

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

IN THE MATTER OF THE HEARING CALLED BY )  
THE OIL CONSERVATION COMMISSION FOR THE )  
PURPOSE OF CONSIDERING: )  
APPLICATION OF SYNERGY OPERATING, )  
L.L.C., FOR COMPULSORY POOLING, )  
SAN JUAN COUNTY, NEW MEXICO )

CASE NO. 13,486

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
COMMISSION HEARING

2006 FEB 23 PM 2 42

BEFORE: MARK E. FESMIRE, CHAIRMAN  
JAMI BAILEY, COMMISSIONER  
WILLIAM C. OLSON, COMMISSIONER

February 9th, 2006  
Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, February 9th, 2006, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

\* \* \*

## I N D E X

February 9th, 2006  
 Commission Hearing  
 CASE NO. 13,486

	PAGE
EXHIBITS	3
APPEARANCES	5
MOTION TO DISMISS BY SYNERGY	10
OPENING STATEMENT BY MR. LARSON	29
SMITH AND ROBBINS WITNESS:	
<u>EDWIN L. SMITH</u>	
Direct Examination by Ms. Chappelle	41
Cross-Examination by Mr. Bruce	45
Examination by Mr. Hall	47
Examination by Commissioner Bailey	48
Examination by Chairman Fesmire	49
OPENING STATEMENT BY MR. BRUCE	54
APPLICANT'S WITNESS:	
<u>PATRICK HEGARTY (Landman)</u>	
Direct Examination by Mr. Bruce	66
Cross-Examination by Mr. Larson	77
Examination by Mr. Hall	89
Redirect Examination by Mr. Bruce	102
Recross-Examination by Mr. Larson	103
Further Examination by Mr. Bruce	106
Examination by Commissioner Bailey	106
Examination by Chairman Fesmire	109

(Continued...)

CLOSING STATEMENTS:

BY MR. BRUCE	110
BY MR. LARSON	111
BY MR. HALL	115

REPORTER'S CERTIFICATE	122
------------------------	-----

\* \* \*

E X H I B I T S

Smith and Robbins	Identified	Admitted
Exhibit A	-	53
Exhibit B	99	53
Exhibit C	-	53
Exhibit D	91	53
Exhibit E	-	53
Exhibit F	-	53
Exhibit G	33	53
Exhibit H	31	32, 53
Exhibit I	36	53
Exhibit J	37	53
Exhibit K	32	32, 53
Exhibit L	53	53
Exhibit M	53	53
Exhibit N	53	53

\* \* \*

Walmsley	Identified	Admitted
Exhibit 1	15	-

\* \* \*

(Continued...)

## E X H I B I T S (Continued)

Applicant's	Identified	Admitted
Exhibit 1	55, 67	76
Exhibit 2	55, 68	76
Exhibit 3	69	76
Exhibit 4	70	76
Exhibit 5	72	76
Exhibit 6	72	76
Exhibit 7	57, 72	76
Exhibit 8	72	76
Exhibit 9	55, 73	76
Exhibit 10	73	76
Exhibit 11	74	76
Exhibit 12	43, 74	76
Exhibit 13	59, 75	76

\* \* \*

## A P P E A R A N C E S

## FOR THE COMMISSION:

DAVID K. BROOKS, JR.  
Assistant General Counsel  
Energy, Minerals and Natural Resources Department  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

## FOR THE APPLICANT:

JAMES G. BRUCE  
Attorney at Law  
P.O. Box 1056  
Santa Fe, New Mexico 87504

## FOR JERRY WALMSLEY:

MILLER, STRATVERT P.A.  
150 Washington  
Suite 300  
Santa Fe, New Mexico 87501  
By: J. SCOTT HALL

## FOR EDWIN L. SMITH, L.L.C., and JOE ROBBINS:

SUTIN, THAYER & BROWNE, P.C.  
By: DEREK V. LARSON  
Two Park Square, Suite 1000  
6565 Americas Parkway, N.E. 87110  
P.O. Box 1945  
Albuquerque, New Mexico 87103

and

SUTIN, THAYER & BROWNE, P.C.  
By: GERMAINE R. CHAPPELLE  
317 Paseo de Peralta  
Santa Fe, New Mexico 87501  
P.O. Box 2187  
Santa Fe, New Mexico 87504

\* \* \*

1           WHEREUPON, the following proceedings were had at  
2 10:10 a.m.:

3           CHAIRMAN FESMIRE: The next case is Cause Number  
4 13,486, *de novo*, continued from the January 12th, 2006,  
5 Commission meeting. It's the Application of Synergy  
6 Operating, L.L.C., for compulsory pooling in San Juan  
7 County, New Mexico.

8           At this time we'll take the entries of appearance  
9 from the attorneys.

10          MR. BRUCE: Mr. Examiner, Jim Bruce of Santa Fe,  
11 representing Synergy Operating, L.L.C.

12          MR. HALL: May it please the Commission, Scott  
13 Hall, Miller Stratvert, PA, Santa Fe, appearing on behalf  
14 of Jerry Walmsley, Trustee of the June H. Walmsley Trust.

15          MR. LARSON: And if it please the Commission,  
16 Derek Larson and Germaine Chappelle with Sutin, Thayer and  
17 Browne, appearing on behalf of Ed Smith, L.L.C., and Joe  
18 Robbins. We have with us also today Mr. and Mrs. Smith to  
19 present some testimony.

20          CHAIRMAN FESMIRE: Okay. Would you spell your  
21 last name for me?

22          MR. LARSON: L-a-r-s-o-n.

23          CHAIRMAN FESMIRE: Is this your first appearance  
24 before the Commission?

25          MR. LARSON: Yes.

1           CHAIRMAN FESMIRE: And Ms. Chappelle, would you  
2 spell your last name?

3           MS. CHAPPELLE: C-h-a-p-p-e-l-l-e.

4           CHAIRMAN FESMIRE: Mr. Bruce?

5           MR. BRUCE: Couple of preliminary matters, Mr.  
6 Chairman.

7           First of all, I would like the Commission to  
8 consider Synergy's motion to dismiss, and I would like to  
9 argue that first.

10           Secondly, I told you I was going to be  
11 embarrassed twice today, and this is the second time.  
12 Despite several e-mails to my client, he misunderstood the  
13 date. And when he didn't show up this morning to meet with  
14 me, I called him at nine o'clock, about an hour ago, and he  
15 was still up in Farmington.

16           I suppose there are several options. First off,  
17 Mr. Larson's clients are here. If the motion to dismiss is  
18 not granted, because they live out of state, I know that  
19 Mr. Larson would want to -- and he can speak for himself,  
20 but I would assume he would want to present his witnesses.

21           Secondly, I suppose with respect to Synergy --  
22 and I apologize to the Commission; in my 23 years appearing  
23 before the Commission and the Division this has never  
24 happened to me -- I suppose there's a couple of options  
25 such as telephone testimony, which I do not -- television

1 -- I mean telephone testimony, which I do not prefer  
2 because I have not had a chance to go through the exhibits  
3 with my client, which I intended to do today. And in that  
4 regard, the Commission could either take the matter under  
5 advisement without testimony from my client, or what I  
6 would prefer is that it be continued so that my witness  
7 could show up at a subsequent Commission hearing.

8 CHAIRMAN FESMIRE: Is your witness on his way?  
9 Is your client on his way?

10 MR. BRUCE: No, he's from up in Farmington. He's  
11 -- I mean, I didn't know what to do at the time, but he's  
12 still up in Farmington.

13 MR. BROOKS: He could probably be here by about  
14 1:30, if you ask him to come right now.

15 MR. BRUCE: If you want me to call him.

16 CHAIRMAN FESMIRE: I sure am not inclined to  
17 continue this again, especially since these folks traveled  
18 to hear it.

19 MR. BRUCE: Yes.

20 CHAIRMAN FESMIRE: Why don't you -- Again, we'll  
21 take a five-minute recess, and go call your client and tell  
22 him to be here as quick as he can.

23 Mr. Larson, would you -- this will be a little  
24 unorthodox, but would you consider presenting your case  
25 first, then we'll break for lunch?

1 Or Mr. Hall, are you going to have a case to  
2 present too?

3 MR. HALL: I have no witnesses. We would be  
4 amenable to doing that. We'd also suggest that we proceed  
5 with Mr. Smith and then continue the case to take Mr.  
6 Hegarty's testimony at a later date. We wouldn't object to  
7 that.

8 CHAIRMAN FESMIRE: Okay. Well, I -- Like I said,  
9 what I'm going to propose -- and if there's no objection  
10 from the Commission or the attorneys -- we'll go ahead and  
11 allow opening statements and then allow Mr. Larson to  
12 present his case, and then we'll break for lunch, and when  
13 Mr. Hegarty gets here we'll go ahead and present the  
14 Applicant's case.

15 COMMISSIONER OLSON: He needs to deal with the  
16 motion. He's got some motions.

17 CHAIRMAN FESMIRE: Right, right, I'm sorry.  
18 First we'll deal with the motion to dismiss and then argue  
19 the motion to dismiss. That may make the rest of the day  
20 easy.

21 Mr. Larson, does that sound like a way of  
22 proceeding for you?

23 MR. LARSON: Yes.

24 CHAIRMAN FESMIRE: Okay. And we'll assume that  
25 Mr. Bruce agrees too, so... Okay?

1           At this time, we'll take a five-minute recess and  
2 reconvene at 10:20.

3           (Thereupon, a recess was taken at 10:15 a.m.)

4           (The following proceedings had at 10:22 a.m.)

5           CHAIRMAN FESMIRE: Okay, at this time we'll go  
6 back on the record. I believe the first order of business  
7 before the Commission is the -- Synergy's motion to  
8 dismiss. Mr. Bruce?

9           MR. BRUCE: I just wanted to make sure everybody  
10 had a copy of the motion to dismiss.

11           May it please the Commission, Synergy has filed a  
12 motion to dismiss. I did not press this motion to dismiss  
13 because the case had been continued and stayed for quite  
14 some time.

15           When you look at the motion to dismiss, it's  
16 based on -- if you turn to the very last page, the Exhibit  
17 E to the motion, which talks about appeals to the  
18 Commission, and from the -- on the third line up from the  
19 bottom it says, Any party of record adversely affected  
20 shall have the right to have the matter heard *de novo*  
21 before the Commission.

22           There are two separate appeals in this matter.  
23 If you look at Exhibits A and B to the motion, one was  
24 filed by Edwin Smith, L.L.C., a New Mexico limited  
25 liability company, and Exhibit B was filed by Jerry

1 Walmsley, Trustee.

2 With respect to Edwin Smith, L.L.C., 's  
3 application, it is simply my position that Edwin Smith,  
4 L.L.C., did not file an entry of appearance before the  
5 Division.

6 If you look at Exhibit C to the motion and go to,  
7 in the upper right-hand corner, page 6 of the hearing  
8 transcript, you have an entry of appearance for Edwin  
9 Smith, the very first -- the entry of appearance by Ms.  
10 Nair from the Sutin firm. It says they represent Edwin  
11 Smith, an interest owner. Edwin Smith himself did not file  
12 an application for hearing, *de novo*.

13 Since Edwin Smith, L.L.C., was not a party of  
14 record, I contend that it had no right under the statute to  
15 file an application for hearing *de novo*. Therefore its  
16 application is improper and must be dismissed.

17 As to the Trustee's application, the Trustee was  
18 indeed a party of record at the Division Hearing. If you  
19 go back to Exhibit C, page 5, in the upper right-hand  
20 corner, or right in the middle, you can see where Mr. Hall  
21 did file an entry of appearance on behalf of the Trustee.

22 The problem with this Application for hearing *de*  
23 *novo* is that the Trustee was not force pooled by this case,  
24 by this order.

25 Again, looking at Exhibit C to the motion and

1 going back to -- in the upper right-hand corner, pages 9  
2 and 10, I asked a question of my witness, "...who do you  
3 seek to pool?"

4 And then at the top of page 10 I say, Do you seek  
5 to pool the Walmsley Trust?

6 No, we don't.

7 Therefore, the Walmsley Trust was not -- is not  
8 subject to Order Number R-12,376. It's my contention if  
9 it's not subject to the order, it is not adversely affected  
10 by the order.

11 Mr. Hall has filed a response saying, Well, why  
12 don't -- that the Walmsley trust claims title to a certain  
13 interest being force pooled by Synergy Operating, and  
14 therefore it's harmed by the order.

15 But as Mr. Hall and Mr. Larson can confirm, a  
16 quiet-title suit on this property has been filed in  
17 District Court in San Juan County. And any of the  
18 interests in this order will be subject to that -- the  
19 force pooled interest, which was one of the Hasselman  
20 heirs, that interest will be quieted or determined by the  
21 District Court action, and the force pooling order will not  
22 as such have an effect. Therefore, Mr. Hall's client is  
23 not adversely affected by the order, and once again it does  
24 not meet the requirements of the statute.

25 As a result, we would ask that this case be

1 dismissed in its entirety and that the original order just  
2 remain in effect. Thank you.

3 CHAIRMAN FESMIRE: Mr. Larson, solely by order of  
4 argument there, I think you're probably the one who should  
5 defend first.

6 MR. LARSON: All right. Well, Mr. Director, Mr.  
7 Smith, Ed Smith, is the sole remaining member of Ed Smith,  
8 L.L.C. He did appear personally on June 15th [sic], and  
9 while the record is not clear that he appeared on behalf of  
10 the L.L.C. as the manager of the L.L.C., that in fact was  
11 the case. Mr. Smith doesn't have any interest personally,  
12 other than through the L.L.C.

13 In addition, I would refer the Commission to  
14 Order Number R-12,376-A and the finding at paragraph 2  
15 where the Commission -- excuse me, the Division, has  
16 already found that Edwin L. Smith -- finding number 2 -- is  
17 a respondent in this case. He has *de facto* appeared and  
18 certainly has interests at risk, and we would move that  
19 this technicality -- this is merely a technicality, that he  
20 has in fact appeared, L.L.C. has appeared. We do represent  
21 the L.L.C. and move that the motion be denied.

22 CHAIRMAN FESMIRE: Mr. Hall?

23 MR. HALL: Mr. Chairman, Commissioners, with  
24 respect to the Smith interest I would point out that an  
25 objection of a very similar nature was asserted in the

1 Chesapeake-Samson case -- I can't believe I can't remember  
2 the case number or the order number that resulted from that  
3 case.

4 In that case, compulsory pooling was initiated by  
5 Chesapeake Operating, L.L.C., whereas the interest was  
6 owned by Chesapeake Energy, as I recall. And the order  
7 that resulted from that case disposed of that contingent,  
8 and I'm sorry, I didn't think to bring that with me and I  
9 can't recall the exact rationale, but it was in effect that  
10 one controlled the other, one was a subsidiary of the  
11 other. And because that was the responsible party, the  
12 person in control of the entities -- or one entity in  
13 control of the other, that was sufficient standing to allow  
14 the compulsory pooling proceeding to go forward.

15 With respect to the standing challenge of my  
16 client, if you will turn to Mr. Bruce's motion, his Exhibit  
17 D is an excerpt from the 6-10 JOA, and attached to that is  
18 the Exhibit A to the operating agreement that breaks out  
19 the interests in the 320-acre unit. I'll give you a moment  
20 to locate that.

21 If you have that in front of you, you'll see the  
22 breakout of interests that they're really talking about  
23 here. For the June Walmsley Estate, there's a 6 1/4  
24 interest. And it came out at hearing that the Trustee had  
25 indeed contributed that interest to the well under an

1 operating agreement, and we'll have to explore the reasons  
2 why that was done in the context of the main hearing.

3 But in addition to that, above that interest  
4 there's 18 3/4 percent claimed by Synergy Operating, L.L.C.  
5 And let me give you some additional background about that  
6 so you can fully understand. That is the interest that we  
7 believe involved a title failure, and it is the subject of  
8 the quiet title action in the 11th Judicial District Court.

9 If I may approach the Commission, I'll provide  
10 each of you with a copy of the complaint that was filed in  
11 that matter for informational purposes, and we've marked it  
12 as our Exhibit 1.

13 I don't expect you to digest all the allegations  
14 of that complaint right now, but to give you some  
15 background with respect to the 18 3/4 percent claimed by  
16 Synergy, it devolved from the interest of four sisters who  
17 -- and their names are Margaret Hasselman Jones, Julia  
18 Hasselman Keller, May Hasselman Kouns and Jennie Hasselman  
19 Hill.

20 Back in 1951 those four sisters went to the  
21 trouble of executing a conveyance to a straw man, Earl M.  
22 Kouns, who in turn executed a conveyance back to each of  
23 them specifically as joint tenants. Before that time they  
24 owned equal shares as tenants in common in the acreage, but  
25 we think that that 1951 conveyance shows specific intent

1 that they were to own that interest as joint tenants with  
2 right of survivorship under New Mexico Statutes.

3 Subsequent to that conveyance there was a quiet  
4 title action initiated by separate parties in 1958, and a  
5 fairly generic form of quiet title decree issued and it  
6 said, these sisters own in fee simple. Based upon that  
7 language in the quiet title decree from 1958, Mr. Hegarty,  
8 a principal of Synergy, in his review of title, took that  
9 to mean that somehow the deeds were reformed and they were  
10 converted back into a tenancy-in-common interest, and  
11 therefore there were some subsequent conveyances to some of  
12 the heirs of the sisters, some of whom had died in the  
13 interim, and that led to Synergy's acquisition of those  
14 interests from the heirs of those four siblings.

15 It's been our contention all along that the 1958  
16 quiet title decree did not have that effect on title. They  
17 continued to be a joint tenancy interest, and through the  
18 succeeding deaths of the four siblings title devolved down  
19 to Jennie Hasselman Hill. And as the last surviving joint  
20 tenant, in 1981 she executed a deed to June Hill Walmsley.  
21 And June Hill Walmsley's interest ended up the current  
22 trust. No probate was necessary for that particular  
23 interest.

24 But because Jennie Hasselman Hill was the last  
25 surviving joint tenant, she took 100 percent of the

1 siblings' interest. Not 25 percent, 100 percent. And so  
2 that's our claim on title. And it includes the 18 3/4 that  
3 is claimed by Synergy today.

4 The point we made in the Division Examiner  
5 Hearing is that that was the title that Synergy represented  
6 to the Division Examiner that gave it the right to drill.  
7 So it was the predicate for jurisdiction, in my view, for  
8 the Division to proceed to pool all the other unjoined  
9 interests.

10 Now, among those unjoined interests were the  
11 interests that appeared to have devolved from the heirs of  
12 Margaret Hasselman Jones. I hope you can follow all this.  
13 I know it's a little convoluted.

14 CHAIRMAN FESMIRE: We'd like a chart.

15 MR. HALL: Yeah, it might be helpful.

16 Margaret Hasselman Jones died, apparently,  
17 intestate. There's no evidence of any probate. Synergy  
18 could not locate the heirs of Margaret Hasselman Jones,  
19 couldn't find anyone to take the lease from, and so  
20 proceeded to pool the interests of Margaret Hasselman Jones  
21 and her unknown heirs, pursuant to the rule for pooling the  
22 interest of unknown interest owners, and that was done.

23 We made the point that if the Division proceeded  
24 to do that -- that's an interest we claimed -- then my  
25 client is being deprived of the opportunity to make an

1 election to participate either under an operating agreement  
2 or under the Division's compulsory pooling order. And so  
3 for that reason alone, it had an interest affected by the  
4 compulsory pooling order and this *de novo* Application.

5 And I think the same is true of the remaining  
6 interests, of the remaining siblings as well. They're  
7 clearly interests that are affected one way or another by  
8 the compulsory pooling Application, and I think those  
9 instances give adequate standing for us to be here today.

10 CHAIRMAN FESMIRE: Mr. Bruce, rebuttal?

11 MR. BRUCE: As I said, you'll notice that Mr.  
12 Hall's entire argument pertains to the quiet title suit in  
13 District Court, and that's where he belongs if he wants to  
14 make those arguments. If -- if -- my client is claiming an  
15 interest, from the heirs of Margaret H. Jones, that it ends  
16 up not owning under the quiet title suit, then this force  
17 pooling order will be of no effect as against that  
18 interest. It can't be.

19 CHAIRMAN FESMIRE: What about the point he made  
20 about the right to determine whether or not they wanted to  
21 join in the well?

22 MR. BRUCE: Mr. Examiner, if you'd turn to the  
23 motion, Exhibit D is a portion of the JOA signed by Mr.  
24 Hall's client, Jerry Walmsley, Trustee.

25 CHAIRMAN FESMIRE: So he --

1 MR. BRUCE: He's already signed a JOA, he -- and  
2 in that order he stipulated to the June Walmsley Estate  
3 having a certain interest, and he sent his money in, which  
4 is the third part of Exhibit D. He sent a check in.

5 Now, if he's determined to have a larger  
6 interest, under the quiet title action, sure, then he'd  
7 have a larger interest. And what is the down side? Well,  
8 the down side would be, a well was drilled in which he paid  
9 a certain amount. He wouldn't have had to pay that larger  
10 amount up front. I don't know that that's adversely  
11 affected.

12 But -- so he signed a JOA. In that JOA he agreed  
13 to a certain interest. And the other thing that Mr. Hall  
14 neglected to mention is that on these various heirs, the  
15 ones that Mr. Walmsley now claims ownership of, Mr. Smith  
16 has been paying those very same heirs for 40 years on an  
17 existing Pictured Cliffs well in the southwest quarter.  
18 Once again, that's for the courts, not for the Division.

19 My client, when he gets here, will show as part  
20 of the exhibits we have that he took assignments from  
21 people who have received payment on this well for 40 years,  
22 and he has a good-faith claim to title and is entitled to  
23 pool.

24 One other -- two other points is that in that  
25 Chesapeake case, Division Rules expressly allow an operator

1 to file an application with the Division, which Chesapeake  
2 Operating in that case did.

3 That's not the situation here, where the Statute  
4 specifically states -- in Chesapeake you aren't dealing  
5 with the Statute as such. But the Commissions Appeal  
6 Statute says any party of record adversely affected. And  
7 this is getting back to the Mr. Smith and the Smith, L.L.C.  
8 Smith, L.L.C. -- I don't care -- you can look through that  
9 record in vain, and you will not see that Smith, L.L.C., is  
10 a party of record. And they are distinct entities. You  
11 can't just pierce the corporate veil just because you say,  
12 Well, I made a mistake.

13 MR. LARSON: Mr. Director, if I may add, as I  
14 stated before, that Mr. Smith does not have any interest  
15 personally, and it would be an abuse of reason to take the  
16 position that while he was appearing here personally, that  
17 he was doing so on behalf of an interest that he didn't  
18 hold. The reality is that he was here personally as the  
19 manager and as the member, the -- and today the only  
20 surviving member of Ed Smith, L.L.C.

21 In addition, if the Commission will allow me, I  
22 have an exhibit which is the joint operating agreement that  
23 Mr. Walmsley signed. I had intended to offer this as part  
24 of our argument on the *de novo* hearing, but I think it will  
25 shed some light on the standing of Walmsley to -- its

1 adverse consequences and its standing, its own standing,  
2 for a separate motion for *de novo* review. May I offer that  
3 to the Commission?

4 CHAIRMAN FESMIRE: Is there any objection?

5 MR. HALL: No objection.

6 CHAIRMAN FESMIRE: Mr. Bruce?

7 MR. BRUCE: No objection.

8 MR. LARSON: First, I would direct the Commission  
9 to page 1 of the joint operating agreement, the first  
10 paragraph under the "Witnesseth" heading, where it recites  
11 that the parties to this agreement are the owners of the  
12 oil and gas and/or oil and gas interests in the land  
13 identified on Exhibit A.

14 Exhibit A is also part of this package, and  
15 you'll find it essentially at what would be page 15. So if  
16 you'll flip back -- It's not numbered page 15, but it  
17 follows page 14.

18 CHAIRMAN FESMIRE: Follows to page 14.

19 MR. LARSON: To page 14, my apologies for that.

20 CHAIRMAN FESMIRE: How does this differ from --

21 MR. HALL: It's the same.

22 MR. LARSON: It is, it is the same. My point  
23 being here is that the parties -- this agreement, this  
24 joint operating agreement, is predicated on the parties  
25 bringing to the agreement an ownership interest in the

1 properties and in the ratios or amounts shown on Exhibit A,  
2 the Walmsley Estate having 6.25 per this statement, and  
3 Synergy having 18.75.

4           Then I would direct your attention to page 2 of  
5 the agreement, Article IV, labeled "Titles", and Section A,  
6 "Title Examination", wherein it states that a title  
7 examination shall be made of the drillsite of any proposed  
8 well prior to the commencement of drilling operations. It  
9 goes on to recite that the parties to the agreement are to  
10 provide any information that they have in support of that  
11 title examination.

12           Turning to the next page, page 3, to the  
13 paragraph just above B, "Loss of Title", where it  
14 reiterates that no well shall be drilled in the contract  
15 area until after (1) the title to the drillsite or drilling  
16 unit has been examined as above provided, and the title has  
17 been approved by the examining attorney or title has been  
18 accepted by all parties who are to participate in the  
19 drilling of the well.

20           So per this joint operating agreement, under  
21 which Synergy is claiming the right to drill and the right  
22 to serve as operator, it requires first that a title  
23 opinion be performed and that it be approved by the  
24 attorney doing so.

25           To my knowledge, the only title opinion that has

1 been given in this case regarding these properties at issue  
2 here is by the attorney that Ed Smith and Mr. Walmsley have  
3 hired. We've gotten a -- and it's in our exhibits to the  
4 *de novo* hearing, a title report and a title opinion that  
5 shows that Synergy does not own any interest in this well.

6 So it's highly unlikely that that title opinion  
7 that would be supportive of this joint operating agreement  
8 would be approved.

9 But continuing on into the next paragraph, "Loss  
10 of Title", should -- and subpart 1, "Failure of Title",  
11 should any oil and gas interest or lease, or interest  
12 therein, be lost through failure of title, which loss  
13 results in a reduction of interest from that shown on  
14 Exhibit "A" -- in other words, if Synergy is found not to  
15 have that 18.25 percent -- or 75 -- but to have anything  
16 less than that, including zero, they've got 90 days to cure  
17 it, and the well cannot be drilled.

18 And here's the real kicker, the next paragraph,  
19 (a), the party whose oil and gas lease or interest is  
20 affected by title failure shall bear alone the entire loss  
21 and shall not be entitled to recover from the operator or  
22 the other parties any development or operating costs which  
23 it may have theretofore have paid or incurred, but there  
24 shall be no additional liability on its part to the other  
25 parties hereto by reason of such title failure.

1           If this order remains in place and the eighty-  
2 some-thousand dollars that have been paid by our client and  
3 the additional moneys paid by Mr. Walmsley for the  
4 drilling, and if the drilling does go forward, and later  
5 title is deemed or determined to not reside in Synergy,  
6 according to this joint operating agreement Walmsley would  
7 lose that money. If they don't have the title, they lose  
8 their interest. If Synergy doesn't have the title, they  
9 walk away. That, to me, is clearly a detriment to Mr.  
10 Walmsley.

11           In addition, I would refer the counsel -- or the  
12 Commission -- to page 4, number -- "Article V, Operator" --  
13 and again, this is the joint operating agreement under  
14 which these parties would proceed -- Section B, Resignation  
15 or Removal of the Operator and Selection of the Successor,  
16 Number 1, Resignation or removal of the operator: Operator  
17 may resign at any time by giving written notice thereof to  
18 the nonoperators.

19           Not a problem.

20           However, next sentence, if the operator  
21 terminates its legal existence or -- and this next clause  
22 is what's important -- no longer owns an interest hereunder  
23 in the contract area -- there's a couple other  
24 possibilities, but then that sentence terminates with,  
25 operator shall be deemed to have resigned without any

1 action by the nonoperators, except for the selection of  
2 successor.

3 So if Synergy doesn't have the interest that it's  
4 claiming, it cannot serve as the operator.

5 And then again in paragraph 2, Selection of the  
6 Successor, the second sentence, the successor operator  
7 shall be selected from the parties owning an interest in  
8 the contract area.

9 That supports again that this entire joint  
10 operating agreement is predicated on the parties thereto  
11 bringing to the agreement an ownership interest in the  
12 property.

13 And so that's, we believe, support why Mr.  
14 Walmsley's client is adversely affected, as well as anybody  
15 else that's going to be pooled under this order.

16 CHAIRMAN FESMIRE: Okay, thank you. But that  
17 doesn't answer the question that Mr. Bruce raised about the  
18 difference between Smith, L.L.C., and Mr. Smith himself.  
19 Do you have a --

20 MR. LARSON: Well, really, he appeared as a  
21 representative, as the manager of L.L.C. While the record  
22 does not state that, these hearings are a little more  
23 informal. And I was not personally present, but another  
24 associate, with short notice, appeared that day and did  
25 appear and represent him. We were representing him in that

1 capacity, the record doesn't reflect it.

2 But he doesn't have any personal interest, Mr.  
3 Smith does not have any interest personally. So for him to  
4 have appeared -- if it were to be only on his own behalf,  
5 there was nothing at issue in that regard. So it's  
6 reasonable to confirm, I guess, that he was appearing as  
7 the manager and a member of the L.L.C.

8 CHAIRMAN FESMIRE: Does anyone else have anything  
9 else to add with respect to this motion?

10 Mr. Hall?

11 MR. HALL: Let me just summarize briefly from the  
12 perspective of my client. Again, we don't know how long  
13 the quiet title action will take to be resolved in San Juan  
14 County. But in the interim, my apprehension is this: With  
15 respect to at least the 6 1/4 interest that Mr. Bruce has  
16 force pooled pursuant to Rule 1207.B, the interest of the  
17 unknown heirs, that's an interest my client claims.

18 But in the interim, my apprehension is that a  
19 well will proceed to be drilled and Synergy will then  
20 proceed to recoup well costs and perhaps the risk penalty  
21 out of that interest we claim.

22 So I think it's quite clear that my client's  
23 interests would be directly affected by a compulsory  
24 pooling proceeding, quite simply.

25 MR. BRUCE: Mr. Chairman, quiet title suit has

1 been filed. They could seek a motion in District Court,  
2 file a motion in District Court, to suspend that portion of  
3 the proceeds.

4 Once again, whether you're talking the contract  
5 which Mr. Smith didn't sign, or the contract which Mr.  
6 Walmsley did sign, you're talking contracts and quiet title  
7 suits. That's not the Division's jurisdiction.

8 CHAIRMAN FESMIRE: Mr. Brooks, we're going to  
9 need to deliberate with some advice from counsel.

10 MR. BROOKS: Would it be the pleasure of the  
11 Commission to deliberate in open session, or to go into  
12 executive session to deliberate?

13 COMMISSIONER BAILEY: I'm neutral.

14 CHAIRMAN FESMIRE: I would prefer executive  
15 session, if that's the --

16 MR. BROOKS: Okay, in that case we need a motion  
17 to go into executive session, stating the reason, which  
18 would be simply to discuss the merits of an adjudicatory  
19 matter before the Commission.

20 COMMISSIONER BAILEY: I so move.

21 COMMISSIONER OLSON: Second.

22 CHAIRMAN FESMIRE: All those in favor?

23 COMMISSIONER BAILEY: Aye.

24 COMMISSIONER OLSON: Aye.

25 CHAIRMAN FESMIRE: The motion having carried, the

1 counsel will go into executive session to discuss the  
2 arguments just heard on the motion before the Commission.

3 (Off the record at 10:52 a.m.)

4 (The following proceedings had at 11:12 a.m.)

5 CHAIRMAN FESMIRE: Let's go back on the record.

6 Let the record reflect that the Commission came out of  
7 executive session at 11:12 a.m. and that the only thing  
8 that was discussed in the executive session was the motion  
9 pending before the Commission for a -- to dismiss.

10 The Commission, having considered it, has found  
11 that a good faith claim to an interest in the subject  
12 matter in the case is vested in the Walmsley Trust -- the  
13 claim is vested, not -- you know, we're not making any  
14 decision with respect to whether or not that interest is  
15 valid, but that they do have a good faith claim and that it  
16 is something that needs to be protected in this proceeding,  
17 and that there was no contest that the trust was a party of  
18 record.

19 With respect to the Smith interest, we've  
20 determined that the Smith, L.L.C., did not have standing to  
21 file a *de novo* application but that the Commission has and  
22 will exercise its discretion to allow Smith, L.L.C., and  
23 its counsel to participate in the proceedings.

24 At this time the Chair will entertain a motion to  
25 that effect and to dismiss the motion to dismiss.

1 COMMISSIONER OLSON: So moved.

2 MR. LARSON: So moved.

3 COMMISSIONER BAILEY: Second.

4 CHAIRMAN FESMIRE: Mr. Bruce, did you understand  
5 the motion?

6 MR. BRUCE: I think I did, Mr. Chairman.

7 CHAIRMAN FESMIRE: All those in favor?

8 COMMISSIONER BAILEY: Aye.

9 COMMISSIONER OLSON: Aye.

10 CHAIRMAN FESMIRE: Opposed? Let the record  
11 reflect that the motion to dismiss -- Synergy's motion to  
12 dismiss has been denied.

13 At this time we'll proceed to the case-in-chief.

14 Mr. Larson, you had indicated that you had  
15 prepared and you wouldn't mind going first?

16 MR. LARSON: Certainly.

17 Commissioners, Mr. Director, we intend to show  
18 that the facts that were presented in support of the  
19 pooling order in June of last year are now known to be  
20 different. Some of them have changed. There was testimony  
21 from a single witness who has significant interest in the  
22 subject, and there were several matters that were  
23 represented as facts or certainty to the Director which are  
24 now known to be otherwise, and we intend to illustrate that  
25 to you.

1           We understand the ruling that was reached, but  
2 believe that the new information will show that this  
3 pooling order was inappropriate and should be rescinded.

4           Mr. Robbins also was not present or represented  
5 at the earlier hearing. He is not familiar with the oil  
6 patch. He was not represented by counsel at the time that  
7 he executed a farmout agreement. We now do represent Mr.  
8 Robbins.

9           The facts known today are significantly different  
10 than those last year. I think the facts will show that  
11 whereas in June of last year Synergy represented that it  
12 did own an interest and that the documents and title  
13 opinions and such would support that, as of today we have  
14 none of that information supported, none of the documents,  
15 whether they be formal title opinions from -- an admission  
16 by Synergy -- none of that has been produced, and so we  
17 went forward and obtained our own, and the information that  
18 we have shows that the Walmsleys own the interests.

19           In the June 16th order, Order 12,376, there were  
20 basically two legs or two foundations for the Division's  
21 order.

22           In page 2 of the order, in the findings, Finding  
23 Number 6 -- and I assume that the Commissioners have that  
24 order -- part 6 -- or Finding 6, Part B, a finding that  
25 Synergy owns 25 percent of the working interest, that was a

1 finding that was made in support of the pooling order.

2           There was also a finding in that paragraph that  
3 Synergy owns an additional 3.125 percent of the working  
4 interest by virtue of obtaining a farmout agreement with  
5 Joseph Roberts.

6           Those were the two legs that support Synergy's  
7 standing in moving to pool.

8           Continuing in paragraph 7 on page 3 of the order,  
9 the Division did note that Walmsley believes that Synergy  
10 does not own the 25 percent. However, the Commission noted  
11 that -- in paragraph 8, it does not have authority to  
12 determine that ownership interest.

13           The Commission did find in paragraph 9 -- or the  
14 Division, excuse me -- that there is no dispute among the  
15 parties that Synergy owns a 3.125-percent working interest  
16 with Robbins.

17           We had not as counsel for Smith seen the farmout  
18 agreement at the time of that hearing. It was later  
19 provided. We were concerned about the circumstances  
20 surrounding the execution of that farmout agreement. Mr.  
21 Robbins retained us and subsequently executed an affidavit  
22 which has been previously provided, but in any event we've  
23 attached it in our -- Smith's exhibits under Tab H. I have  
24 extra, if anyone needs.

25           And on the second physical page of the affidavit

1 there's a fax header that notes it's page 3, but the second  
2 physical page, paragraph --

3 MR. BRUCE: Mr. Examiner, as to this exhibit and  
4 another one, I'm going to object flat out that they be  
5 admitted into evidence. This is an affidavit by Mr.  
6 Robbins, who isn't present. It's hearsay, I cannot cross-  
7 examine him on it, and I would object to its admission or  
8 any discussion of this affidavit.

9 CHAIRMAN FESMIRE: Mr. Bruce, your objections are  
10 noted, and in a formal hearing you'd be absolutely right.  
11 This will be admitted subject to your objection, and the  
12 Commission will take due notice of it.

13 Mr. Larson, continue.

14 MR. LARSON: Thank you. I would refer to  
15 paragraphs 6 and 7 wherein Mr. Robbins indicates that he  
16 executed the farmout agreement under representation that  
17 Synergy had interests that were certain and that he -- that  
18 Synergy would be able to force pool.

19 After later learning that those interests were in  
20 question, Mr. Robbins executed the next document under Tab  
21 K on January 26th of this year, rescinding that farmout  
22 agreement.

23 CHAIRMAN FESMIRE: Mr. Larson, may I ask  
24 something? Is it your contention that Mr. Robbins can  
25 unilaterally rescind the farmout with this document and --

1           MR. LARSON: Absolutely, the document being  
2 executory, not having been completed on Synergy's end by  
3 the drilling of a well, no interest having passed to  
4 Synergy, and having been procured through  
5 misrepresentation, even if innocent misrepresentation,  
6 either are bases for rescission. And so yes, it is our  
7 position that the document is appropriate and is proper.

8           Therefore, that leg of the Division's finding of  
9 an interest that may have been owned by Synergy goes away,  
10 leaving, then, the potential interest owned by Synergy  
11 through the heirs of the Walmsley ancestors. So...

12           MR. BRUCE: Mr. Chairman, I make the same  
13 objection to this document.

14           CHAIRMAN FESMIRE: The objection will be noted,  
15 but we will allow admission.

16           MR. LARSON: At the June 16th hearing, Synergy's  
17 principal, Mr. Hegarty, testified that Synergy had obtained  
18 a preliminary title opinion supporting Synergy's claim to  
19 the 25-percent interest that they claim to have obtained  
20 through the Walmsleys. I believe that is in the package  
21 there, G of your packet, of the Division's packet, you have  
22 a transcript of the proceedings.

23           CHAIRMAN FESMIRE: Okay.

24           MR. LARSON: In the transcript, page 23, lines 3  
25 through 6:

1 Question: Did you have a title opinion rendered?

2 Answer: We are in the process of having a title  
3 opinion prepared. The documentation -- we have [a]  
4 preliminary title -- an opinion of title, but as far  
5 as the official title opinion, it has not been  
6 prepared as of this date.

7 Question: All right. Would you make that  
8 available to us?

9 Answer: Sure.

10

11 Then again on page 34 of the transcript, lines 6  
12 through 18:

13

14 Question (by Examiner Catanach): Mr. Hegarty, do  
15 you know when that title opinion is going to be ready?

16 Answer: That should be ready -- you know, I just  
17 don't have an idea. I would [like] to make an inquiry  
18 to be certain. Right now the oil and gas industry, as  
19 you're well aware by your workload and everybody's  
20 workload, is -- because of -- the current prices are  
21 fairly high, the workload is burdensome. So I cannot  
22 make a definitive statement or answer without some  
23 inquiry.

24 Question: And it's your plan to drill [as] well  
25 as soon as you have a pooling order?

1           17 -- line 17, the answer: Yes, and a rig. We  
2 are comfortable with title. We will not wait for the  
3 opinion.

4  
5           The Hearing Examiner appeared to rely upon Mr.  
6 Hegarty's assurance that a formal opinion would not reveal  
7 any new facts and that Mr. Hegarty was comfortable that  
8 Synergy owned the 25-percent interest.

9           On page 35 of the transcript, lines 5 through 7,  
10 the question by the Hearing Officer:

11  
12           Hm. Do you have any reason to believe that your  
13 title opinion is going to show anything different than  
14 what you've shown here today, Mr. Hegarty?

15           The answer: No [sic] whatsoever.

16  
17           And then on page 37 of the transcript, lines 18  
18 through 24, question, again by the Examiner, Mr. Catanach:

19  
20           Mr. Hegarty, is Synergy comfortable with drilling  
21 the well without a final title opinion in place?

22           Answer: Yes, we are.

23           Question: And that's based upon your belief that  
24 you do own [an] interest?

25           Answer: Yes, it is.

1           Mr. Hegarty and Synergy committed to producing  
2 both the preliminary and the formal title opinion. We have  
3 continuously requested those opinions since that hearing  
4 and they have not been forthcoming.

5           Mr. Smith as the operator, the current operator  
6 of an existing well, the Claude Smith well in this same  
7 section, wanted to know, who should I be paying? So  
8 together with the Walmsleys, who have a question about the  
9 sum of their ownership interest together, commissioned a  
10 title report by a land person in Farmington to search  
11 through the San Juan records and determine if there are any  
12 other documents that we were not aware of that might impact  
13 the title through the Walmsleys.

14           That title report is found at Exhibit I of your  
15 package, by Ms. Tammy Sloan Smith, and she recites the  
16 documents that she investigated. And I would direct the  
17 Commission's attention to the note at the top of page 2  
18 wherein she notes that under warranty deed dated April  
19 26th, 1951 --

20           CHAIRMAN FESMIRE: Mr. Larson --

21           MR. LARSON: Yes.

22           CHAIRMAN FESMIRE: -- before Mr. Bruce says  
23 something, again, we're talking an awful lot of hearsay  
24 here. I am about to the end what I think is reasonable.

25           MR. LARSON: All right. Well, let me see if I

1 could summarize, then. I'll offer these exhibits as  
2 support that the Smiths and the Walmsleys have investigated  
3 the issue of the title, and information is now available  
4 that is different than was represented to the Examiner in  
5 June of last year. These documents speak for themselves.

6 The title report, which is behind Tab J, the next  
7 document that we obtained, that title report by a New  
8 Mexico lawyer in this field of area does show that the  
9 title is not in Synergy, that it is in the Walmsleys.

10 My point to all of this is that it is a very  
11 different fact, or assumption, if you will -- if it's  
12 merely taken as an assumption, it's very different than  
13 that which was represented to the Examiner in June of last  
14 year.

15 CHAIRMAN FESMIRE: So you're going to offer these  
16 as evidence that your client has investigated the title,  
17 and in the next breath you want to tell us, and therefore  
18 it proves that the faxed have changed. I'm a little  
19 concerned about that.

20 MR. LARSON: That the facts that were available  
21 to the Examiner in June of last year -- the order allowing  
22 the pooling recognizes a possible interest owned by  
23 Synergy.

24 It also recognized at that point an undisputed  
25 interest owned by Synergy through Robbins. We're

1 attempting to show that the Robbins interest is no longer  
2 available as a grounds for standing to pool, and that the  
3 Synergy interest claimed through the Walmsleys is indeed in  
4 question and not as certain as Mr. Hegarty may have led the  
5 Director to believe at the time that the Director granted  
6 the order.

7 We're not asking the Commission to make a  
8 determinate finding, but to the extent that there is a  
9 question of that title -- Without that tile, without any  
10 ownership interest, Synergy has no standing to move to  
11 pool. And that's our objective, is to show that the one  
12 leg that was undisputed at that time is -- no longer  
13 exists.

14 And the other leg, which was a secondary or a  
15 collateral leg at the time, the questionable leg, is now --  
16 the evidence available now shows that that's actually, I  
17 would assert, unlikely, but certainly, at worst, in  
18 question and should not be allowed to support an order for  
19 pooling.

20 CHAIRMAN FESMIRE: And I see your point, but  
21 shouldn't Mr. Bruce be able to examine your witnesses and  
22 perhaps introduce, you know, some of the facts that aren't  
23 presented in these affidavits? I mean, that's what's  
24 concerning me.

25 I mean, the first two were hearsay and, you know,

1 we went ahead and accepted them, you know, as evidence.  
2 But now we're getting to the point where you're making  
3 assertions about the title itself that Mr. Bruce should, in  
4 all fairness, be able to examine.

5 MR. LARSON: And we don't disagree. We'll be  
6 happy to hear and consider in the District Court action,  
7 which is now in place through the quiet title action that  
8 is filed, and I believe Mr. Hall provided a copy of that to  
9 you earlier. So that will be determined elsewhere.

10 Our point simply is that any interest that is  
11 owned there, whoever owns it should not be allowed to form  
12 the basis for a pooling order here today, in its *de novo*  
13 review of the existing order. That is our point. We're  
14 not seeking to have a determination. But to the extent  
15 that the record and the order that is in place suggests  
16 that there was some reliance on the possibility of title,  
17 that that reliance was perhaps --

18 CHAIRMAN FESMIRE: So again, your point is that  
19 it was in question, but not that this is definitively the  
20 way --

21 MR. LARSON: Correct.

22 CHAIRMAN FESMIRE: -- the title --

23 MR. LARSON: Correct.

24 CHAIRMAN FESMIRE: Okay.

25 MR. LARSON: And I guess -- It was in question

1 then. I would say, but it is even more in question now.  
2 It is formally in question now, through the quiet title  
3 action that we have filed.

4 I then intended to go through the joint operating  
5 agreement, which I did earlier, to show that even under the  
6 agreement that's in place, that there is substantial risk  
7 to all of the parties because if under that agreement it is  
8 determined at some later date by the District Court that  
9 Synergy does not own any interest, first of all it cannot  
10 remain a party to that joint operating agreement, and more  
11 importantly it cannot serve as the operator of this  
12 property under that agreement.

13 Finally, I would offer the testimony of Mr. Ed  
14 Smith on behalf of Ed Smith, L.L.C., as to a number of  
15 circumstances surrounding his payment, because I noticed in  
16 the exhibits that will be offered by Mr. Bruce a copy of  
17 the check from Ed Smith, L.L.C., for the *pro rata* share of  
18 drilling costs under the Division's existing order.

19 And I'll let Mr. Smith tell us, tell the  
20 Commission, why he made those payments. Ms. Chappelle is  
21 actually going to direct that testimony, if that's all  
22 right.

23 CHAIRMAN FESMIRE: Are you ready to do that now?

24 MR. LARSON: We are.

25 CHAIRMAN FESMIRE: Okay. Mr. Smith, this is our

1 witness chair, and we're going to ask the court reporter to  
2 swear you in.

3 (Thereupon, the witness was sworn.)

4 EDWIN L. SMITH,

5 the witness herein, after having been first duly sworn upon  
6 his oath, was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MS. CHAPPELLE:

9 Q. Good morning, Mr. Smith, how are you today?

10 A. Great.

11 Q. Good. Thanks for traveling from California to  
12 appear before the Commission in this matter.

13 I wanted to talk to you a little bit and ask a  
14 few questions about your previous payment practice from the  
15 Claude Smith well and how you came to suspend payments. So  
16 could you please talk a little bit about your past payment  
17 practice?

18 A. We went back to the original agreements. It was  
19 not brought to our attention that some of the family had  
20 passed away. We made all of our royalty payments according  
21 to the dockets [sic] and the information that we had.

22 When Synergy came into play, it was brought to  
23 our attention that there was a possible question in the  
24 ownership, as of a deed that was presented to us. We put a  
25 stop to the payment. We did make one payment to Synergy

1 prior to receiving this -- a copy of this deed. As soon as  
2 we received this and that there was a question of title, we  
3 put a stop to payments to any of the questionable  
4 royalties. We are now holding those, and we have continued  
5 to hold those till this date.

6 Q. Thank you, Mr. Smith. Just a few more questions.  
7 In other exhibits to the packets introduced by Mr. Bruce is  
8 a check for your share of the operating costs. Can you  
9 talk to us -- can you explain to us how you came about  
10 making that payment?

11 A. At the meeting in June, at the pooling there, we  
12 were told that Synergy had the right to pool the well, and  
13 even though we were in question, it was -- as we understood  
14 it, they were given the right to pool it. And for us to  
15 remain as a partner in the well, we had to provide funds to  
16 take care of that pooling, and that was the reason that we  
17 provided that check.

18 Q. Did you make any stipulations about providing the  
19 check?

20 A. Yes, I told Synergy that if -- I was in perfectly  
21 agreement with drilling a well, with having a well drilled,  
22 as long as they would provide me with the proof that there  
23 was a settlement between the Walmsley interest and their  
24 interest, proving that they were an owner.

25 MS. CHAPPELLE: And then to that effect,

1 Commission and Mr. Director, there -- we included a letter  
2 making the same stipulation with that check, which is not  
3 made part of the record in Mr. Bruce's packet, and I'd like  
4 to offer that as an exhibit, if I may.

5 CHAIRMAN FESMIRE: Mr. Bruce, have you seen --

6 MR. BRUCE: I have no objection.

7 CHAIRMAN FESMIRE: Mr. Hall?

8 MR. HALL: No objection.

9 MS. CHAPPELLE: I'm just going to have the  
10 witness confirm that it's --

11 MR. BRUCE: Mr. Chairman, in my exhibit packet  
12 the check paid from Sutin, Thayer and Browne on behalf of  
13 Mr. Smith is marked Exhibit 12.

14 Q. (By Ms. Chappelle) Mr. Smith, does that letter  
15 accurately reflect your recollection of your stipulations?

16 A. Yes, it does.

17 Q. And then just one final matter, Mr. Smith. You  
18 have testified that you are supportive of having a well  
19 drilled in this subject property. Can you talk to us about  
20 your own intention and ability to drill a well, should the  
21 force pooling order not be upheld?

22 A. If it's not upheld, I would like to apply for  
23 drilling permits. And I have checked with people in the  
24 Farmington area. I believe that we can produce a well and  
25 get it on line much more reasonable than what Synergy has

1 put in place. We have always been interested in drilling,  
2 but our -- with the question of ownership and the question  
3 of rights and one thing or another, as I directed to  
4 Synergy, was that if everything was cleared up and  
5 straightened up, we would be more than willing to work with  
6 them and go with it, but they had to come up with proof of  
7 ownership before I was willing to risk more -- or the  
8 royalties from the Claude Smith well, as well as a new  
9 well.

10 Q. And Mr. Smith, have you talked with the other  
11 owners in the southwest quarter about your intent to drill?

12 A. Yes, we have talked and discussed the matter, and  
13 I have gotten a tentative approval, verbal approval from  
14 them, that if this does not go through, we as an entity  
15 will go ahead and drill our own well on our own property,  
16 which would be not the 320-acre but the 160-acre lot which  
17 we own, or if Synergy is proven to own, then they will also  
18 be part of it.

19 Q. And by those other owners that you've talked to,  
20 can you tell us who specifically you've talked to?

21 A. Mr. Walmsley and Mr. Robbin [sic]. And of course  
22 I represent the management aspect of the Edwin L. Smith,  
23 L.L.C.

24 MS. CHAPPELLE: Thank you, Mr. Smith, for your  
25 testimony.

1 CHAIRMAN FESMIRE: Mr. Bruce?

2 CROSS-EXAMINATION

3 BY MR. BRUCE:

4 Q. Mr. Smith, let's go into some background. You've  
5 referenced an existing well in the southwest quarter of  
6 this section.

7 A. Yes.

8 Q. What is the name of that well?

9 A. Claude Smith.

10 Q. And what well -- excuse me, what formation is  
11 that well completed in and producing from?

12 A. Pictured cliff.

13 Q. And 160 acres is dedicated to that well, is it  
14 not?

15 A. Yes.

16 Q. The southwest quarter?

17 A. Yes, I believe so.

18 Q. When was that well drilled?

19 A. I believe -- without having reference in front of  
20 me, I believe it was in the mid-1950s.

21 Q. Okay.

22 A. Mid- to late 1950s.

23 Q. Was it drilled by your father?

24 A. No, it was drilled by my grandfather.

25 Q. Okay. And so it has been producing for 50 years,

1 roughly?

2 A. Yes.

3 Q. And it's still capable of producing?

4 A. Yes.

5 Q. And since it has been producing, have all of the  
6 Hasselman heirs been paid on production from that well?

7 A. To the best of my knowledge, yes, until we were  
8 given proof or documentation that they had -- there had  
9 been a change, possible change of ownership and legality,  
10 and we put a stop to the payments.

11 Q. So right now payments are in suspense?

12 A. Correct.

13 Q. As of middle of last year, say?

14 A. Yes.

15 Q. Okay. Do you recall the names of any of the  
16 parties that you were paying in that well? Did that  
17 include Jodie Yates, Robert Kouns, Charla Varner, Margaret  
18 Dunn, Kimberly Brautigam and Annemarie Keller?

19 A. Some of those names are very familiar to me, but  
20 I cannot -- I don't have that particular document in front  
21 of me, so I can't state exactly who it was that we were  
22 paying.

23 Q. Okay. But the fact is, they had been paid for --  
24 not just a couple of years, they had been paid for decades?

25 A. They have been paid in the past, if they were the

1 -- listed, as far as we were concerned, as royalty holders,  
2 yes.

3 Q. Now, when you talked about drilling a well, were  
4 you talking about drilling a Fruitland Coal well or another  
5 Pictured Cliffs well?

6 A. It would be a Fruitland Coal.

7 Q. Are you aware that the well spacing in the  
8 Fruitland Coal is 320 acres?

9 A. No, I understood it was 160.

10 Q. And so you have never made a well proposal to  
11 anyone, say, in either the northwest quarter of Section 8  
12 or the southeast quarter of Section 8?

13 A. We have not petitioned at this point until this  
14 property matter is cleared.

15 MR. BRUCE: That's all I have, Mr. Chairman.

16 CHAIRMAN FESMIRE: Mr. Hall, do you have any  
17 questions of this witness?

18 MR. HALL: Briefly, Mr. Chairman.

19 EXAMINATION

20 BY MR. HALL:

21 Q. Mr. Smith, I'm curious to know, did the Hasselman  
22 heirs provide you with a Division order for your Pictured  
23 Cliffs well?

24 A. Did they, you say?

25 Q. Yes.

1 A. Not that I'm aware of.

2 Q. Okay. I wonder if you could explain to us, what  
3 was your understanding of the reasons that Mr. Walmsley  
4 committed his undisputed 6 1/4 interest to the Synergy  
5 Fruitland Coal well?

6 A. My understanding was that he would commit because  
7 of the pooling, but was in question of the ownership and  
8 that there was doubt and a question there that he had, but  
9 because of the fact that the OCD had given a pooling order,  
10 he felt that there was a possibility that he should  
11 participate, as I understand, with some reservations.

12 Q. Is it your understanding he participated  
13 conditionally?

14 A. Yes.

15 MR. HALL: Nothing further, Mr. Chairman.

16 CHAIRMAN FESMIRE: Commissioner Bailey?

17 EXAMINATION

18 BY COMMISSIONER BAILEY:

19 Q. I have a question about the JOA. I see where  
20 Burlington Resources is a 50-percent interest owner, but I  
21 don't see a signature from them or have heard anything  
22 about Burlington's interest in this particular case. Have  
23 they made any proposal to become the operator or to drill  
24 separately, that you've heard?

25 A. Not that I'm aware of. In June it was requested

1 of Mr. Hegarty to provide that to the board and to us, and  
2 at this point I've never seen anything to that degree. Mr.  
3 Hegarty assured the board that he did have documents, or  
4 would have or would produce them to us, which at this point  
5 he has not.

6 COMMISSIONER BAILEY: Well, Mr. Larson, did you  
7 get an answer?

8 MR. LARSON: I was just going to add, I didn't  
9 know what he was going to say there, but just to that, that  
10 we had -- the question -- as of June of last year it had  
11 not been signed, and we don't know today -- we haven't seen  
12 any documents that indicated that they have. So we don't  
13 know today whether they're a party to that agreement or  
14 not.

15 COMMISSIONER BAILEY: Okay, thank you. That's  
16 all I have.

17 CHAIRMAN FESMIRE: Commissioner Olson?

18 COMMISSIONER OLSON: No questions.

19 EXAMINATION

20 BY CHAIRMAN FESMIRE:

21 Q. Mr. Smith, Edwin Smith, L.L.C., is an inactive  
22 operator up there, I'm assuming?

23 A. Yes.

24 Q. How many wells do you operate?

25 A. Just the one.

1 Q. Just the one well?

2 A. Yes.

3 Q. And it's your intention, if you can get the title  
4 question solved, to drill a second well on the lease?

5 A. Yes, sir.

6 Q. And the base lease -- I guess I'm not  
7 understanding. It's with the Walmsley Trust and others?

8 A. Right.

9 CHAIRMAN FESMIRE: I have no further questions.  
10 Do you have any redirect, Mr. Larson?

11 MR. LARSON: We do not.

12 CHAIRMAN FESMIRE: Okay. Thank you very much,  
13 Mr. Smith.

14 THE WITNESS: Thank you.

15 CHAIRMAN FESMIRE: Mr. Larson, do you have  
16 anything else?

17 MR. LARSON: No, just to summarize, that we think  
18 we've shown that of the two bases for the order, that one  
19 no longer exists, and the other which was a question at the  
20 time is, we believe now, even more in question, and that  
21 there is a substantial financial interest at risk by a  
22 number of the parties -- Mr. Robbins, Mr. Smith, the  
23 Walmsleys -- that ought to be worked out in the District  
24 Court before any drilling commences.

25 The joint operating agreement -- that is the only

1 agreement that we've seen that's in place -- requires that  
2 that title be cleared up first if the order that's in place  
3 is to stand. The significant funds that Mr. Smith has  
4 committed are sitting out there, accruing interest to  
5 somebody. Synergy is holding the money; Mr. Smith, or  
6 Smith, L.L.C., and the Walmsleys' funds are not usable by  
7 them for other purposes.

8 We would request that the order be rescinded or,  
9 at a minimum, that the Commission stay the effect of the  
10 present order, pending an outcome of the title suit, and  
11 require the refund of those moneys paid for drilling until  
12 such time as drilling can go forward, either through the  
13 order that's been stayed, or through a separate matter.

14 And that's all we have on our case. We would  
15 reserve the right to rebuttal to anything, not having heard  
16 Mr. Bruce's --

17 CHAIRMAN FESMIRE: I understand that you're doing  
18 this as an accommodation to Mr. Bruce's client, so we'll  
19 allow you that --

20 MR. LARSON: Thank you.

21 CHAIRMAN FESMIRE: -- opportunity at the end.

22 Mr. Hall, did you have anything you wanted to  
23 present as a case-in-chief?

24 MR. HALL: Mr. Chairman, I have no witnesses. I  
25 hope to elicit some testimony through cross-examination of

1 Mr. Bruce's witness.

2 CHAIRMAN FESMIRE: Okay. Mr. Bruce, is there  
3 anything we can do in your case before your witness gets  
4 here?

5 MR. BRUCE: I don't think so. I'd rather have  
6 him testify, rather than me try to summarize anything, and  
7 the only thing I want to notice again for the record is  
8 that I object to Exhibits F, H, I, J and K, which were  
9 substantiated by any witness.

10 MR. BROOKS: Mr. Chairman, may I ask Mr. Hall a  
11 question?

12 CHAIRMAN FESMIRE: Surely, sir.

13 MR. BROOKS: Mr. Hall, has your client tendered  
14 money for participation for its entire interest that it  
15 claims, the 18.75, or only for the conceded 6.25?

16 MR. HALL: Just for the 6 1/4.

17 MR. BROOKS: And they have not undertaken to make  
18 any election to participate or not with regard to the  
19 interest that they claim, that Synergy claims they do not  
20 own?

21 MR. HALL: Haven't been afforded the opportunity  
22 under either the JOA or the pooling order.

23 MR. BROOKS: Thank you.

24 CHAIRMAN FESMIRE: Mr. Larson, I think maybe we  
25 ought to formally introduce all your exhibits to make sure

1 we've got them all, and if you could do that for the  
2 record, I'd appreciate it.

3 MR. LARSON: Sure. We would move the  
4 introduction of Exhibits A through --

5 CHAIRMAN FESMIRE: -- K.

6 MR. LARSON: Is it K?

7 CHAIRMAN FESMIRE: Well, the joint operating  
8 agreement and letter?

9 MR. LARSON: K. And in addition the letter that  
10 we produced this morning from -- and the joint operating  
11 agreement. And I don't know if it was done earlier during  
12 the motion to dismiss, but the complaint for quiet title  
13 that Mr. Hall offered.

14 CHAIRMAN FESMIRE: Okay. At this time, subject  
15 to Mr. Bruce's objections, which are noted, the Commission  
16 will accept Exhibits A through K; the model operating form  
17 agreement, which we will label Exhibit L; the letter dated  
18 August 8th, 2005, as Exhibit M; and the other document that  
19 I seem to have misplaced --

20 MR. LARSON: Quiet title?

21 CHAIRMAN FESMIRE: The quiet title. Do you have  
22 another copy for the --

23 MR. BRUCE: Here you go, Mr. Chair.

24 CHAIRMAN FESMIRE: -- which we will -- the  
25 complaint to quiet title, which we will label Exhibit N.

1           Is there anything else, Mr. Larson, that we need  
2 to make part of the record?

3           MR. LARSON: I don't believe so.

4           CHAIRMAN FESMIRE: Okay. Mr. Bruce, did your  
5 client give you an estimate of the time that he'd be here?

6           MR. BRUCE: No, but I got hold of him right  
7 before 10:15 and he said he would leave immediately. It  
8 is, from Farmington, about three hours, and I presume he's  
9 not obeying the speed limit. So I should think we'd be  
10 ready to go by 1:30.

11           CHAIRMAN FESMIRE: Okay. So we will adjourn, and  
12 re-adjourn [*sic*] after a nice leisurely lunch at 1:30.  
13 Thank you.

14           (Thereupon, a recess was taken at 11:53 a.m.)

15           (The following proceedings had at 1:30 p.m.)

16           CHAIRMAN FESMIRE: Okay, let the record reflect  
17 it's 1:30 p.m. on Thursday, February 9th, 2006. This is a  
18 continuance of Cause Number 13,486, the *de novo* Application  
19 of Synergy Operating, L.L.C., for compulsory pooling in San  
20 Juan County, New Mexico.

21           Mr. Bruce, I believe you wanted to make an  
22 opening statement?

23           MR. BRUCE: Yes, sir. First off I'd like to say,  
24 Mr. Chairman, that in my opinion everything that Mr. Larson  
25 raised in his opening argument was considered by the

1 Division. There might be a few more documents available,  
2 but frankly the documents that are now available make me  
3 even more comfortable with my client's position.

4 If you would look at Synergy's exhibits -- and  
5 let me run through them to explain the situation.

6 Exhibit 1 is simply a land plat, not a very good  
7 one, but it's a land plat of the west half. The southwest  
8 quarter is fee acreage, and that concerns Mr. Larson's  
9 client. Those are the -- the interest owners here today  
10 own -- Mr. Smith or Mr. Smith, L.L.C., owns an interest  
11 there. Mr. Hall's client, the Walmsley Trust, owns an  
12 interest. And that's also where Synergy claims an  
13 interest.

14 Noted in the northwest quarter is -- it says BLM  
15 federal lease. That is 100-percent Burlington. And the  
16 well that we're here for today will be located on the  
17 Burlington lease.

18 If you'd turn to Exhibit 2, this was presented  
19 before the Division, and it shows the breakdown according  
20 to Synergy. And to bring this into focus, what I'd ask you  
21 to look at is Exhibit 2 and Exhibit 9. And Exhibit 9 is  
22 also an exhibit in the Smith exhibit packet that was  
23 already admitted, but I've included it also. It is a copy  
24 of a quiet title decree.

25 Okay, if you look at Exhibit 9, the mineral --

1 This is a quiet title decree, which decreed that the  
2 plaintiffs, Margaret Hasselman Jones, Julia Hasselman  
3 Keller, Jennie Hasselman Hill and May Hasselman Kouns, own  
4 100 percent of the mineral interest -- I should say own an  
5 undivided 1/2 mineral interest, excuse me, in the southwest  
6 quarter of this Section 8.

7 If you'll turn to page 4 of the decree, the  
8 bottom paragraph -- as an aside, Claude Smith was a  
9 plaintiff and it said he owned an undivided one half of the  
10 surface rights. But at the very bottom it says the -- who  
11 I refer to as the Hasselman heirs, are the owners in fee  
12 simple as heirs-at-law of Herman Hasselman.

13 Now this quiet title decree was after the deeds  
14 that were talked about by Mr. Larson, creating a joint  
15 tenancy, and it's Synergy's contention that if you own  
16 property as heirs of someone, it is not joint tenancy, it  
17 is as tenants in common.

18 CHAIRMAN FESMIRE: Mr. Bruce, do you have a cite  
19 to bolster that argument?

20 MR. BRUCE: I don't have -- I do have something,  
21 I don't have it with me. I have a cite to that  
22 proposition.

23 What I do not have -- and I think this is also  
24 referenced in Mr. Larson's exhibits -- is that there is now  
25 no New Mexico case which says that if you own something,

1 say, as joint tenants, and you have a subsequent  
2 instrument, does that convert it out of joint tenancy? But  
3 I know the law is is if you have something as heirs of  
4 person X, that is owned as tenants in common. The only  
5 exception would be if there is a will, but that's not --  
6 you're not an heir if there's a will. A will could give it  
7 to people in joint tenancy. Okay.

8           So then what you have is, if you turn back to  
9 Exhibit 2, it lists those four sisters -- I think they were  
10 sisters -- and Synergy attributes each of them a 1/8  
11 interest, in other words, 1/4 of the undivided 1/2  
12 interest. And Synergy took assignments from the heirs of  
13 Julia H. Keller and the heirs of May H. Kouns, and those  
14 assignments are submitted, and were previously submitted,  
15 as Synergy Exhibit 7, and those are the parties that have  
16 been paid production proceeds on the Smith Pictured Cliffs  
17 well in the southwest quarter for 50 years.

18           So it's Synergy's position -- it's twofold.  
19 Number one, that under the quiet title decree these four  
20 sisters own the property as community property, and  
21 therefore their heirs owned an interest, and Synergy  
22 acquired a legal interest.

23           The alternative position is that they've had 50  
24 years of adverse possession, and they have established  
25 title through that adverse possession. There has been 50

1 years of production. And under New Mexico law you need 10  
2 years of production.

3 CHAIRMAN FESMIRE: Can you adversely possess  
4 minerals?

5 MR. BRUCE: If there's production, and I can give  
6 you -- there are several cites to that.

7 You cannot -- If there is not production you  
8 cannot adversely possess minerals, but if there is  
9 production you can.

10 MR. BROOKS: Is the mere receipt of proceeds  
11 sufficient to establish adverse possession in the absence  
12 of actually being on the ground and operating the property?

13 MR. BRUCE: I don't believe it requires you to be  
14 an operator, Mr. Brooks. The four elements are:

15 Color of title. I believe the quiet title decree  
16 gives color of title.

17 Ten years of possession. There's been 50.

18 Payment of taxes. In this instance there would  
19 be payment of severance taxes to the State.

20 And open -- the other one is open and adverse or  
21 open and hostile possession. The fact that Synergy's  
22 assignors have been in possession for 50 years and have  
23 been paid. I mean, and that again is something for the  
24 court to determine.

25 And to buttress that, I would actually turn to

1 one of Mr. Larson's exhibits, which is Exhibit I, which is  
2 a title report from Tammy Sloan Smith. And if you'd turn  
3 to page 2 of this, you can see her -- the second full  
4 paragraph says, "Several documents reviewed in the Clerk's  
5 office indicate that there appears to have been confusion  
6 as to whether the Hasselman sisters owned the interest as  
7 joint tenants or as tenants in common." And then they  
8 proceed to list about 20 instruments.

9 But importantly, if you go down to the third one,  
10 it's the Estate of May H. Kouns in which she claimed a 1/8  
11 interest. If she truly owned that interest as a joint  
12 tenant with her sister, she would not have owned that 1/8  
13 interest, because upon her death it would have passed  
14 without any heirship determination, any probate proceeding,  
15 immediately to her sister.

16 And in fact, the -- up above that they list some  
17 designations of agents and powers of attorney where the  
18 heirs of May Kouns designated certain people to deal with  
19 this property, and that is after the death of May H. Kouns.

20 So what I'm saying is, for 40 years the people  
21 have treated it as tenants in common, and that is where my  
22 client derives title.

23 And in fact, one of the exhibits -- the final  
24 exhibit that I would reference is Synergy Exhibit 13, which  
25 is a copy of an old title opinion from Pan American, which

1 is of course now BP America, Exhibit 13. And if you go to  
2 the second page where it lists the mineral owners you will  
3 see that the bulk of the interest is owned by Claude Smith,  
4 Mr. Smith's predecessor in title, a small interest owned by  
5 two gentlemen --

6 CHAIRMAN FESMIRE: Mr. Bruce, I don't believe I  
7 got a 13, and I don't think either of the Commissioners  
8 did.

9 MR. BRUCE: Well, I delivered them yesterday, Mr.  
10 Examiner.

11 MR. BROOKS: I don't either.

12 COMMISSIONER BAILEY: Late exhibits.

13 CHAIRMAN FESMIRE: Oh, the late exhibits, oh.

14 MR. BROOKS: Is that a different package?

15 COMMISSIONER OLSON: Yeah.

16 MR. BROOKS: It's this -- Okay. Yeah, here it  
17 is.

18 MR. BRUCE: This is a copy, as I said, of an old  
19 Pan American Petroleum Corporation title opinion, acquired  
20 by my client on the same southwest quarter of Section 8 and  
21 -- whether you look at the surface at the bottom of page 1  
22 or the minerals at the top of page 2. As I said, Mr.  
23 Smith's predecessors owned not quite a 1/2 interest.  
24 George Robbins and J.R. Robbins own a small interest. And  
25 then the rest is split among the Hasselman sisters and

1 their heirs --

2 COMMISSIONER BAILEY: Uh-huh.

3 MR. BRUCE: -- as if they owned it as tenants in  
4 common.

5 And in fact, all of those sisters and their heirs  
6 -- you'll see a little asterisk saying that by designation  
7 of agents these parties appointed Jennie Hasselman Hill --  
8 and that's Mr. Hall's client's predecessor in title -- as  
9 their agent and attorney in fact for purposes of receiving  
10 their account, royalties, et cetera.

11 So Mr. Hall's predecessor in title, Jennie  
12 Hasselman Hill, was designated agent for receipt of  
13 proceeds, apparently, but as a tenant in common and not as  
14 a joint tenant.

15 And based on that, it is Synergy's position that  
16 if validly acquired assignments, marked as Exhibit 7, from  
17 the heirs of Julia Keller, one of the sisters, and from the  
18 heirs of May Kouns, one of the sisters, for 40 years, that  
19 people have treated it as joint tenancy -- excuse me, as  
20 tenants in common, and in fact that's what title decree  
21 states, I would further state that as Mr. -- they also --  
22 Synergy also has a farmout from Mr. Robbins, and with  
23 respect to that so-called rescission, the farmout agreement  
24 has a -- had a one-year term that expires May 31 of this  
25 year. A rescission -- if you have a contract between two

1 people, it can only be rescinded or terminated by the  
2 agreement of both parties. That's as plain as I can put  
3 it. A simple notice of rescission affects nothing, or  
4 effects nothing, and it is invalid unless a contract is  
5 terminated by a court of law.

6 And therefore it is Synergy's position that it  
7 has valid interests under several chains of title and has  
8 the right to go ahead and drill -- force pool this interest  
9 to drill the well.

10 CHAIRMAN FESMIRE: The Pan American title opinion  
11 from 1965 --

12 MR. BRUCE: Uh-huh.

13 CHAIRMAN FESMIRE: -- what tracts is that -- does  
14 that cover?

15 MR. BRUCE: It covers the southwest quarter of  
16 Section 8.

17 CHAIRMAN FESMIRE: Just the quarter?

18 MR. BRUCE: Below the base of the Pictured Cliffs  
19 formation, but to the best of my knowledge the cutoff was  
20 only because Mr. Smith has a well to the base of the PC.  
21 There is no known division of mineral title between -- at  
22 the base of the PC. It's uniform as to all depths.

23 MR. LARSON: Mr. Director, I don't mean to be  
24 obstructive, but to the extent that there was an objection  
25 to the title opinions that were offered by Mr. Smith, we

1 would make the same objection, but understand that it's  
2 part of your review in considering them.

3 CHAIRMAN FESMIRE: And we will make the same  
4 note.

5 MR. HALL: I would join in that objection, Mr.  
6 Chairman.

7 CHAIRMAN FESMIRE: Isn't this stuff old enough to  
8 qualify as an ancient document?

9 (Laughter)

10 MR. HALL: No, when I first saw it, I -- that's  
11 the first thing that occurred to me, is this guy still  
12 alive? If he were, would we be obliged to refer him to the  
13 unauthorized practice of law committee? A Texas lawyer  
14 rendering opinion on title in New Mexico. But he may be  
15 New Mexico bar, we don't know.

16 I would note something about the opinion. If  
17 you'll look at the coverage dates for the materials  
18 examined, they run from September 16th, 1960, through to  
19 May 16, 1965, on the basis of two abstracts. And as we've  
20 pointed out, the salient conveyances that I think you ought  
21 to consider are -- they all predate the dates of coverage  
22 for the opinion. The important deeds were the 1951 deeds  
23 to the joint tenants, and then subsequently the 1958 quiet  
24 title decree. It's not clear whether this attorney had any  
25 of those materials before him and whether he took those

1 into consideration.

2 I think because of that, it's not considered --  
3 it shouldn't be accorded very much weight at all. Of  
4 course, he's not here to be cross-examined about what  
5 weight, what consideration he gave those particular  
6 instruments, but I think that's very important.

7 MR. BROOKS: How precise is the supplemental  
8 title opinion? In accordance with normal title practice,  
9 one would assume he had a previous title opinion that he  
10 reviewed, that traced the title from sovereignty.

11 MR. HALL: You would think; you just don't know.

12 MR. BROOKS: Yeah.

13 MR. HALL: It does say it is supplemental.

14 I would also point out, Mr. Chairman, that the  
15 devolution of the interests claimed by Synergy, most of  
16 that through the Hasselman heirs, from the title report in  
17 the Smith set of exhibits, it does not appear that most of  
18 those interests were ever probated. And under New Mexico  
19 law, simple claim to title by stipulation, affidavit of  
20 heirship, whatever, is ineffective. You have to have  
21 probate or ancillary probate in this State in order to  
22 effect a valid transfer. And the case law for that is  
23 called *Allen vs. Amoco Production Company*. It's 114 New  
24 Mexico 18; it's a Court of Appeals 1992 case.

25 (Mr. Hegarty present at this time.)

1 MR. HALL: The point of all this -- I think it's  
2 clear to the Commission, it's evident that both sides have  
3 competing claims to title. A lot of these same discussions  
4 are going to be had before the 11th Judicial District Court  
5 in Aztec, and I don't believe we're asking you to  
6 substitute your judgment for the Court's.

7 The concern we have, though, is that, given the  
8 nature of compulsory pooling proceedings in themselves, we  
9 think the effect of a compulsory pooling order is extensive  
10 enough that it does have a bearing on title. It's going to  
11 have a bearing on the ownership interests of the pooled  
12 parties. And as we've pointed out before, if a party  
13 claims an interest -- there may be title failure and he's  
14 trying to clear up title to that interest, and in the  
15 interim the interest is pooled. Well costs, risk penalty  
16 are recouped out of that interest.

17 We think that reaches too far. That's too close  
18 to a quiet title, and I think some of the authorities that  
19 have opined on the Commission's function in the past have  
20 indicated that parties shouldn't utilize a compulsory  
21 pooling proceeding in order to cure title defects. That's  
22 what any good operator ought to be doing before he even  
23 undertakes to propose a well, and it's our point to you  
24 that that was not done here.

25 MR. BRUCE: And I don't think it requires

1 marketable title to drill a well, if you look at marketable  
2 title and disbursing proceeds.

3 CHAIRMAN FESMIRE: Mr. Bruce, did you want to  
4 take a few minutes with your client?

5 MR. BRUCE: Can I take about two minutes with my  
6 witness, Mr. Chairman?

7 CHAIRMAN FESMIRE: We won't even recess. We'll  
8 sit here, but we won't talk.

9 MR. BROOKS: At least not about the case.

10 (Off the record)

11 CHAIRMAN FESMIRE: Mr. Hegarty, would you stand  
12 to be sworn, please?

13 (Thereupon, the witness was sworn.)

14 PATRICK HEGARTY,  
15 the witness herein, after having been first duly sworn upon  
16 his oath, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. BRUCE:

19 Q. Would you please state your name and city of  
20 residence?

21 A. Patrick Hegarty, Aztec, New Mexico.

22 Q. And what is your relationship to Synergy  
23 Operating, L.L.C.?

24 A. I am one of three owners.

25 Q. And by trade are you a petroleum landman?

1 A. Yes, I am.

2 Q. Have you previously testified -- You've  
3 previously testified before the Division. Have you  
4 previously testified before this Commission?

5 A. Yes, I have.

6 Q. And were your credentials as an expert landman  
7 accepted as a matter of record?

8 A. Yes, they were.

9 Q. And are you familiar with the land matters  
10 involved in this Application?

11 A. Yes, I am.

12 MR. BRUCE: Mr. Examiner, I'd tender Mr. Hegarty  
13 as an expert petroleum landman.

14 CHAIRMAN FESMIRE: Is there any objection?

15 MR. HALL: No objection.

16 MR. LARSON: No.

17 CHAIRMAN FESMIRE: Mr. Hegarty, your credentials  
18 are accepted.

19 Q. (By Mr. Bruce) Mr. Hegarty, let's run through  
20 these exhibits briefly, as I told you I'd run through some  
21 of them, but just briefly, what does Exhibit 1 reflect?

22 A. It is basically the proration unit, the 320 acres  
23 necessary to drill a Fruitland Coal well, and it's a  
24 depiction of that 320.

25 Q. Okay, and we've been discussing the southwest

1 quarter of Section 8, which is the fee land. Who owns the  
2 northwest quarter?

3 A. That is Burlington.

4 Q. Okay, and the proposed well will be at an  
5 orthodox location on Burlington's acreage?

6 A. Yes.

7 Q. And has Burlington signed an operating agreement  
8 with Synergy?

9 A. Yes, they have.

10 Q. Moving on to Exhibit 2, could you briefly  
11 identify that for the Commission?

12 A. Exhibit 2 is a rendition of the ownership of the  
13 southwest quarter of Section 8 of 29 North, 11 West.

14 Q. And you listed the various Hasselman heirs, and  
15 has Synergy acquired assignments from certain of these  
16 heirs?

17 A. Yes, we have.

18 Q. Now, in preparation for this, did you and people  
19 on your behalf examine the county records to determine  
20 ownership?

21 A. Yes, they did.

22 Q. Were you also in touch with Mr. Smith regarding  
23 interest ownership in this well?

24 A. Yes, we were.

25 Q. Okay. And the people he was paying revenues to?

1 A. Yes.

2 Q. Okay. And what does Exhibit 3 reflect?

3 A. Exhibit 3 is a letter that I wrote to Mr. Smith  
4 and -- basically giving him copies of the assignments that  
5 we acquired from the Hasselman heirs and basically, you  
6 know, asking for payment. And then also there was, you  
7 know, some operational discussion.

8 Q. And did you -- As part of Exhibit 3, are your  
9 proposal letters regarding this well attached also?

10 A. Yes, they are.

11 Q. And at the original hearing, which -- You took  
12 certain assignments. Looking at Exhibit 2, you did seek to  
13 force pool the heirs of Margaret H. Jones; is that correct?

14 A. That's correct.

15 Q. And have you searched the records to determine  
16 who her heirs were?

17 A. Yes, we have.

18 Q. And what did that result in?

19 A. We have traced down heirs to Pueblo, Colorado.  
20 And after the -- we think -- as a matter of fact, we just  
21 can't locate those heirs --

22 Q. Okay.

23 A. -- so -- but we did make a very serious effort to  
24 try and locate them.

25 Q. Was David Jones her husband?

1 A. Yes.

2 Q. Okay. So you have not been able, after a due  
3 search -- did that include not only the county records but  
4 Internet searches?

5 A. Yes.

6 Q. And the only other person you sought to force  
7 pool was the Smith interest; is that correct?

8 A. That's correct.

9 Q. Okay. And in your opinion did you make a good  
10 faith effort to obtain the voluntary joinder of the  
11 interest owners in this well?

12 A. Yes, we did.

13 Q. Or to locate the unlocatable owners?

14 A. Yes, we did.

15 Q. What is Exhibit 4?

16 A. Exhibit 4 is the -- what is called in our  
17 industry an AFE, authority for expenditure, and it's  
18 basically the guesstimation as of March 15, 2005, as to the  
19 cost of drilling the proposed well.

20 Q. And what is the proposed completed well cost?

21 A. Drilled, completed, \$340,000.

22 Q. And is this cost -- What is the approximate  
23 depth of the Fruitland Coal here?

24 A. Roughly 1400 feet.

25 Q. And is this cost in line with the cost of other

1 wells drilled to this depth in this area of New Mexico?

2 A. Yes, it is.

3 Q. And do you request that Synergy be designated  
4 operator of the well?

5 A. Yes, we do.

6 Q. And do you have a recommendation for the amounts  
7 which the operator should be paid for supervision and  
8 administrative expenses?

9 A. \$500 for an operating overhead rate, and a  
10 drilling overhead rate of \$5000.

11 Q. And are these amounts equivalent to those  
12 normally charged by Synergy and other operators for wells  
13 of this depth in this area of New Mexico?

14 A. Yes, that is what Burlington Resources has agreed  
15 to pay.

16 Q. Okay. Now, along that lines, has Synergy drilled  
17 other Coal gas wells in New Mexico?

18 A. Yes, we have.

19 Q. Approximately how many Coal or Pictured Cliffs  
20 wells does Synergy operate?

21 A. We operate -- I'm not sure of the exact amount.  
22 Probably at least 20 or so.

23 Q. Okay. And for the original hearing, the interest  
24 owners were notified of this Application, were they not?

25 A. Yes.

1 Q. And that's reflected in Exhibit 5 and Exhibit 6,  
2 a publication notice against certain unlocatable people?

3 A. Yes.

4 Q. Now, let's turn to your interest ownership. What  
5 is Exhibit 7?

6 A. These are just the assignments that we use to  
7 convey the portion of the minerals from the surface to the  
8 base of the PC --

9 Q. Okay.

10 A. -- Pictured Cliff horizon.

11 Q. These are the assignments you took from certain  
12 Hasselman heirs; is that correct?

13 A. Yes.

14 Q. And then you said you did provide copies of these  
15 to Mr. Smith?

16 A. Yes. As a matter of fact, he even paid us, you  
17 know, revenues associated with these interests. We have a  
18 check from him and he paid us --

19 Q. Okay, and is that reflected in Exhibit 8?

20 A. Yes, it is.

21 Q. Now, Exhibit 8, who was that prepared by?

22 A. Mr. Smith.

23 Q. And after you had provided him with your  
24 ownership information, he prepared this, which shows  
25 Synergy with an interest, down at the bottom -- a working

1 interest, at the bottom of this page?

2 A. Yes, he -- Yes.

3 Q. And it shows the amount due, \$1500-plus. Is that  
4 reflected on the second page of that exhibit?

5 A. Yes, it is.

6 Q. And that check was paid to you by Mr. Smith?

7 A. That's his signature.

8 Q. Exhibit 9 is just a quiet title decree, Mr.  
9 Hegarty. We've already discussed that.

10 Synergy Exhibit 10, it's only a partial exhibit.  
11 Did you provide an operating agreement to Mr. Walmsley?

12 A. Yes, we did.

13 Q. And this just shows the signature page, showing  
14 that Mr. Walmsley did sign the JOA?

15 A. Yes, he did.

16 Q. And as part of this exhibit, when you provided  
17 him with the JOA did it show the interest ownership -- was  
18 Exhibit A to the JOA included, which is page 3 of this  
19 exhibit? Was that included with the materials he received  
20 and signed?

21 A. Yes.

22 Q. And then finally, the final page, although it  
23 copied quite poorly, did Mr. Walmsley then pay for his  
24 proportionate share of the proposed well under this JOA?

25 A. Yes, he did.

1 Q. Referring to Exhibit 11, what is this?

2 A. That's the farmout agreement that Mr. Robbins  
3 signed.

4 Q. And this is dated. What is the date of this?

5 A. May 31st, 2005.

6 Q. And how long -- what was the term of the farmout?

7 A. One year.

8 Q. So you have until May 31, 2006, in order to drill  
9 the well?

10 A. You know, it's been a while since I've read this.  
11 Let me make sure. That might be May 1st.

12 Q. I'd refer you to paragraph numbered 1, Mr.  
13 Hegarty.

14 A. Oh, yeah, there it is.

15 Q. Okay. And in your opinion, do you own Mr.  
16 Robbins' working interest under this farmout?

17 A. Well, at the point in time that we drill the  
18 well, we will.

19 Q. You will earn it?

20 A. We will earn it, under the terms of this  
21 agreement.

22 Q. Okay. And is it common in the business for  
23 people to obtain farmouts and drill wells under farmouts?

24 A. Oh, yeah.

25 Q. What does Exhibit 12 reflect?

1 A. This is the check for Mr. Smith's interest.

2 Q. So he did -- and it's already been submitted  
3 through Mr. Smith, but he did --

4 A. Yes.

5 Q. -- pay his proportionate share of well costs last  
6 summer?

7 A. Yes, he did.

8 Q. Okay. And so assuming the pooling order is  
9 confirmed, Mr. Smith would be a consenting working interest  
10 owner under the pooling order?

11 A. That's correct.

12 Q. And finally, Exhibit 13 is a title opinion from  
13 Pan American. You provided this to me, Mr. Hegarty. Where  
14 did you obtain this?

15 A. I received a copy of this from Mr. Peter Kepler,  
16 who is an attorney and also one of the heirs to the  
17 Hasselmans, and he gave me -- and he received these title  
18 opinions from XTO Energy, Inc., who is the current operator  
19 of two Dakota wells that are on this same property, and  
20 they involved the same 320 acres.

21 Q. And in your opinion, is the granting of Synergy's  
22 pooling Application in the interests of conservation and  
23 the prevention of waste?

24 A. Yes, it is.

25 Q. Do you believe that by drilling a well, it will

1 protect the parties' correlative rights by commencing  
2 production when the prices are good?

3 A. Yes.

4 Q. And were Exhibits 1 through 13 either prepared by  
5 you or compiled under your direction?

6 A. Yes, they were.

7 MR. BRUCE: Mr. Chairman, I'd move the admission  
8 of Synergy Exhibits 1 through 13.

9 CHAIRMAN FESMIRE: Any objection, Mr. Larson?

10 MR. LARSON: None, other than the one that I  
11 previously stated as to the title opinion.

12 CHAIRMAN FESMIRE: Your objection will be noted  
13 and overruled.

14 Mr. Hall?

15 MR. HALL: No objection.

16 CHAIRMAN FESMIRE: Commissioners?

17 COMMISSIONER BAILEY: No questions.

18 COMMISSIONER OLSON: No.

19 CHAIRMAN FESMIRE: Exhibits 1 through 13 will be  
20 admitted, Synergy Exhibits 1 through 13 will be admitted  
21 for the record.

22 Mr. Bruce, does that conclude your examination of  
23 this witness?

24 MR. BRUCE: That concludes my direct, yes, sir.

25 CHAIRMAN FESMIRE: Mr. Larson, you have cross-

1 examination of this witness?

2 MR. LARSON: I do.

3 CROSS-EXAMINATION

4 BY MR. LARSON:

5 Q. Mr. Hegarty, I'd like to provide you -- I don't  
6 know if you've got it there in front of you, but a copy of  
7 the complete operating agreement --

8 MR. BRUCE: Let me give him mine.

9 MR. LARSON: Okay. Is that a clean copy, without  
10 any notes or highlighting?

11 MR. BRUCE: I have not marked any.

12 MR. LARSON: Okay.

13 MR. BRUCE: I do not have a highlighter with me.

14 MR. LARSON: Okay.

15 Q. (By Mr. Larson) And I would like to ask you, if  
16 you would, to turn to Exhibit D to the joint operating  
17 agreement. It's a letter-size piece of paper, the first  
18 one, I think, after the --

19 A. The insurance coverage; is that right?

20 Q. Yes. I'd actually like to refer you to the  
21 paragraph ahead of that, where the reference is -- or the  
22 statement is made, "Attached to and made a part of that  
23 certain Operating Agreement dated March 1, 2005 between  
24 Synergy Operating, LLC, as Operator, and Burlington  
25 Resources Oil & Gas Company..." and Devon Energy Production

1 Company, L.P., as nonoperators.

2 And my question is, what is the nature of that  
3 referenced agreement?

4 A. Okay, I'm looking at something that doesn't say  
5 that. I'm looking at -- mine says, "...between Synergy  
6 Operating, LLC, as Operator, and Burlington Resources Oil &  
7 Gas Company et al. as nonoperators."

8 Q. Well, it is a slightly different version, which  
9 makes the point. Let me -- We'll drop the reference to  
10 Devon, then, at the moment and just stick with the  
11 reference to Burlington, which is what I was most  
12 interested in.

13 A. Yeah.

14 Q. What agreement is --

15 CHAIRMAN FESMIRE: Why don't we explain the  
16 difference between the two?

17 MR. LARSON: How?

18 CHAIRMAN FESMIRE: Why we have two forms of the  
19 same agreement?

20 MR. LARSON: I think -- and I'll have to ask the  
21 witness if he can explain that.

22 Q. (By Mr. Larson) Can you explain the difference  
23 as to why we have two different agreements, one with the  
24 reference to Devon and one without?

25 A. Well, I'm assuming that you gave me this; is that

1 right?

2 Q. That's what we produced today as an exhibit.

3 A. Okay. And -- Well, and what I'm looking at says  
4 Burlington.

5 Q. Okay.

6 A. So -- But, you know, we've drilled wells with  
7 Devon, and so -- but I can't explain it because, I mean,  
8 this is something that you provided to me, so why there  
9 would be a difference, I -- being that you produced the  
10 document, I'm not sure that I could answer it.

11 Q. Have you been aware of a similar document where  
12 Devon has been a party to it?

13 A. Yes, oh, yeah, Devon has been a party to wells  
14 that we've drilled.

15 Q. If I represent to you that the copy that I'm  
16 reviewing, that has the reference to Devon, is the copy  
17 that was provided under cover of letter from you to Ed  
18 Smith with his invitation to agree -- or to sign and agree  
19 to it, can you -- does that assist you in your memory?

20 A. Well, if -- Now, and then who -- who -- where did  
21 you get this -- Where did I get this copy?

22 Q. And my understanding is that that copy is the  
23 version that was provided under cover of letter from you to  
24 Mr. Walmsley.

25 A. Oh, okay. Well, most likely what happened was,

1 it's the exact same -- I would assume, I haven't looked at  
2 it. But this is a form, and basically in the San Juan  
3 Basin this form of operating agreement is what everybody  
4 uses, meaning that if you want to get Devon or if you want  
5 to get Burlington Resources, you have to use the exact same  
6 language. And the reason why they do that is so it doesn't  
7 gum up their, you know, legal department, and they have a  
8 certain format that they'll agree to. So anyway, probably  
9 what occurred would be such that the exact same language  
10 was used, but maybe they put, you know, a different  
11 reference on there or a different page, but it's the exact  
12 same agreement.

13 As a matter of fact, that's a good point to bring  
14 up here and for all of you to understand, is that this is  
15 the agreement that Burlington said they would sign. And  
16 so, it was their -- Burlington Resources' legal department,  
17 in conjunction with ConocoPhillips and Devon and Burlington  
18 Resources, and they all got together and basically decided  
19 on this format, and they said if you want to drill a well  
20 with us as a working interest owner, here's the agreement  
21 you're going to use.

22 And so that's -- you know, that's how this came  
23 about and was created.

24 CHAIRMAN FESMIRE: So the AAPL, 198- -- or --

25 THE WITNESS: -- '82.

1 CHAIRMAN FESMIRE: -- this is Form 610-1982 --

2 THE WITNESS: Yeah.

3 CHAIRMAN FESMIRE: -- as opposed to the newer  
4 formats?

5 THE WITNESS: Yeah, yeah, uh-huh.

6 CHAIRMAN FESMIRE: Decided not to use it?

7 THE WITNESS: Right.

8 CHAIRMAN FESMIRE: That's interesting.

9 Q. (By Mr. Larson) That was going to be my next  
10 question, is, what form -- As of June of last year, you  
11 testified that Burlington had not signed an operating  
12 agreement.

13 A. Right.

14 Q. Now, a few moments ago you said that they have.

15 A. Yes.

16 Q. The question is, what form have they --

17 A. This is it, this one here.

18 Q. Okay, all right. Also on June 16th, you  
19 testified -- and this the transcript which is Exhibit G in  
20 the package that Smith provided, the transcript again, page  
21 20, line 24. The question was, by Mr. Hall, What is  
22 Synergy's right to drill the well -- to drill the 104 well  
23 on the northwest quarter currently? So he was asking you  
24 what currently is the right.

25 Your answer then was, at the top of page 21 --

1           A.    Okay, and you're referencing not to the operating  
2 agreement, but --

3           Q.    No, I'm referring to your testimony --

4           A.    Oh, okay.

5           Q.    -- the transcript of your testimony at the June  
6 hearing --

7           MR. BRUCE:   Which page?

8           THE WITNESS:   He said 20.

9           MR. LARSON:   Beginning on page 20 at the bottom,  
10 line 24, Question, What is Synergy's right to drill the 104  
11 well on the northwest quarter currently?

12                        Your answer at the top of the next page was, By  
13 virtue of our ownership in the -- from the assignments from  
14 the heirs of Julia Keller and the heirs of May H. Keller,  
15 as well as the operating agreement signed by Mr. Walmsley.

16           A.    Yeah.

17           Q.    Is that correct?

18           A.    That's correct.

19           Q.    Okay. And the Keller heirs' interests are now in  
20 dispute; is that correct?

21           A.    Well, we don't think they're in dispute.

22           Q.    Are you aware of a quiet title action having been  
23 filed related to those interests in the 11th Judicial  
24 District?

25           A.    Yes.

1 Q. Okay. With reference to that statement that you  
2 rely on the joint operating agreement --

3 A. Yes.

4 Q. -- that you have, and you have a copy there in  
5 front of you, can you direct us to what particular  
6 provision within that joint operating agreement you rely on  
7 for that statement as to the right to drill?

8 A. Sure. Mr. Walmsley agreed to elect us as  
9 operator to drill this well. Therefore, that in my mind  
10 gave us the right to drill.

11 Q. So it was a representation you claim Mr. Walmsley  
12 made, as opposed to the actual agreement, as you stated in  
13 June of last year?

14 A. Well, he signed a contract that designated us  
15 operator of that well.

16 Q. And --

17 A. Is that not a right?

18 Q. -- is that contract in front of you today?

19 A. This here?

20 Q. Yes.

21 A. Yes.

22 Q. And that's the contract you're referring to?

23 A. Yeah.

24 Q. Okay. What provision within that contract are  
25 you relying on for your statement that you have the right

1 to drill?

2 A. "This agreement, entered into by and between  
3 Synergy Operating, LLC, hereinafter designated and referred  
4 to as 'Operator'..."

5 MR. LARSON: Okay.

6 CHAIRMAN FESMIRE: Can I ask a question --

7 MR. LARSON: Sure.

8 CHAIRMAN FESMIRE: -- before you continue?

9 On page 14, the signature page that you have in  
10 there, what signatory is on there?

11 MR. LARSON: This version, which again I believe  
12 was provided to Mr. Smith, bears only Mr. Hegarty's  
13 signature. It had not been executed by Mr. Walmsley at  
14 that point in time.

15 CHAIRMAN FESMIRE: Okay.

16 THE WITNESS: You know, actually, I think it had  
17 been, but I didn't provide him with a copy.

18 CHAIRMAN FESMIRE: Okay.

19 THE WITNESS: Yeah.

20 CHAIRMAN FESMIRE: I think we ought to make sure  
21 that the Smith interests have a copy of the one that's  
22 executed by the Walmsley Trust.

23 MR. LARSON: We did get that last night, and that  
24 was the genesis of what you have in your hands there. I  
25 had a paralegal compare, and it looked to be that these

1 were the same, but obviously in the few minutes --

2 MR. BRUCE: I had provided a copy of the entire  
3 agreement to Mr. Hall with the signature --

4 CHAIRMAN FESMIRE: Okay.

5 MR. BRUCE: -- and --

6 CHAIRMAN FESMIRE: So you do have --

7 MR. LARSON: So I've got what you have in your  
8 hands, and I didn't realize that they were different, other  
9 than the signature.

10 CHAIRMAN FESMIRE: Okay.

11 Q. (By Mr. Larson) Also at the June 16th hearing,  
12 in the transcript that you have there in front of you, on  
13 page 23, line 3, the question was, Did you have a title  
14 opinion rendered?

15 And you answered that you are in the process of  
16 having a title opinion prepared, that you have a  
17 preliminary title opinion, but as far as an official title  
18 opinion it hasn't been prepared as of that date.

19 The question was, after that, Would you make that  
20 available to us?

21 And you agreed to do so.

22 As of this date, I have not seen any title  
23 opinion, with the exception of the Pan American title,  
24 which we just discussed a few minutes ago. Is this Pan  
25 American title opinion the one to which you were referring

1 in June of last year?

2 A. You know, basically the way we, you know, prepare  
3 title is, we prepare all the documents and do basically a  
4 chain of title. And then we have a gentleman who's a long-  
5 time land person, and he renders those opinions for us.  
6 And then if we -- if there's any sort of legal questions,  
7 there's an attorney that we use in Farmington -- his name  
8 is Tommy Roberts, and Scott knows Tommy -- and he basically  
9 provides us with written opinions as to legal questions  
10 that come up and that, and that's basically, you know, the  
11 process.

12 And so -- but when all of these problems came  
13 about, we held off having Tommy get involved, because we  
14 wanted to see what your arguments were and present that to  
15 him so he could do a -- you know, rather than going back at  
16 a later date, revising it, he could basically render an  
17 opinion with all of the facts at hand.

18 Because what we're looking at -- I mean, we've  
19 got tons of evidence that, you know, legitimize our  
20 ownership even to the point where Mr. Smith paid us, and we  
21 buy interests all the time and, you know, we were -- we're  
22 very confident that we own this interest and that there's  
23 not a dispute. And we've got our own theories why this is  
24 happening, but anyway that's the process.

25 Q. I appreciate that explanation but must object as

1 it's nonresponsive. The question was, is the 1965 Pan  
2 American opinion the one you were referring to in your  
3 statement --

4 A. No.

5 Q. -- in June? Thank you.

6 So you have not had a formal title opinion  
7 completed; is that correct?

8 A. No.

9 Q. Okay. And the preliminary opinion that you were  
10 referring to, is that the one that you just explained now?

11 A. Yeah, it's in-house.

12 Q. Okay. The preliminary opinion that you referred  
13 to, was it produced in writing in any way?

14 A. No.

15 Q. Okay. Given the current state of the facts and  
16 including the quiet title, the title opinion that has been  
17 given by Nancy King, a New Mexico attorney, have you seen a  
18 copy of that?

19 A. I don't think --

20 Q. Okay --

21 A. -- well --

22 Q. -- there has been -- we have obtained a title  
23 report, an independent title report, from a land person in  
24 Farmington, out of the San Juan records.

25 A. And who is this person?

1 MR. LARSON: Tammy -- Loan Smith?

2 MS. CHAPPELLE: Sloan.

3 Q. (By Mr. Larson) Tammy Sloan Smith. And in  
4 addition, we've had that reviewed and a title opinion, but  
5 given by Nancy King, and we've provided it to your  
6 attorney.

7 Those -- I represent to you that that report and  
8 that opinion is that Synergy does not, in fact, own that  
9 interest. Given that representation, assuming that that  
10 is, in fact, proved out, given the rescission that Mr.  
11 Robbins has tendered, what is Synergy's current intent to  
12 drill? Does it still intend to drill?

13 A. Yes, very definitely.

14 Q. Even without its own formal title opinion?

15 A. Oh, we are comfortable with the fact that we own  
16 that interest.

17 Q. If drilling without a formal title opinion were  
18 to be contrary to the joint operating agreement, would you  
19 agree that that would be considered a breach of that  
20 agreement?

21 A. We're in communications with Burlington  
22 Resources, and we feel we're comfortable with title, and  
23 that our title will stand.

24 MR. LARSON: I don't have any further questions.

25 CHAIRMAN FESMIRE: Mr. Hall?

## EXAMINATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BY MR. HALL:

Q. Mr. Hegarty, it occurred to me, we ought to clear up something for the record here, in view of the advertisement for the case. The advertisement is for the Duff Well Number 104 and the infill 105 well. Just so we're clear what we're doing here today, the 105 infill well is no longer a part of your compulsory pooling Application; is that right?

A. No, it's not.

MR. BRUCE: And if I could throw in, just to make clear, there were originally two wells in the pooling Application, one in the northwest, one in the southwest. The southwest one is not the subject of this Application. The Application further sought to force pool the southwest as to 160-acre units --

CHAIRMAN FESMIRE: Right.

MR. BRUCE: -- but that's no longer at issue. The only thing is the 320-acre Fruitland Coal.

CHAIRMAN FESMIRE: Right.

MR. LARSON: So the record is clear, then the question was, Is that correct? Your response was, No, it's not. I just want to make sure that the record is clear that you're not asking to drill the 105 well? Is that --

THE WITNESS: That's correct.

1 MR. LARSON: Okay.

2 THE WITNESS: We are not asking to drill the 105  
3 well.

4 Q. (By Mr. Hall) Thank you. Mr. Hegarty, let me  
5 ask you again so I understand how you examined title here.  
6 Was it you or was it your landman that generated the title  
7 report?

8 A. Basically, I'll generate the initial title  
9 report.

10 Q. Okay. So you go do a standup examination and  
11 collect all the documents of record?

12 A. No, actually what we do is, we have a title  
13 company generate a report as to all the documents, and then  
14 there's some girls in our office that go out and collect  
15 those documents, and then we make up a, you know, chain of  
16 title, and then I'll go through and examine those  
17 documents.

18 Q. Do you get a run sheet from --

19 A. Yeah, a run sheet --

20 Q. Okay --

21 A. -- right.

22 Q. -- when you had your run sheet and your  
23 documents, I assume you came across -- If you would look at  
24 -- see if you have a set of Mr. Smith's exhibits there.

25 MR. LARSON: Should be a group of tabs, A through

1 K or I.

2 MR. BRUCE: Yeah, there.

3 Q. (By Mr. Hall) If you would turn to Exhibit D in  
4 the Smith exhibits, what is Exhibit D? Could you identify  
5 that for the record, please?

6 A. It's a warranty deed between Jennie Hasselman  
7 Hill and it says surviving joint tenant of Margaret  
8 Hasselman Jones, and it names off the other Hasselman  
9 heirs, all deceased, to Jennie Hasselman Hill as sole and  
10 separate property.

11 Q. And that warranty deed is dated September 8th,  
12 1981; is that correct?

13 A. Yes.

14 Q. Let me ask you, did you have a copy of this deed  
15 when you --

16 A. Yes, I did.

17 Q. -- examined the title?

18 And what date -- strike that. What weight did  
19 you accord this deed?

20 A. Not much.

21 Q. And why not?

22 A. Well, two things. Well, a multitude of things,  
23 but originally -- well, first of all, we got a court decree  
24 which Mr. Smith's father and the Walmsleys were a part of  
25 it, all the heirs were a part of it. In this court decree

1 they define the -- Mr. Smith's interest as -- not Mr.  
2 Smith's interest but the Hasselman heirs interest as in fee  
3 simple. They use that verbiage. And "in fee simple" means  
4 that -- but that it was owned jointly, number one.

5 Number two --

6 CHAIRMAN FESMIRE: Let me go back and clarify  
7 what you just said.

8 THE WITNESS: Okay.

9 CHAIRMAN FESMIRE: It says that it was in fee  
10 simple, but it was owned jointly?

11 THE WITNESS: Yeah. Well, okay, jointly means  
12 that -- if you own 160 acres and you own it jointly, you  
13 own a percentage of the 160, not that, you know, this 10  
14 acres is yours and this 25 acres is theirs, so on and so  
15 forth. In fee simple means that, you know, they can pass  
16 that on to their heirs.

17 So anyway, that's -- you know, this is a gold  
18 standard in the title-review business, so we went with the  
19 court decree, which Mr. -- like I said, Mr. Smith's father  
20 initiated.

21 CHAIRMAN FESMIRE: Was that filed prior to this  
22 warranty deed?

23 THE WITNESS: Oh, yeah, this was 1957. This deed  
24 was 1981, the warranty deed, number one.

25 Number two, I've got --

1 MR. BROOKS: Excuse me, what warranty deed are  
2 you referring to?

3 THE WITNESS: Oh --

4 CHAIRMAN FESMIRE: It's in the --

5 MR. HALL: It's Exhibit D to --

6 CHAIRMAN FESMIRE: It's the Smith exhibits.

7 THE WITNESS: Yeah.

8 MR. HALL: -- the Smith exhibits.

9 MR. BRUCE: The Smith exhibits, Mr. Brooks.

10 MR. BROOKS: Okay, very good.

11 THE WITNESS: Okay. Then the other thing was,  
12 there was numerous documents after the 1957 deed, and I've  
13 brought a few of them if you'd like to look. But where  
14 Julie -- or Jennie -- let's see here. Here it is. Okay,  
15 Jennie Hasselman here -- Hill, signed this in 1965, and  
16 this is a declaration of agent. Okay? And, you know, the  
17 heirs -- One of the sisters had died, and the heirs of that  
18 sister signed the declaration of agent. And so basically  
19 acknowledging the fact that, you know, it's not a joint  
20 tenancy interest, it's -- you know, obviously Jennie  
21 Hasselman Hill on this date acknowledged the fact that the  
22 heirs own the interest. And if it was a joint tenancy  
23 interest as they claim, then the heirs wouldn't have any  
24 right to sign this document.

25 And the other thing was, is Mr. Smith paid -- for

1 40, 50 years, paid the heirs their proportionate share of  
2 the interest from the well that he operated.

3 So you take all those facts into consideration  
4 and there's no question that we own that interest, based on  
5 the preponderance of evidence.

6 Q. (By Mr. Hall) With respect to that instrument  
7 you were just referring to, the Jennie Hasselman Hill --

8 A. Yeah.

9 Q. -- agency appointment --

10 A. Right.

11 Q. -- when you examined title, did you see any  
12 evidence of record of the probate of the estate of Jennie  
13 Hasselman Hill?

14 A. Boy, you know, I -- we usually go to the -- if  
15 it's filed in the San Juan County courthouse, we would have  
16 reviewed that document. But off the top of my head I'd  
17 have to go back to the office and review that. So I can't  
18 definitively answer your question, Scott.

19 Q. And same question with regard to the estates of  
20 Julia Hasselman Keller and Margaret Hasselman Jones.

21 A. As far as the probate court decrees?

22 Q. Did you see any evidence at all that their  
23 estates --

24 A. You know --

25 Q. -- had been probated in New Mexico?

1           A.    You know, off the top of my head I don't know.  
2 I'd have to go back and check that. I know we did get some  
3 probates, but off the top of my head I can't remember which  
4 ones or whose they were.

5           Q.    Now, back to my earlier question with respect to  
6 the Exhibit D warranty deed, the 1981 warranty --

7           A.    Yeah.

8           Q.    -- deed to June Hill Walmsley, did the existence  
9 of this deed of record, San Juan County Clerk's office,  
10 cause you to try to undertake any sort of curative action  
11 to get this released?

12          A.    Well, I spoke to Mr. Walmsley and, you know, told  
13 him what we were doing, sent him the letter offered to his  
14 participation in this well, and he was rather excited about  
15 it, and signed the operating agreement, paid his money and  
16 was all excited to get after it.

17                So if any -- if a claim were to have been made, I  
18 would suspect that he would have made it. You know, he  
19 owned the other individuals' interests.

20                So based upon that assurance on his part and his  
21 payment of the check and signing the operating agreement, I  
22 didn't question it.

23          Q.    Did you seek to obtain a stipulation of interest,  
24 a stipulation of heirship or anything from the surviving  
25 heirs of Margaret Jones, Julia Hasselman Keller or May

1 Hasselman Kouns, in view of the 1981 warranty deed?

2 A. Well, by virtue of the fact that we have ample  
3 records -- in our due diligence before we acquired this  
4 interest, there was ample evidence that these people were  
5 getting paid proceeds from the Claude Smith well, and  
6 that's the interest that we're acquiring at 40 years of --  
7 or 50, close to 50 years of evidence of their being paid,  
8 and we received payment as well. I didn't see the need.

9 Q. Okay. So you didn't discuss the implications of  
10 the 1981 deed with your landman or Tommy Roberts?

11 A. No. Oh, you know what? No, let me back up.  
12 When this came about I did put in a call to Tommy and just,  
13 you know, explained the situation. And he just in a  
14 general conversation felt pretty comfortable that we were  
15 in a very strong position. And I -- he still feels that  
16 way, matter of fact.

17 Q. Simply based upon your representations --

18 A. Yes.

19 Q. -- to him --

20 A. That's right --

21 Q. -- about --

22 A. -- simply based on my representations, that's  
23 correct.

24 Q. He hasn't undertaken any sort of independent --

25 A. No.

1 Q. -- review of instruments?

2 A. No. And as soon as we get all the facts in,  
3 assuredly, he will do that.

4 Q. All right. Let's turn to your Exhibit Number 9.  
5 It's the quiet title judgment.

6 A. Oh, yes.

7 Q. And we understand this is what you were really  
8 relying on to have --

9 A. Yes.

10 Q. -- established title, as you claim it.

11 If you will turn to page 2 of the judgment and  
12 look at -- under Roman numeral I there's a finding in  
13 there. It says in part, "...the allegations and each of  
14 them made in plaintiffs' Amended Complaint are true and  
15 correct..." Do you see that?

16 A. Yes, I do.

17 Q. Do you know what allegations were made in the  
18 amended complaint? And let me also ask you, do you know  
19 what prayer for relief was contained in the amended  
20 complaint?

21 A. Well, as I understand the reason for this quiet  
22 title, the interest that was really in dispute at that  
23 point in time was the Robbins interest. And what it dealt  
24 with and -- there was an assignment that Mr. Robbins made,  
25 and then he -- assignment of his minerals, but he retained

1 -- I think it was like a 1/16 royalty or something like  
2 that. So there was a bit of confusion.

3 So it was my impression that the -- you know, the  
4 reason why Mr. Smith's father and the other heirs,  
5 Hasselman heirs, went through all this -- well, and it was  
6 predominantly Mr. Smith, because it affected his interest;  
7 he had the 50 percent that this mainly addressed -- was  
8 trying to define exactly what it was that Mr. Robbins  
9 owned. So that, you know, is -- that's basically my  
10 understanding of what that dealt with.

11 Q. All right, let me ask it this way then: Do you  
12 have any reason to believe that anything in the quiet title  
13 proceeding sought a reformation of any prior deed or a  
14 change in anyone's previous interest from tenancy in common  
15 to joint tenancy or vice versa?

16 A. Well, it was my main contention when I read this  
17 that it said what it -- it, you know, was basically a  
18 process to define what the surface and the mineral  
19 ownership was of the southwest quarter of Section 8 of 29-  
20 11, and it did that. And it used the words "in fee simple"  
21 and it basically defined what everybody owned, and that's  
22 what quiet title proceedings do, is, they clean up and  
23 declaratively state what the ownership of a tract of land  
24 is, and I thought this did it quite adequately.

25 Q. My original question was, do you know whether

1 reformation of any interest was sought in the quiet title  
2 proceeding? I assume the correct answer would be no?

3 A. No.

4 Q. You don't know?

5 A. I don't know.

6 Q. Let's look back to Smith Exhibit B, and that is  
7 the 1951 deed from Earl Kouns to the Hasselman siblings,  
8 and I think you'll agree this is the deed that tips it all  
9 off, this is the deed that on its face says, in part, not  
10 in tenancy in common but in joint tenancy.

11 Now, is there anything else you reviewed and  
12 relied on to conclude that the joint tenancy was  
13 extinguished or that this deed was reformed?

14 A. Yes. Oh, yeah. Well, first of all, going back -  
15 - and I'm repeating myself a bit, but we've got the court  
16 decree which says the interest is owned in fee simple,  
17 meaning that they could pass it on to their heirs.

18 We've got a multitude of agreements that Jenny  
19 Hasselman Hill signed with the heirs of, you know, her  
20 sisters, basically giving a very clear indication that --  
21 you know, that title had passed to the children of her  
22 sister.

23 And then we've got 40 or 50 years' worth of  
24 payments that were made to the heirs of the sisters, and  
25 our own check that we got from Mr. Smith for those

1 proceeds.

2 And so we felt that was a preponderance of  
3 evidence that the interest was owned jointly by these  
4 sisters, and it was very evident that -- matter of fact,  
5 you know, we didn't have any question, and still don't.

6 Q. Based on your experience and expertise as a  
7 petroleum landman, can't a joint tenancy be owned in fee  
8 simple?

9 A. Can't a joint tenancy be owned in fee simple?

10 Q. Do you know?

11 A. Under the circumstances that I just described to  
12 you, no. And the reason is because Jenny Hasselman Hill  
13 signed documents that were also signed by the siblings of  
14 her sisters.

15 So if that -- if what you're saying is true, it  
16 wouldn't be applicable to this situation, because she  
17 herself, by her own signature, acknowledged the transfer of  
18 the interest from her sister to her sister's children.

19 Q. Mr. Hegarty, is Burlington participating by way  
20 of a farmout to you or under the JOA?

21 A. JOA.

22 Q. Okay. And would you provide the Commission with  
23 a signed copy of the Burlington JOA?

24 A. You know, I'm not sure if we did.

25 MR. BRUCE: No --

1 THE WITNESS: Oh --

2 Q. (By Mr. Hall) Would you?

3 A. Oh, yeah, sure.

4 Q. Do you plan on obtaining a Division order title  
5 opinion before distributing production proceeds from the  
6 well?

7 A. The opinion that will be generated once we obtain  
8 whatever additional documentation you all provide us will  
9 reference the ownership of any royalty if there is any, but  
10 quite frankly, being that we all own minerals, there's no  
11 royalty involved, and Burlington is taking their production  
12 in kind, so they will be paying their royalty owners. So  
13 there really is no need for a Division order title opinion.

14 But certainly if any royalty interest -- and  
15 matter of fact, Mr. Smith is collecting the royalty on the  
16 Claude Smith well, which he has no documentation to  
17 substantiate why he's doing that, and that will certainly  
18 be reviewed as well. We've asked for documentation, but  
19 he's never provided it. And we don't understand why he is  
20 assessing a 1/8 royalty against the Hasselman heirs. It  
21 has no basis, contractual basis, to do that. Matter of  
22 fact, if you could explain that, I'd appreciate it.

23 Q. Mr. Hegarty, let me ask you, with respect to the  
24 interest previously owned by Margaret Hasselman Jones that  
25 you're pooling and you couldn't locate the heirs --

1 A. Yes.

2 Q. -- do you intend on recouping well costs and a  
3 risk penalty out of that interest?

4 A. Yes, we do.

5 Q. And that's at the statutory 1/8-7/8 rate; is that  
6 right?

7 A. That's correct.

8 Q. Would Synergy agree to place into suspense  
9 proceeds attributable to the 18 3/4 percent that's in  
10 dispute until the quiet title action is resolved?

11 A. So you're saying place all of our interest in  
12 suspense?

13 Q. Yes, the disputed interests?

14 A. I don't see the need to do that.

15 Q. So the answer is no?

16 A. No.

17 MR. HALL: I have nothing further, Mr. Director.

18 CHAIRMAN FESMIRE: Any redirect, Mr. Bruce?

19 MR. BRUCE: Just a couple of clarifications.

20 REDIRECT EXAMINATION

21 BY MR. BRUCE:

22 Q. You've used the term "own jointly". By that, you  
23 mean they own it together --

24 A. Collectively.

25 Q. -- not as joint tenants --

1 A. Right.

2 Q. -- where you succeed upon someone's death?

3 A. (Nods)

4 MR. BRUCE: That's all I have -- Oh, one more,  
5 Mr. Chairman, I'm sorry.

6 Q. (By Mr. Bruce) When you mentioned these  
7 designation of agents, et cetera, signed by June Hasselman  
8 Hill, she is Mr. Walmsley's -- the trustee's predecessor in  
9 title, is she not?

10 A. Yes, she is.

11 MR. BRUCE: Okay, that's all. I'm sorry, Mr.  
12 Chairman.

13 CHAIRMAN FESMIRE: Mr. Bruce, would you object to  
14 recross from Mr. Larson?

15 MR. BRUCE: No.

16 CHAIRMAN FESMIRE: Mr. Larson?

17 MR. LARSON: I have a few follow-up, based on  
18 what we've heard since my examination.

19 RECROSS-EXAMINATION

20 BY MR. LARSON:

21 Q. Mr. Hegarty, you claim to be an expert in -- an  
22 expert landman; is that correct?

23 A. Hm, I guess -- yes, that would be correct.

24 Q. You did testify to that earlier today --

25 A. Yes.

1 Q. -- did you not? All right.

2 Have you had any courses in law?

3 A. Yes, I have.

4 Q. Okay, what were those? What's the extent of  
5 that?

6 A. Business law, I've had a full year of it.

7 Q. Have you had any classes in probate law?

8 A. No.

9 Q. How about property law? Property law?

10 A. Yes.

11 Q. Have you attended law school?

12 A. No.

13 Q. You're not a lawyer then; is that correct?

14 A. No.

15 Q. Okay. Are you familiar with the interests that  
16 can be included within fee simple?

17 A. The interests that can be included in fee simple.  
18 You mean as far as -- Well, if you could clarify that.

19 Q. Well, let me ask you this. Do you have an  
20 opinion as to whether -- well, it's two parts -- whether a  
21 joint tenancy --

22 A. Uh-huh.

23 Q. -- can be held in fee simple?

24 A. No, I don't.

25 Q. Do you have an opinion as to whether tenants in

1 common can be held in fee simple?

2 A. Yes, it can.

3 Q. Let me ask you turn to Exhibit F that's in the --  
4 Smith Exhibit F, the package with the tabs. There we go.  
5 And ask if you have seen this document before. And just to  
6 make sure that you're on the right one, this should be a  
7 petition for condemnation?

8 A. No, I have not.

9 Q. Then let me direct your attention, as well as the  
10 Commission's, to paragraph 3 and ask you to read that into  
11 the record if you would.

12 A. After a diligent search of the records of real  
13 property in the Office of the Clerk of the County -- Clerk  
14 of San Juan County, New Mexico, it appears that Edwin  
15 Smith, LLC, a New Mexico Limited Liability Company and June  
16 Hill Walmsley are the recorded owners of the above-  
17 described quarter section of land and tenants in common,  
18 each hold an undivided one-half interest in an -- in the  
19 title to said property.

20 Q. Okay. I would correct that it does say recorded  
21 rather than recorded owners, but with that correction let  
22 me ask you if that -- if this opinion here in this petition  
23 for condemnation changes your opinion in any way about the  
24 title that Synergy is claiming from the Walmsleys?

25 A. None whatsoever.

1 MR. LARSON: That's the end of my questions.

2 CHAIRMAN FESMIRE: Mr. Bruce?

3 FURTHER EXAMINATION

4 BY MR. BRUCE:

5 Q. Are you aware that that petition only has to do  
6 with the surface estate?

7 A. Yes.

8 MR. BRUCE: That's all.

9 CHAIRMAN FESMIRE: Any further questions of this  
10 witness?

11 Well, Mr. Hegarty, thanks for the flying trip.  
12 We appreciate it.

13 Are the attorneys prepared to close?

14 Oh, I'm sorry, Mr. Hegarty, I have a question  
15 from the Commission --

16 THE WITNESS: Sure.

17 CHAIRMAN FESMIRE: -- I forgot to ask. Go ahead.

18 EXAMINATION

19 BY COMMISSIONER BAILEY:

20 Q. You mentioned that there are Dakota wells in this  
21 half of the section?

22 A. Yes.

23 Q. Who's the operator?

24 A. XTO Energy, Inc.

25 Q. Are the working interest owners the same?

1 A. Yes, they are.

2 Q. Because the proration unit is the same. Do you  
3 know how distribution is handled for those two Dakota  
4 wells?

5 A. I do not.

6 CHAIRMAN FESMIRE: Good point.

7 Q. (By Commissioner Bailey) Was there any  
8 limitation or any segregation on these transfers of  
9 interests, as far as you could see, for these documents  
10 that have been presented to the Commission? In other  
11 words, are we limited to the surface to the base of the  
12 Pictured Cliffs, or are these Dakota wells a potential  
13 factor in what we should be looking at today?

14 A. Well, I think -- it's our opinion, you know, that  
15 as far as the collection of title, and that's where the  
16 deeper wells would come into play, but that's, you know, a  
17 matter of the court's -- they're going to look at the title  
18 and be able to render an opinion. And if that's an  
19 appropriate thing to look at, I'm sure it will be brought  
20 up.

21 But as far as the drilling the well and the  
22 protection of correlative rights, we've got Burlington  
23 Resources, which doesn't just designate anyone to operate a  
24 well. There has to be a certain level of trust for the  
25 operation. They've agreed to allow us to drill this well.

1 We're prepared to risk our dollars -- I mean, this is money  
2 coming out of our pockets, and we're -- I think we've got a  
3 February 17th obligation date to drill, and we're prepared  
4 to meet that.

5           You know, I think from the State's standpoint you  
6 want to encourage the drilling of a well. If we're willing  
7 to risk our money to do that, I think we should be given  
8 the opportunity, because the State and everybody will  
9 benefit. There's not one person that won't benefit from us  
10 drilling that well and rendering that acreage productive,  
11 because it will enrich everybody, so...

12           To what degree will it enrich everybody? There  
13 seems to be a question, not in our minds, but I think  
14 there's other motivations for Mr. Smith and Mr. Walmsley  
15 doing -- going the route that they're going. And I made  
16 reference to one of them, the collection of royalty for 40  
17 years against an interest with no contractual right to do  
18 that. And we've asked some questions in that regard which  
19 have never been responded to, and I think that's one of the  
20 motivations for this, is if he can prevail, then it will  
21 somehow justify what he had no contractual right to do.  
22 And I don't think that the Hasselman heirs were  
23 sophisticated enough to know to ask the questions. But  
24 anyway, that's another point.

25           But the point is -- you know, as far as, you

1 know, whether those Dakota wells are a factor, I'm --  
2 certainly if once this court proceeding, I -- personally, I  
3 think this will never get to court, but if it does in fact  
4 go to court I'm sure that they'll bring it up if it's  
5 applicable.

6 COMMISSIONER BAILEY: That's all I have.

7 CHAIRMAN FESMIRE: Commissioner Olson, did you  
8 have any questions?

9 COMMISSIONER OLSON: No questions.

10 EXAMINATION

11 BY CHAIRMAN FESMIRE:

12 Q. Mr. Hegarty, I do want to take the opportunity to  
13 revisit a question that Mr. Larson asked you concerning  
14 joint tenancy and fee simple.

15 A. Uh-huh.

16 Q. Now you explained it a little bit earlier. It  
17 concerns me. Is it your contention that joint tenancy  
18 cannot be held in fee simple?

19 A. It's our contention, based upon the evidence that  
20 I'm looking at, that this joint -- there is no joint  
21 tenancy here. And the reasons because there's --

22 Q. But the question was hypothetical, not in the  
23 specific. Can a joint tenancy be held in fee simple?

24 A. I don't think it can, that's my opinion.

25 CHAIRMAN FESMIRE: Any other questions of this

1 witness?

2 Now thank you, Mr. Hegarty.

3 THE WITNESS: Okay.

4 CHAIRMAN FESMIRE: Mr. Bruce, are you prepared to  
5 close?

6 MR. BRUCE: Yes, sir. I'll be very brief, since  
7 I'm surprised my voice lasted this long.

8 Just a couple of issues.

9 Both Mr. Larson and Mr. Hall have indicated  
10 allegations of harm if the pooling goes forward. And the  
11 drilling of the well, I just don't see how a well's going  
12 to be drilled, regardless. The quicker you get production,  
13 the better for everyone. And if there are uncertain  
14 ownerships, then that will be determined by the District  
15 Court, not by the Division. And everyone will be bound by  
16 it who is a party to that quiet title decree.

17 Insofar as a right to drill, that arises from  
18 several things. Synergy owns an interest. First of all  
19 under the Robbins farmout, that rescission of farmout  
20 agreement which allegedly was signed by Joe Robbins, that's  
21 completely without merit. It is completely ineffective.  
22 Only if Mr. Hegarty on behalf of Synergy also signed that  
23 document would that farmout not be valid. So he has the  
24 right to drill.

25 Secondly, under the assignments he's taken from

1 the Hasselman heirs, people who have been in these wells,  
2 in the well, and have been receiving production for 50  
3 years, even after the deaths of all the alleged joint  
4 tenants, they have been paid. And at the very least, that  
5 gives Synergy a good faith claim to title on that end.

6 He also has the right to drill under the JOA  
7 signed by the Walmsley Trust, which agrees in its Exhibit A  
8 with the interest which Mr. Hegarty has testified to.

9 And finally, it has the right to drill under a  
10 JOA with Burlington. And we will send you the signature  
11 page or the entire JOA signed by Burlington. The well is  
12 being drilled on Burlington's lease. It's not going to  
13 allow that if it hasn't signed the JOA.

14 We think the title is clear. They've filed the  
15 quiet title action, but the fact of the matter is, Synergy  
16 has an interest. It therefore has the right to drill under  
17 the pooling statute, it proposed a well. And we would just  
18 simply ask that the Division's pooling order be affirmed.

19 Thank you.

20 CHAIRMAN FESMIRE: Mr. Larson?

21 MR. LARSON: Well, in closing I'd like to remind  
22 the Commission of a few points, one being that adverse  
23 possession cannot be had if it is not open and adverse.  
24 And it cannot be adverse in either of joint-tenancy or  
25 tenancy-in-common situations. So regardless of which one

1 you've got there, it is undisputed that these payments have  
2 been made for the last 40 or 50 years. It is now believed  
3 that those payments were made in mistake. But certainly  
4 not -- there has been no adverse possession, and there  
5 cannot be under law.

6 As to the rescission, the document is executory.  
7 On its face it only provides an ownership interest to  
8 Synergy upon completion of a well, and so there is a  
9 failure of consideration until the time a well is drilled.  
10 And they have not done so, and so it remains executory and  
11 is capable of being rescinded, and it has been.

12 CHAIRMAN FESMIRE: Mr. Larson, do you have a cite  
13 to that?

14 MR. LARSON: I don't, but I'll be happy to  
15 provide it at the conclusion of the hearing, or in the next  
16 day or so.

17 I also have to offer, if the Commission cares for  
18 it, a chronology of the titles that we have prepared. It's  
19 obviously going to be one-sided, but I do believe it is  
20 factually accurate, and we can offer it if it's of any  
21 assistance to the Commission. You can take it or leave it.

22 CHAIRMAN FESMIRE: Mr. Bruce, would you have an  
23 objection to a late exhibit?

24 MR. BRUCE: I'll -- You know, we both filed late  
25 deals, but I would object to it just because I haven't had

1 a chance to see it before.

2 MR. LARSON: And it also references there in the  
3 handwriting A, B, C, D to our Smith exhibits of the legal  
4 instruments.

5 CHAIRMAN FESMIRE: Well, if Mr. Bruce is going to  
6 object -- Why don't we ask again? Do you object to this --

7 MR. BRUCE: Yes, I object.

8 CHAIRMAN FESMIRE: Okay. I don't think that we  
9 can accept it --

10 MR. LARSON: Okay.

11 CHAIRMAN FESMIRE: -- over his objection, given  
12 that he hasn't had a chance to look at it, as much as I'd  
13 like to have it.

14 MR. LARSON: Its details are set out in more  
15 detail in our prior briefings. It's just a summary.

16 CHAIRMAN FESMIRE: Okay.

17 MR. LARSON: Finally, I would like to direct the  
18 Commission to the statute that -- and to 70-2-17, that  
19 affords each owner of property -- and that is record owner  
20 of property -- the opportunity to pool. And of course, our  
21 position is that Synergy is not the record owner of any  
22 property, or at least has questionable title through the  
23 Walmsley interest to owner of property.

24 Similarly, at 19.2.100.52 NMAC allows the record  
25 owner or operator to force pool, again if there's no

1 ownership interest. And if they cannot be an operator  
2 under the JOA because of a lack of interest, then they have  
3 no standing to force pool either.

4 Also, I'd like to again direct the Commission to  
5 the joint operating agreement, page 3, Article IV, B.1.(a),  
6 and the provision there that upon a failure of title there  
7 shall be no additional liability on its part to the other  
8 parties hereto by reason of such title failure.

9 So as to the statement that this well is going  
10 forward and it's a matter of who's going to get the money,  
11 well, if Synergy is determined not to have any title, at  
12 least pursuant to this agreement to which Mr. Walmsley  
13 signed, there's an argument that Synergy would have not  
14 liability to any of the others to return any funds that  
15 have been paid in excess of actual costs of drilling, for  
16 example. So there is certainly a risk there.

17 It appears that -- It's apparent that Synergy is  
18 going to drill -- Mr. Hegarty has stated so here today --  
19 even in the face of a title dispute as to its interest from  
20 the Walmsleys. Without reading or having read, apparently,  
21 the title report that we've had commissioned and the title  
22 summary that we've obtained, the title report by the land  
23 person, Mr. Hegarty testified that he did not himself  
24 examine the title records in San Juan County but had some,  
25 quote, girls in his office to take care of that.

1           Even in the face of a joint operating agreement  
2 that prohibits drilling until a title opinion has been  
3 given and accepted by the parties, and even in the risk of  
4 potentially having no interest from Robbins if the  
5 rescission agreement is effective, clearly something needs  
6 to be done to prohibit or to prevent the drilling of this  
7 well until this interest can be straightened out. And we  
8 would again ask that -- first that the order be rescinded,  
9 and absent that, that the order be at least stayed until an  
10 opinion by the 11th District can quiet the title, and in  
11 that interim that the funds committed for the drilling be  
12 returned.

13           CHAIRMAN FESMIRE: Okay. Mr. Larson, quick  
14 question. Is not the mutual exchange of promises  
15 sufficient in the farmout agreement to make this a non-  
16 executory agreement, that it is a completed agreement?

17           MR. LARSON: I do not believe so. I believe that  
18 in order for the property interest to transfer, Synergy  
19 does have to actually drill and complete a well.

20           CHAIRMAN FESMIRE: Mr. Hall?

21           MR. HALL: Mr. Chairman, Commission, since we've  
22 touched upon the issue of joint tenancy today I thought the  
23 Commission might find it helpful to have copies of the  
24 three joint tenancy statutes --

25           CHAIRMAN FESMIRE: Out of your property 101 book.

1 MR. HALL: -- only because I've printed them out,  
2 and I have attempted to highlight on all of them, I hope,  
3 the language that addresses the conclusivity of a  
4 conveyance in joint tenancy. So you may wish to take  
5 administrative notice of those three statutes as you wish.

6 Secondly, the Commission and the Division have  
7 said a number of times now that it will not try title and  
8 it will not cure title, will not examine title, will do no  
9 more than make a determination whether a party has a good-  
10 faith claim to title. I think that continues to be true  
11 here today. No one is asking you to cure title defects,  
12 obvious title defects, with the contested interests here.

13 Problem is, the compulsory pooling orders of the  
14 agency have the effect of affecting title interest, and at  
15 the very least the entitlement to production proceeds. So  
16 you can't simply say there is no effect on title  
17 absolutely.

18 Agreed, it's within the province of the District  
19 Court to cure title and to quiet title. But we have found  
20 now that Mr. Hegarty will not place into suspense any  
21 proceeds attributable to the contested interests, and that  
22 concerns me.

23 I don't know if, in fact, we might have some  
24 relief in the district court to change that. It's been my  
25 experience that district courts accord a significant amount

1 of weight to the decisions of this agency, and so my fear  
2 is that we'll get into a district court setting and we'll  
3 ask for some form of relief like that, and Synergy will  
4 simply point to the compulsory pooling order, and it says,  
5 you know, you have pooled these interests, you may recoup  
6 well costs out of them, you may recover the risk penalty as  
7 well. It seems to me that's inappropriate in this  
8 circumstance.

9           What I would ask, if the Commission proceeds to  
10 pool the interests, that the pooling order provide that the  
11 proceeds attributable to the contested interest, the 18 3/4  
12 percent, be placed into suspense until completion of the  
13 quiet title proceeding.

14           That's all I ask.

15           CHAIRMAN FESMIRE: Would this Commission have the  
16 authority to do that?

17           MR. HALL: I believe it has the discretion to do  
18 that, because it implicates in my view correlative rights.  
19 You're talking about pooling a real property interest,  
20 you're taking away from one party the right to drill on his  
21 interest. At the very least, subsumed within that  
22 authority, I think, is discretion to protect that interest  
23 to the extent you can. I don't think a provision like that  
24 would have the effect of quieting title, but I think it  
25 would keep the parties whole.

1           CHAIRMAN FESMIRE: Anything else?

2           MR. BROOKS: Mr. Chairman, I would like to ask a  
3 question of counsel.

4           CHAIRMAN FESMIRE: Surely, sir.

5           MR. BROOKS: I assume probably the answer is  
6 going to be no, because I assume you would have told us if  
7 it had been otherwise, but the only briefing that has in  
8 effect been tendered is the title opinion that was offered  
9 in evidence on behalf of Smith, L.L.C., from Montgomery and  
10 Andrews, and it's been admitted in evidence, but  
11 conditionally, and I'm not sure that it would be proper for  
12 the Commission to consider it under the circumstances, and  
13 it states that there's no New Mexico case in point on the  
14 key issue. And I just wanted to ask counsel if any counsel  
15 is aware of any court decisions in any jurisdiction that  
16 ought to be considered before the Commission makes a  
17 decision on this case.

18           MS. CHAPPELLE: Yes, Commissioners and Mr.  
19 Brooks, we did conduct research in our office on that  
20 point. I did it myself actually, and I'd be more than  
21 happy to submit a brief to that point.

22           MR. BROOKS: Okay. Well, I think the Commission  
23 will decide when it deliberates whether it wants to ask for  
24 a briefing or not. I just wanted to know if anybody has  
25 anything they can submit right now. It's really not my

1 position as counsel for the Commission to ask for a brief  
2 until the Commission has deliberated on the issue, so I  
3 won't go further with the matter right now.

4 MS. CHAPPELLE: Unfortunately, I don't have those  
5 cases with me --

6 MR. BROOKS: Okay.

7 MS. CHAPPELLE: -- but the research I did do did  
8 support our position.

9 MR. BROOKS: Okay.

10 CHAIRMAN FESMIRE: With that, the Chair would  
11 entertain a motion to go into executive session to  
12 deliberate the issue. Is there a motion to that effect?

13 CHAIRMAN FESMIRE: So move.

14 COMMISSIONER OLSON: Second.

15 CHAIRMAN FESMIRE: All those in favor?

16 COMMISSIONER BAILEY: Aye.

17 COMMISSIONER OLSON: Aye.

18 CHAIRMAN FESMIRE: Let the record reflect that at  
19 3:05 p.m. the counsel -- the Commission went into executive  
20 session for the sole purpose of deliberating in the cause  
21 now before it.

22 (Off the record at 3:05 p.m.)

23 (The following proceedings had at 3:34 p.m.)

24 CHAIRMAN FESMIRE: Okay, let the record reflect  
25 that at 3:34 the Commission reconvened. The Commission had

1 been meeting in executive session for the sole purpose of  
2 discussing the evidence and deliberating on the case before  
3 it, Cause Number 13,486.

4 After that discussion and deliberation, the  
5 Commission finds on the evidence before it that Synergy is  
6 an owner entitled to force pool other owners in the unit  
7 and will be granted a force pooling order for that unit.  
8 The Commission does not have jurisdiction to determine  
9 title, and this decision does not attempt to decide any  
10 title dispute.

11 At this time the Chair would accept a motion to  
12 grant the order.

13 COMMISSIONER BAILEY: I move we grant the order.

14 COMMISSIONER OLSON: Second.

15 CHAIRMAN FESMIRE: All those in favor?

16 COMMISSIONER BAILEY: Aye.

17 COMMISSIONER OLSON: Aye.

18 CHAIRMAN FESMIRE: Let the record reflect that  
19 the motion to grant the order has passed, and we direct  
20 Counsel Brooks to draft an order conforming to the  
21 counsel's -- to the Commission's decision.

22 Is there any further evidence before the  
23 Commission today -- any further business before the  
24 Commission today?

25 With that, the Chair would entertain a motion to

1 adjourn.

2 COMMISSIONER BAILEY: I move we adjourn.

3 COMMISSIONER OLSON: Second.

4 CHAIRMAN FESMIRE: All those in favor?

5 COMMISSIONER BAILEY: Aye.

6 COMMISSIONER OLSON: Aye.

7 CHAIRMAN FESMIRE: Let the record reflect that  
8 the February 9th, 2006, meeting of the New Mexico Oil  
9 Conservation Commission adjourned at 3:35 p.m.

10 (Thereupon, these proceedings were concluded at  
11 3:35 p.m.)

12 \* \* \*

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATE OF REPORTER

STATE OF NEW MEXICO )  
 ) SS.  
 COUNTY OF SANTA FE )

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL February 12th, 2006.



STEVEN T. BRENNER  
 CCR No. 7

My commission expires: October 16th, 2006