally* Tr. pp. 174-212, and MRC Exhibits.

Legal Background

7. The Oil and Gas Act authorizes pooling when "two or more separately owned tracts of land are embraced within a spacing or proration unit . . . [and] such owner or owners have not

[1] All references to FME3's Exhibits are to FME3's Revised Exhibit Packet filed on February 15, 2024.

agreed to pool their interests, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply…." NMSA 1978, §70-2-17.C.

8. The Oil and Gas Act states that 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. NMSA 1978, § 70-2-11(A); *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 11, 373 P.2d 809 ("[T]he basis of [the Division's] powers is founded on the duty to prevent waste and to protect correlative rights. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights." (citation omitted)).

9. The Oil and Gas Act defines "correlative rights" as "the opportunity afforded, so 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 or both 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 such purpose, to use the owner's just and equitable share of the reservoir energy." NMSA 1978, § 70-2-33(H).

10. Section 70-2-17(A) of the Oil and Gas Act states: "The rules, regulations or orders of the division shall, so far as it is practicable to do so, afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for this purpose to use his just and equitable share of the reservoir energy."

11. The Oil and Gas Act requires the Division to prevent underground and surface waste. *See* NMSA 1978, § 70-2-11(A).

12. The Oil and Gas Act defines "underground waste" as the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool[.]" NMSA 1978, § 70-2-3(A).

13. The Oil and Gas Act defines "surface waste" as "the unnecessary or excessive surface loss or destruction without beneficial use, however caused . . . resulting from the manner of spacing, equipping, operating or producing, well or wells, or incident to or resulting from the use of inefficient storage." NMSA 1978, § 70-2-3(B).

Testimony and Evidence

14. FME3 is the only operator seeking to be designated operator of the acreage at issue in these cases. MRC dismissed its applications and does not seek to be designated operator of the acreage. *See* Tr. p. 9, lines 18-25, p. 10, lines 1-6.

15. FME3 acquired its first lease in the Cross State Development Area in 2022 and has been diligently working to develop this acreage since then, including acquiring additional leases and interests, and support. *See* Tr. p. 47, lines 11-24; FME3 Ex. B, ¶¶ 36 to 40 ("Zink Aff."); FME3 Ex. B.6; FME3 Ex. B.14-15.

16. At the time of the hearing, FME3 controlled between approximately 39.2% and 64.7% in the Cross State Wolfcamp units and between approximately 46.78% and 57.96% in the Cross State Bone Spring units. *See* FME3 Ex. B.17.b, B.18.b, B.19.b, B.20.b, B.21.b, B.22.b, B.23.b, B.24.b.

17. FME3 has an interest in every tract in FME3's proposed Cross State units except two. FME3 Ex. B (Zink Aff.) ¶ 18, FME3 Ex. B-3 and B-4.

18. FME3 has the support of Davis Partners, Mestengo Energy Company, and REG XI, who own interests in the acreage that FME3 seeks to pool and Davis Partners and Mestengo submitted letters in support of FME3's development plan. FME3 Ex. B.14 & B.15.

19. MRC's working interest in the Wolfcamp is less than 4% and its working interest in the Bone Spring is less than 14%. FME3 Ex. B (Zink Aff.) ¶¶ 14, 17; FME3 Ex. B.3 and B.4.

20. MRC has no working interest in Section 36 and only has working interest in the S/2 of Section 1. FME3 Ex. B.3 and B.4.

21. FME3 has invested substantial time and thought into developing this acreage. *See* Tr. p. 47 to 49, p. 153, lines 9-22; FME3 Ex. B (Zink Aff.) ¶¶ 25-41; FME3 Ex. B-6 through B.14.

22. FME3's Cross State wells are part of a comprehensive, holistic development in this area, which is efficient, thoughtful and reduces overall footprint, and reduces surface disturbance, while increasing efficiencies and decreasing costs. *See* Tr. p. 47 to 49; p. 153, lines 9-22; FME3 Ex. B (Zink Aff.) ¶ 26; FME3 Ex. B-6. FME3's overall plan for this area includes FME3's current and proposed Gold State wells and its proposed Parallel wells, both immediately adjacent to the Satellite and Cross development areas. *See* FME3 Ex. B-6 through B.14.

23. FME3 has orders for the Satellite Wolfcamp Units, which overlap with the Cross units. FME3 owns 100% of the working interest in the W/2 Bone Spring units. FME3 has orders for the W/2W/2 Gold wells and has drilled and is currently completing those wells. FME3 Ex. B (Zink Aff.) ¶ 26; FME3 Ex. B-6.

24. FME3 is the designated operator of four Satellite State Wolfcamp units, which extend into the N/2N/2 of Section 36. FME3 Ex. B.6.

25. FME3's Satellite State Wolfcamp applications were published on the Division's docket and identify that FME3 was providing notice of an overlapping spacing unit and seeking approval, to the extent necessary, of an overlapping spacing unit in Section 36. *See* Satellite Applications, Case Nos. 23829-23832; Tr. p. 119-121, 123-124.

26. FME3's Cross State Units overlap with Satellite State units in the N/2N/2 of Section 36. *See generally* Tr. p. 47-48; *see also* FME3 Ex. B (Zink Aff.) ¶ 26. FME3 Ex. B.6 through B.8.

27. FME3 proposes to co-develop the Cross State and Satellite State units to access reserves that would otherwise be inaccessible, to increase efficiency, and reduce surface impacts. *See generally* Tr. p. 49-51; *see also* FME3 Ex. B (Zink Aff.) ¶¶ 26-27; FME3 Ex. B.7; Tr. p. 144; FME3 Ex. D ¶¶ 8, 11-12 ("McCoy Aff."); Tr. p. 149-151.

28. FME3 presented evidence that its plan to co-develop the Cross State and Satellite State units will allow FME3 to access reserves in the N/2N/2 of Section 36 that would otherwise be inaccessible due to technological limitations for drilling horizontal well bores and surface access limitations. *See generally* Tr. p. 48-51; 78-18; FME3 Ex. B (Zink Aff.) ¶ 28; FME3 Ex. B.8; Tr. p. 134, lines 20-25, p. 135, lines 1-10, p. 144; McCoy Aff. (Ex. D) ¶¶ 8, 11-12; Tr. p. 149-151; Tr. p. 157, lines 11-17.

29. FME3 presented evidence that technological constraints limit the amount of reserves recoverable from the heel and toe of a wellbore. Tr. p. 49-51, p. 74, lines 22-25, p. 75, lines 16-22; p. 79, lines 29-19, p. 84, p. 149-153; FME3 Ex. B.8.

30. FME3 demonstrated that the industry standard build rate, based on current day technology, is ten degrees per 100 feet, which means that it takes approximately 500 feet for a well bore to transition from vertical to horizontal. Tr. p. 75, lines 16-22; p. 80, lines 1-3, Tr. p. 149-153; FME3 Ex. B.8.

31. FME3 established that, without a workaround, no operator can drill a horizontal well with a first take point at the regulatory setback distances (100 feet/330 feet) from the outer boundary of the spacing unit, which means stranding a minimum of 500 feet of reserves. Tr. p. 50. lines 7-20, p. 74, lines 18-25, p. 75, lines 16-22, p. 79, lines 2-19, p. 80, lines 1-3, p. 84, lines 5-21; p. 149-153; FME3 Ex. B.8

32. FME3 demonstrated that this situation is compounded when units are built "heel-to-heel", because each well within the units will have a first take point a minimum of 500 feet from the unit boundary, leaving 1000 feet (500 feet times 2) undeveloped and undevelopable per well. Tr. p. 49-50; p. 149-153; FME3 Ex. B.8

33. FME3 presented evidence that co-developing the Cross State and Satellite State units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Cross State wells that would otherwise be inaccessible to the Satellite State wells. Tr. p. 49-50, p. 149-150; FME3 Ex. B.8; FME3 Ex. D (McCoy Aff.) ¶ 12.

34. FME3 presented evidence that co-developing the Cross State and Satellite State units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Satellite State wells that would otherwise be inaccessible to the Cross State wells. Tr. p. 49-50, p. 149-150; FME3 Ex. B.8; FME3 Ex. D (McCoy Aff.) ¶ 12.

35. FME3 presented evidence that, absent the ability to back build or utilize off-lease surface hole locations, the Cross State wells' first take points would be approximately 600' from the north line of the unit boundary if FME3 developed the Cross State units as standalone units. Tr. pp. 75-76, p. 80, lines 1-4, p. 92, lines 1-13, p. 95, p. 163, lines 2-4, p. 168, lines 11-24, p. 169.

36. FME3 presented evidence that under FME3's co-development plan, the Cross State wells first take point would be approximately 600' from the north line of the unit boundary. Tr. pp. 75-76, p. 80, lines 1-4, p. 92, lines 1-13, p. 95, p. 163, lines 2-4, p. 168, lines 11-24, p. 169.

37. FME3 presented evidence that under either scenario, the Cross State well's first take points would be in substantially the same location as FME3 is proposing under its co-development plans. Tr. pp. 75-76, p. 80, lines 1-4, p. 92, lines 1-13, p. 95, p. 163, lines 2-4, p. 168, lines 11-24, p. 169.

38. FME3 presented evidence that geological impediments can result in a tract not contributing proportionally to a well. Tr. p. 141-142.

39. MRC's witness testified that, in his opinion, FME3's Cross State development plans would dilute the correlative rights of the interest owners in the Cross State Units who do not own in the N/2N/2 of Section 36. MRC Ex. C; Tr. p. 198, lines 1-6.

40. MRC's witness did not perform any reservoir engineering study or submit any data, or cite to any other study, or any other evidence to support his naked opinion. *See* MRC Exhibit C and Exhibits C-1 & C.2.

41. MRC's witness was not involved in developing MRC's development plan for its Mongoose wells that was abandoned on the eve of the hearing nor did he advocate in favor of any other development plan which would more optimally recover resources, prevent waste and protect correlative rights. Tr. p. 201, lines 6-20.

42. MRC's witness agreed that "[w]ithout a back-build," any well's first take point is going to be "substantially beyond" the 100 foot regulatory setback for first take points. *See* Tr. p. 204, lines1-10 ("Correct. Without a back-build, if you're just going straight down, then yes, that limitation does exist."). He also acknowledge that MRC has built back wells in Texas where special field rules allow for off-lease drill pads. *Id*. lines 15-24, p. 209, lines 23-25, page 210, lines 1-8.

43. MRC did not refute FME3's evidence that co-developing the Cross State and Satellite State units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Cross State wells that would otherwise be inaccessible to the Satellite State wells.

44. MRC did not refute FME3's evidence that co-developing the Cross State and Satellite State units will allow FME3 to access reserves in the N/2N/2 of Section 36 via the Satellite State wells that would otherwise be inaccessible to the Cross State wells.

45. FME3 cannot place its surface facilities in other areas because of surface constraints or permitting requirements. Tr. p. 100, lines 10-22; p. 116, lines 1-14, p. 118, lines 8-20.

46. FME3 presented evidence that its plan to co-develop the Cross State and Satellite State units will reduce surface impacts by allow both sets of units to be developed from shared surface facilities, including consolidated well pads. *See generally* Tr. p. 49-51; p. 53, lines 4-19, p. 114, lines 1-16, p. 149, lines 4-14; *see also* FME3 Ex. B (Zink Aff.) ¶¶ 26-27; FME3 Ex. B.7 & B.8; FME3 Ex. D (McCoy Aff.) ¶¶ 11-12.

47. MRC did not refute FME3's evidence that co-developing the Cross State and Satellite State units will reduce surface impacts; MRC's only line of questing by its counsel was limited to the central tank battery, which does not take into account FME3's other reductions in surface impacts. Tr. p. 70, lines 14-21; *see also* FME3 Ex. B.7 & B.8.

48. FME3 presented evidence that its plan to co-develop the Cross State and Satellite State units is more efficient and prevents waste due to eliminating additional infrastructure that would be needed if FME3 did not co-develop the Cross and Satellite units. *See generally* Tr. p. 49-51; p. 53, lines 4-19, p. 149, lines 15-25, p. 153, lines 9-22, *see also* FME3 Ex. B (Zink Aff.) ¶¶ 26-27; FME3 Ex. B.7 & B.8; FME3 Ex. D (McCoy Aff.), ¶¶ 11-12.

49. MRC did not refute FME3's evidence that co-developing the Cross State and Satellite State units is more efficient and prevents waste.

50. FME3 presented evidence that its plan to co-develop the Cross State and Satellite State units is more efficient, will reduce costs, and is a net benefit to all of the owners in the units, including the owners in the Cross State units. *See generally* Tr. p. 51-52, p. 122, lines 21-25, p. 123, lines 1-8, p. 149, lines 15-25, p. 153, lines 9-22; *see also* FME3 Ex. B (Zink Aff.) ¶¶ 25-29; FME3 Ex. B.7 & B.8; FME3 Ex. D (McCoy Aff.) ¶ 12.

51. FME3 is ready is ready, willing, and able to drill and complete the Cross State wells. FME3 Ex. B.9 through B.14.

52. FME3 is addressing gas and water takeaway constraints. Tr. p. 122, lines 21-25, p. 123, lines 1-8, p. 153, lines 9-22; FME3 Ex. B, ¶¶ 30-34; FME3 Ex. B.9 & B.10.

53. FME3 is investing $17.2 million of capital solve water takeaway constraints and to expand the pipeline system to increase capacity, including 20 miles of pipeline infrastructure. FME3 is targeting in service Q2/Q3 2024. Tr. p. 122, lines 21-25, p. 123, lines 1-8, p. 153, lines 9-22; FME3 Ex. B (Zink Aff.) ¶¶ 30-34; FME3 Ex. B.9 & B.10.

54. FME3 is investing in gathering to gather gas to a single point, which will allow multiple third parties to connect, increasing flow assurance. FME3 is proposing to construct approximately 16 miles of pipeline infrastructure. FME3 is investing $19.8 million to address the gas takeaway constraints. Target in service is Q2/Q3 2024. Tr. p. 122, lines 21-25, p. 123, lines 1-8, p. 153, lines 9-22; FME3 Ex. B (Zink Aff.) ¶¶ 30-34; FME3 Ex. B.9 & B.11.

55. FME3 signed an acreage dedication with Plains to ensure oil pipeline takeaway would be in place day one for FME3's new development projects, including Cross. Tr. p. 122, lines 21-25, p. 123, lines 1-8, p. 153, lines 9-22; FME3 Ex. B (Zink Aff.) ¶¶ 30-34; FME3 Ex. B.9 & B.12.

56. The proposed orientation of the horizontal wells from north to south is appropriate. FME3 Ex. C, ¶ 6 (Kessel Aff.); FME3 Ex. C-2.

57. FME3's AFEs are fair and reasonable. FME3 Ex. D (McCoy Aff.) ¶ 18.

58. FME3 is a prudent operator. FME3 operates 41 wells within a six-mile radius of the Cross State units. FME3 has turned on production of 13 wells between October 2023 and January 2024. The Satellite and Cross wells are on its 2024 drilling schedule. FME3 Ex. B.13, B.14.

59. FME3 has made a good faith effort to obtain the voluntary joinder of interest owners in the proposed units. FME3 Ex. B (Zink Aff.) ¶ 42-45; FME3 Ex. B14 through 16

60. FME3's proposed Cross State units are described in more detail in Exhibit A (compulsory pooling checklists).

61. FME3 will dedicate the well(s) described in Exhibit A to the Units.

62. FME3 proposes the supervision and risk charges for the Well(s) described in Exhibit A.

63. FME3 identified the owners of uncommitted interests in oil and gas minerals in the Units and provided evidence that notice was given. FME3 Exhibits Tab E.

64. FME3 identified the operators and working interest owners in the overlapping units and provided evidence that notice was given. FME3 Exhibits Tab E.

65. MRC had actual knowledge of the plans to overlap the Cross State Units and the Satellite State units. *See* Order denying MRC's Motion to Vacate.

66. FME3 provided MRC with its Cross State unit proposals in July 2023 and FME3 mailed its Cross State Unit applications to MRC on September 15, 2023. Tr. p. 54, lines 2-10; FME3 Exhibits Tab E.

67. MRC did not reach out to FME3 with any questions regarding FME3's proposed development plans, despite MRC's witness testifying it was common practice to do so. Tr. p. 54, lines 11-25, p. 55, lines 1-4; pp 202-203, p.210, lines 10-21.

Proposed Conclusions of Law

1. The Division has jurisdiction to issue this Order pursuant to NMSA 1978, § 70-2-17.

2. FME3 is the owner of an oil and gas working interest within the Units.

3. FME3 satisfied the notice requirements for the applications and the hearing required by 19.15.4.12.

4. FME3 satisfied the notice requirements pertaining to overlapping spacing units.

5. MRC had actual notice of the overlapping spacing units.

6. The Division satisfied the notice requirements for the hearing as required by 19.15.4.9 NMAC.

7. FME3 has the right to drill the Well(s) to a common source of supply at the depth(s) and location(s) in the Units described in Exhibit A.

8. The Units contains separately owned uncommitted interests in oil and gas minerals.

9. Some of the owners of the uncommitted interests have not agreed to commit their interests to the Units.

10. The pooling of uncommitted interests in the Units will prevent waste and protect correlative rights, including the drilling of unnecessary wells.

11. FME3 established that its proposed development plan will prevent waste and will protect correlative rights.

12. FME3's development plans will prevent waste because co-developing the Cross State and Satellite State units will allow FME3 to access reserves that would otherwise be inaccessible and will result in fewer surface impacts.

13. FME3's development plan will protect correlative rights because, by co-developing the Satellite and Cross Units, FME3 will be able to access reserves that would otherwise be inaccessible if the Cross Units were developed as standalone units.

14. MRC failed to establish that FME3's plans will negatively impact correlative rights.

15. The Oil and Gas Act does not require each tract within a well bore to contribute precisely proportionally to the well but rather only that an interest owner is afforded the opportunity, so far as it is practicable, to produce without waste the owner's just and equitable share of the oil or gas or both in the pool, being an amount "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…." NMSA 1978, § 70-2-33(H).

16. FME3's development plan allows each interest owner to his or her just and equitable share so far as is practicable in an amount substantially in proportion to the acreage dedicated to the well.

17. This Order affords to the owner of an uncommitted interest the opportunity to produce his just and equitable share of the oil or gas in the pool so far as can be practicably obtained without waste substantially in the proportion that the quantity of recoverable oil or gas bears to the under such property bears to the total recoverable oil or gas.

18. FME3's development plan will not impair MRC's correlative rights because the Cross State wells will access oil and gas in the N/2N/2 of Section 36 that are not accessible by the Satellite State wells.

19. FME's development plan will not impair MRC's correlative rights because it is undisputed that, absent the ability to back build or utilize off-lease surface hole locations, the Cross State well's first take points would be in substantially the same location as FME3 is proposing under its co-development plans.

20. FME3's development plan will benefit MRC and the other interest owners because FME3 will be able to access reserves in the N/2N/2 of Section 36 that would otherwise be stranded if the Cross Units were developed as standalone units and because FME3's development plan will reduce surface impacts and costs, due to efficiency with surface facilities. The reduction in costs will inure to MRC and the other Cross Unit interest owners.