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

IN THE MATTER OF THE APPLICATION
SYNERGY OPERATING, LLC FOR
COMPULSORY POOLING,
SAN JUAN COUNTY, NEW MEXICO

CASE NO. 13663

2006 JUN 29 PM 4 45

POST-HEARING MEMORANDUM
OF
JERRY WALMSLEY, TRUSTEE,
JUNE H. WALMSLEY TRUST

Jerry Walmsley, Trustee, Bypass Trust U/W June H. Walmsley, ("Trust"), provides this memorandum of authority with respect to the request that any order of the Division entered in this matter pooling unjoined interests require that revenues attributable to the interests claimed by the Trust be placed in suspense by the well operator pending resolution of the separate quiet title litigation pending in the 11th Judicial District Court.

BACKGROUND SUMMARY

The Walmsley Trust is the undisputed owner of a 12.5% interest in the SW/4 of Section 8, T29N, R11W, which Synergy proposes to consolidate with the W/2 of said Section 8 and dedicate to the Duff 29-11-8 Well No. 104 Basin Fruitland Coal formation well drilled in the NW/4 of the Section and the No. 105 infill well it proposes to drill in the SW/4 of the same section. In the 320-acre proration unit, the Walmsley Trust owns a 6.25% undisputed interest, proportionately reduced. This interest was committed to the initial well under Synergy's Joint Operating Agreement.

In addition to the 6.25% interest in the unit reflected on the Exhibit "A" to the Joint Operating Agreement, the Walmsley Trust claims ownership of 100% of the 18.75% attributed to Synergy Operating, LLC on the exhibit.[1]

The Walmsley Trust interests derive from that Warranty Deed dated April 28, 1951 from Earl Kouns to Margaret Hasselman Jones, Julia Hasselman Keller, Mae Hasselman Kouns, and Jenny Hasselman Hill, "*as Joint Tenants*" and covering the interest in the subject lands. That 1951 conveyance was followed by a Warranty Deed dated September 8, 1981 whereby Jenny Hasselman Hill, the last of the surviving joint tenants and then the owner of 100% of the joint tenancy interest conveyed the property to June Hill Walmsley. As a result of the succession of interests, June Hill Walmsley became the sole owner of a 1/2 interest in the SW/4, which interest was subsequently conveyed to the Walmsley Trust.

Synergy has taken the position that a 1958 Quiet Title Decree somehow extinguished the joint tenancy and transformed it into a tenancy in common. Synergy proceeded to acquire assignments of the mineral interests from the heirs of Julia Hasselman Keller, Mae Hasselman Kouns and Jenny Hasselman Hill, which together comprise a putative 25% interest in the SW/4 of Section 8.

At the first Division Examiner Hearing for the compulsory pooling for the initial well, Synergy represented that it was unable to locate any of the heirs of Margaret Hasselman Jones and therefore proceeded to force pool that particular assumed interest by publication pursuant to Rule 1207-B. As a consequence, the interest attributed to Margaret Hasselman Jones was pooled under Order No. R-12376 at the statutorily presumed 7/8^{ths} working interest and 1/8th royalty interest rates pursuant to NMSA 1978 § 70-2-17C.

[1] The 18.75% interest would include the 6.25% Margaret Hasselman Jones interest.

At the first hearing, the Walmsley Trust made a *prima facie* showing of a colorable claim to title to the remaining interests derived from Margaret Hasselman Jones, Julia Hasselman Keller, Mae Hasselman Kouns, and Jenny Hasselman Hill, based on instruments filed of record in San Juan County.

At the initial compulsory pooling hearing, the Walmsley Trust explained that a compulsory pooling order would allow Synergy to recoup well costs and the risk penalty out of the proceeds attributable to a portion of the mineral interest claimed by the Trust. The Walmsley Trust argued that to permit Synergy to recoup those costs and the risk penalty would be a *dejure* determination of the Walmsley Trust's claim to title and its concomitant entitlement to production proceeds without the risk penalty. Further the Walmsley Trust would be effectively deprived of the opportunity to elect to participate or go non-consent with respect to the force-pooled interests. Walmsley would also be effectively deprived of the opportunity to make an election on the infill well. Synergy would accordingly reap an unfair windfall with respect to the risk penalty recovered from the disputed interest. Once those revenues are diverted into Synergy's coffers under the authority of the compulsory pooling order, their recovery becomes problematic in the event Walmsley's title is quieted against the claims of Synergy.

For these reasons, the Walmsley Trust argues that the issuance of a compulsory pooling order providing for the recovery of costs and the risk penalty under these particular circumstances reaches too far and intrudes into the equitable and statutory quiet title powers of the District Court. Accordingly, the Trust's request that the Division's order provide for the funds attributable to the disputed interest be placed in suspense is "just and reasonable" and is within the Division's statutory authority, both express and implied.

The Division has the Authority to Grant the Relief Requested

The jurisdiction and the authority of the Division to grant the relief sought by the Application in this matter are clearly established in the Oil and Gas Act. NMSA 1978 §70-2-1 et seq. The Division's primary statutory authority for compulsory pooling, specifically provides, in part:

> "...All orders effecting such pooling shall be made after notice and hearing, and shall be upon such terms and conditions *as are just and reasonable*... ." NMSA 1978 §70-2-17 C (emphasis added).

§70-2-11 of the Oil and Gas Act is also a broad grant of authority. That section provides:

> "(a.) The Division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the Division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof."[2]

The exercise of authority under this section furthers the purposes of §70-2-17 C providing for the issuance of pooling orders on terms and conditions "as are just and reasonable". *Id.*

We cannot locate a precedent Division order that is exactly on-point. However, there is no order known to us standing for the proposition that the Division is without the authority to grant the relief that is requested here. In addition, there are a number of precedent orders demonstrating the reach of the Division's authority to provide for "just and reasonable" terms and conditions in its compulsory pooling orders, specifically where the participation in well proceeds is involved.

In one exemplary case, the agency was asked to exercise its authority to reduce a royalty on an interest that was force pooled. It was an extraordinary request for relief and the owner of the override challenged the agency's authority to do so. In its order granting the request, the

agency specifically cited to Section 70-2-11 of the Oil and Gas Act as authority supporting the Agency's broad construction of its powers to act as "cumulative and not exclusive". *Order No. R-11573(B), Case No. 12601; Application of Bettis, Boyle and Stovall to Reopen Compulsory Pooling Order No. R-11573*). The Commission was openly offended that the owner of an unleased interest would lease his acreage to an affiliate company for a 27.5% royalty shortly after the interest owners received notice of the operator's compulsory pooling application. In that case, the Commission ordered that the interest be treated as an unleased mineral interest with a simple $1/8^{th}$ royalty interest. As further authority for its actions, the Commission cited to precedent established by the Oklahoma Corporation Commission in *Patterson v. Stanolind Oil & Gas Co.*, 182 Oklahoma 155, 77 P.2d 83 (Okla. 1938).

In Order No. R-7335 (*Case No. 7922; Application of Rio Pecos Corporation, Inc. For Compulsory Pooling*) the NMOCD determined that a 50% overriding royalty interest on a 40 acre tract dedicated to a 320 acre unit would cause the operator and the other interest owners to bear an unreasonable cost burden. Accordingly, the Division ordered the voluntary reduction of the overriding royalty to a reasonable figure within a reasonable time or otherwise the 320 acre unit would be pooled without that particular 40 acre tract.

In Case No. 8859; *Application of Robert E. Chandler Corporation for an Amendment to Division Order No. R-8047*; the Commission provided that risk penalty charges were to be recovered as well costs before the owners of a net profits interest could participate in production proceeds under a compulsory pooling order. (*Order No. R-8047-C).*

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[2] See, *also*, NMSA 1978, § 70-2-6; "...[The Division] shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act ...."

These cases, in the context of the provisions of the compulsory pooling statute allowing the agency to craft orders with terms and conditions "as are just and reasonable", establish the Division's broad authority to grant the relief requested by the Trust in this case.

Respectfully submitted,

MILLER STRATVERT P.A.

By: _____

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was faxed to counsel of record on the 26 day of August 2005, as follows:

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