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

2006 APR 12 P 1:

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

Case No. 13,486
Order No. R-12376-C

JOINT APPLICATION FOR RECONSIDERATION BEFORE THE OIL CONSERVATION COMMISSION AND FOR STAY

Jerry Walmsley, Trustee of the Bypass Trust under the will of June H. Walmsley, deceased, (Walmsley), Edwin Smith, LLC, a New Mexico limited liability company (Smith), and Joseph Robbins (Robbins) parties of record in the above-captioned matter and adversely affected by Order of the Oil Conservation Commission, R-12376-C (the Order) entered on March 23, 2006, approving Synergy's application to pool all interests in the W/2 of Section 8, Township 29 North, Range 12 West, NMPM, in San Juan County, New Mexico, to form a 320-acre compulsory-pooled gas spacing unit (the Property), by and through undersigned counsel and pursuant to 19.15.14.1223 NMAC, hereby request the Oil Conservation Commission (the Commission) to reconsider the Order and impose a stay prohibiting Synergy from producing the Duff 104 Well until a reconsideration hearing is held, for the following reasons:

Introduction:

The Commission erred when it concluded that Synergy Operating, LLC (Synergy) had a right to drill a well on the proposed unit and named Synergy the Operator of the proposed unit. *See* Order at 4-5, ¶¶ 19-21. The Commission erroneously concluded it

did not have to decide whether Synergy has a right to drill pursuant to the interests Synergy claims to derive from the Heirs of Julia Hasselman Keller, deceased, and from the heirs of Heirs of May Hasselman Kouns, deceased, because: (1) Synergy's right to drill is established by evidence that it holds a farmout agreement (the Farmout) from Joseph C. Robbins (Robbins), and (2) that it is the named operator in a joint operating agreement executed by both Walmsley and Burlington Resources Oil & Gas Co (the JOA).

The Commission's conclusion ignores the fact that, as discussed in more detail herein, Robbins validly rescinded the Farmout and that previously admitted evidence was sufficient to authenticate the Notice of Rescission. Alternatively, an affidavit acknowledged by a notary public authenticating Robbins' Notice of Rescission is attached hereto as "Exhibit 1." Further, the JOA does not grant Synergy any possessory interest in the subject property and, therefore, does not afford Synergy standing to force pool. Synergy failed to provide substantial evidence proving it has possessory title in the subject property and, at best, has only colorable title to the subject property. Colorable title, without substantial evidence proving title, is insufficient to establish standing to force pool. *Res. Co. v. Oklahoma Corp. Comm'n,* 859 P.2d 1118 (Okla. Civ. App. 1993).

Additionally at the March 30, 2006, hearing on Synergy's Application for compulsory pooling to include a second well, the Duff 105 Well, Case No. 13663, (Synergy's Second Force Pool Application) Hegarty admitted that he found the identity and location of the previously unknown heirs previously force-pooled by Order of the Division, Case No. 13486, Order No. R-12376 (the Division's Order), which was upheld

by the Commission's Order. In that proceeding, Synergy represented to the Division that it sought to pool a 12.5% interest in the SW/4 of Section 8 owned by David F. Jones, Heir of Margaret H. Jones. Synergy further stated at that hearing that, despite its efforts, David F. Jones could not be located. Pursuant to Synergy's representations, the hearing examiner pooled "all uncommitted mineral interests" in the subject property. The Division's Order, at p. 4. The Commission's Order mirrored this conclusion. *See* Order at p. 6. Since David F. Jones was not locatable, his interest was uncommitted and therefore pooled by the Division's and Commission's respective Orders.

However, Hegarty stated at the March 30, 2006, hearing that he was no longer seeking to force pool the previously unknown interests, had not given them notice of either force pool proceeding and, instead, was trying to buy-out their purported interests. Hegarty refused to disclose their identity or addresses. *See* Testimony of March 30, 2006, Hearing, pp. 17-31, 36, 38, attached as "Exhibit 2." As a result of this and other Notice issues, Synergy's Second Force Pool Application was continued.

As discussed in more detail herein, absent consolidation of all interests in the Unit, whether by communitization or pooling, the well may not be produced. Synergy has intentionally ignored its obligation to secure voluntary unitization from the heirs of Margaret H. Jones and has, instead, withheld valuable information about these proceedings from the heirs so that Synergy can acquire their purported interests. A rehearing on this matter should therefore be held and a stay on production imposed to afford these previously unknown persons notice and an opportunity to participate. *See Johnson v. New Mexico Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 30, 127 N.M. 120, 978 P.2d 327 (where applicant had actual knowledge of identity and address of

interested party to application and where constructive notice was provided, failure to provide actual notice to such party about the pendency of the application rendered the Commission's approval of the application void).

The Commission should reconsider its Order by rehearing this matter and imposing a stay prohibiting Synergy from producing the Duff 104 Well until this matter is reheard because Synergy has not produced sufficient evidence to prove Synergy owns a possessory interest in the subject property and Synergy failed to consolidate all the interests in the Unit.

Robbins' Rescission was Validly Admitted as Evidence:

The Commission concluded it could disregard the fact that Robbins has rescinded the Farmout because Robbins' Notice of Rescission was not a sworn statement acknowledged by a notary public. There is no legal authority requiring such a notarization and the Commission erred in so finding. Rule 11-901 NMRA provides that evidence is admissible if the trier of fact can determine that the evidence submitted is authentic by comparing such evidence to previously submitted admissible evidence or that the evidence, when viewed in conjunction with the circumstances of the matter, is authentic.[1]

Authenticated documents bearing Robbins' signature have been entered into the record in this case and could be compared with Robbins' signature on the Notice of

[1] Rule 11-901 provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims... By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: ....(3) **Comparison by trier or expert witness.** Comparison by the trier of fact ... with specimens which have been authenticated. (4) **Distinctive characteristic and the like.** Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

Rescission. First, the Farmout has been entered into the record by Synergy. Even though the Farmout is not a notarized document, and therefore should not have been considered as having superior status or authenticity, than the (then) similarly un-notarized Rescission, the Commission nonetheless relied upon it to conclude that it gave Synergy sufficient standing to force pool. Second, the affidavit filed by Robbins on July 28, 2005, and submitted as part of Smith's Prehearing Statement prior to the subject hearing, contains Robbins' signature, which was acknowledged by a notary public. These documents were sufficient to provide the Commission with verified samples for comparison to determine that Robbins' signature on the Notice of Rescission was consistent with Robbins' signature on the Farmout and July 28, 2005, affidavit.

Additionally, the July 28, 2005, affidavit clearly states that Robbins intended to rescind the Farmout if Synergy could not prove it had title to the interests it claimed gave it standing to force pool. When an independent title opinion by a reputable attorney concluded that Synergy had no title to the property in question, Robbins carried through on his stated intent to rescind by providing Synergy and the Commission with the Notice of Rescission. These events were sufficient to enable the Commission to determine that, in conjunction with the circumstances, Robbins' Notice of Rescission was authentic.

Alternatively, an affidavit acknowledged by a notary public authenticating Robbins' Notice of Rescission is attached as "Exhibit 1." Additionally, on March 30, 2006, in a hearing before Hearing Examiner Catanach on Synergy's Second Force Pool Application, Patrick Hegarty, principal of Synergy, (Hegarty) testified under oath that he

had a telephone conversation with Robbins in which Robbins confirmed directly to Hegarty that Robbins had rescinded the Farmout. *See* Transcript of March 30, 2006 Hearing, p. 35, attached as "Exhibit 3". Therefore, the Notice of Rescission is admissible evidence because: Robbins' signature on the Notice of Rescission is authentic when compared with other authenticated documents; Robbins previously communicated his intent to rescind the Farmout by affidavit; an acknowledged affidavit by Robbins is submitted hereto authenticating the Notice of Rescission; and Hegarty admitted under oath that Robbins told Hegarty directly that Robbins rescinded the Farmout.

Robbins Validly Rescinded the Farmout:

Robbins Can Rescind the Farmout at Any Time Prior to Synergy's Performance Under Such Agreement Without Synergy's Consent

A unilateral contract is a contract in which an offeror makes a promise in exchange for the performance by the offeree, rather than an exchange of mutual promises as in a bilateral contract. *Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 627, 916 P.2d 822, 827 (1996). Likewise, a farmout agreement is a unilateral contract if the contract provides that a well driller will obtain an interest in the subject well from the subject property owner upon the driller's successful drilling of a well. *Id.*, (Farmout agreement was a unilateral contract in which offeror made promise in exchange, not for reciprocal promise by offeree, but for performance of drilling test well). Here, under the Farmout, Synergy would obtain an interest in the proposed Duff 104 Well from Robbins only if, and when, Synergy successfully drilled the well. Since there was no consideration for, or acceptance of, Robbins' transfer of interest to Synergy

unless Synergy successfully drilled a well (performance), the Farmout is a unilateral contract.

Unilateral contracts can be rescinded any time before performance occurs without permission from the other party. *Id.*, (In a unilateral contract, offeree accepts offer by undertaking requested performance; generally, offeror is free to revoke offer before acceptance) (citing 1 Joseph M. Perillo, *Corbin on Contracts*, § 1.23 and 2.18). Robbins gave notice to Synergy both in writing and orally that Robbins revoked the Farmout on January 26, 2006. Synergy did not drill the subject well until after February 13, 2006. Robbins, therefore, validly rescinded the Farmout because he did so (with written notice to Synergy's attorney and directly by telephone) prior to Synergy's drilling of the Duff 104 Well.

Robbins Can Rescind the Farmout Based on Fraudulent Misrepresentations made by Hegarty Upon Which Robbins Relied and Which Induced Robbins to Enter the Farmout Letter Agreement

Contracts, whether unilateral or bilateral, can be rescinded if a party is induced into entering a contract by fraudulent misrepresentations. *Agnew v. Landers*, 59 N.M. 54, 66, 278 P.2d 970, 977 (1955) (affirming judgment of district court that buyer could rescind deed conveying real property where the seller concealed confusion regarding title to other property involved in transaction); *Baum v. Great Western Cities, Inc. of New Mexico*, 703 F.2d 1197, 1205-06 (10th Cir. 1983) (fraud or misrepresentation employed by one party to induce another party to enter a contract is sufficient to invoke the equitable doctrine of rescission). Additionally, co-owners of mineral interests in a particular property owe each other a duty to convey the whole truth as discussed, particularly where one volunteers to convey information that may influence the conduct

of the other party. *Uptegraft v. Dome Petroleum Corp.*, 764 P.2d 1350, 1353 (Okla. 1988) (one conveying false impression by disclosure of some facts and concealment of others is guilty of fraud even though his statement is true as far as it goes, since concealment is in effect a false representation that what is disclosed is the whole truth).

Here, Hegarty testified at the February 9, 2006, OCD hearing that, as an "expert landman," he had reviewed the chain of title and found a deed raising questions regarding Synergy's chain of title. Transcript of February 9, 2006 Hearing, p 91; Transcript of June 16, 2005 Hearing, p 27, attached as "Exhibit 4." When Hegarty represented to Robbins that he owned mineral interests in the Property, he did not disclose that a deed recorded earlier than Synergy's deed potentially divested Synergy of its interest in the Property. Robbins Affidavit, dated July 29, 2005, attached as "Exhibit 5." Synergy further emphatically assured Robbins that it had standing to force pool and would do so. *Id.* Robbins, therefore, was induced to enter the Farmout under the misrepresentation that if he did not enter the Farmout he would either have to voluntarily pay a portion of the well costs, which he could not afford, or pay an even steeper force pool penalty. *Id.*

Therefore, in addition to being entitled to rescind the Farmout prior to performance by Synergy, Robbins was also justified in rescinding the Farmout based on Synergy's misrepresentations. Since Robbins validly rescinded the Farmout, Synergy cannot rely on the Farmout to claim the prerequisite ownership interest necessary to force pool the Property.

Synergy's Motion to Force Pool Should be Denied Because Synergy Has Not Provided Sufficient Evidence to Establish a Possessory Interest:

By the Commission's own admission, determining whether Synergy has a right to drill on the proposed unit is a prerequisite to the exercise of the Commission's compulsory pooling power under NMSA 1978, § 70-2-17.C. In New Mexico, a person does not have the right to drill unless they own a present possessory interest in the subject property. *See* NMSA 1978, § 70-7-5 (in order to file a pooling application, applicant must be a working interest owner) and § 70-7-4 (defines a working interest owner as having a possessory interest in unitized substances). Further, such interest cannot be merely colorable but must, instead, be supported by substantial evidence. *Samson Resources Co. v. Oklahoma Corp. Comm'n,* 859 P.2d 1118, 1121 (Okla. Civ. App. 1993). Otherwise, as here, "[i]f an applicant need only show 'color of title' ... then that would mean an applicant would not have to own any minerals or have a right to drill but just present evidence that they might." *Id.*

Each of the conclusions reached by the Commission in the Order rely on the Commission's refusal to accept as evidence the Notice of Rescission executed by Robbins. As established *supra*, the Notice of Rescission is admissible evidence and cannot be ignored by the Commission. Since the Commission cannot ignore the validity of the Notice of Rescission, it must recognize that the Notice of Rescission puts Synergy's claim to possessory interest in the subject property into question.

Further, Smith and Walmsley have presented substantial evidence that Synergy does not own an undivided 25% mineral interest in the SW/4 of Section 8, derived from the Heirs of Julia Hasselman Keller, deceased (12.5%) and from the heirs of Heirs of May Hasselman Kouns, deceased (12.5%). During the hearing, Synergy could not

adequately explain why it had not obtained an independent title opinion supporting its purported interest, in spite of its earlier representations that it would provide a formal title opinion to the Commission, and despite the JOA requirement that it must obtain a title opinion before drilling any wells on the subject property. To the contrary, Smith and Walmsley have procured an independent title opinion, which is supported by a quiet title judgment, all known recorded deeds, and case law, establishing that Synergy does not own it's claimed title as follows:

A previous quiet title action had been filed in 1957 in the Eleventh Judicial District (Cause No. 5994). A title report was prepared at that time by San Juan County Abstract & Title Company. The following documents were discovered in the first title search:

1. Warranty Deed conveying undivided one-half interest in the Property from Margaret Hasselman Jones, Julia Hasselman Keller, May Hasselman Kouns, and Jennie Hasselman Hill to Earl Kouns, on April 28, 1951.

2. Warranty Deed conveying the same undivided one-half interest in the Property from Earl Kouns to Margaret Hasselman Jones, Julia Hasselman Keller, May Hasselman Kouns, and Jennie Hasselman Hill as joint tenants with a right of survivorship, on April 28, 1951.

On August 19, 1958, a Judgment was entered in Cause No. 5994 confirming ownership of the same undivided one-half interest in the Property by Margaret Hasselman Jones, Julia Hasselman Keller, May Hasselman Kouns, and Jennie Hasselman Hill. The court order, while silent as to the type of tenancy, did not effect a conveyance and did not change the fact that the owners owned the property in joint tenancy. Generally, once property has been conveyed by deed, the property must be

"re-conveyed" before the law will recognize another person as having acquired title. *Gonzales v. Gonzales*, 166 N.M. 838, 845, 867 P.2d 1220, 1227 (1993). Further, the only way for Synergy to have validly obtained an interest in the Property is if the 1951 deed was transformed from joint tenancy to tenancy in common. There are no documents to suggest that joint tenancy was ever severed.

Prior to filing the 2006 quiet title action, Walmsley, Smith, and Robbins hired a professional landman (Tammy Sloan Smith) to research the San Juan County Real Property Records from the date of the previous quiet title ruling, August 19, 1958, to the present. The documents obtained by Ms. Sloan Smith were then provided to Nancy M. King of Montgomery & Andrews, for analysis. After analyzing the documents, Ms. King concluded the following:

In 1974, Jennie Hasselman Hill became the last remaining joint tenant to the 1951 joint tenancy deed when her remaining surviving sister died. Her interest was passed to June Hill Walmsley by a Warranty Deed conveying the same undivided one-half interest in the Property from Jennie Hasselman Hill, as the surviving joint tenant of Margaret Hasselman Jones, Julia Hasselman Keller, May Hasselman Kouns, and Jennie Hasselman Hill, to June Hill Walmsley, dated September 8, 1981, and recorded on September 16, 1981. June Hill Walmsley's interest passed to her heirs through the probate of her will and is now held by J. Truman Walmsley, Trustee of the Bypass Trust under the Will of June H. Walmsley, Deceased, dated April 7, 1992.

Synergy bases its claimed interest in the Property on the Assignments made by the heirs of joint tenants May Hasselman Kouns and Julia Hasselman Keller to Synergy in October and November of 2004. The title opinion confirms that May Hasselman

Kouns and Julia Hasselman Keller owned their interests in the Property as joint tenants with Jennie Hasselman Hill and Margaret Hasselman Jones. May Hasselman Kouns and Julia Hasselman Keller (and Margaret Hasselman Jones) died before Jennie Hasselman Hill. The joint interests of these three passed to Jennie Hasselman Hill upon their respective deaths. Therefore, by operation of law, the heirs of May Hasselman Kouns and Julia Hasselman Keller had no interest in the Property to convey to Synergy.

Thus, the assignments upon which Synergy bases its claimed interest in the Property are invalid because the assignors never held any title in the Property, including at the time they granted the assignments to Synergy.

Further, any interest Synergy claimed through the Farmout with Robbins has been extinguished pursuant to the Notice of Rescission.

Finally, Smith is the operator of an existing oil well on the Property. Smith intends to drill a Fruitland gas well in the same area in which Synergy has wrongfully attempted to obtain an interest. The remaining interest owners in the Property, Walmsley and Robbins, have communicated their intent to voluntarily participate in the drilling of that well by Smith.

Synergy Failed to Disclose the Title Dispute to Burlington:

When Smith contacted Burlington to communicate his own intent to drill a Fruitland gas well and to obtain Burlington's voluntarily participation in the proposed well, Smith learned that Burlington was unaware of the dispute as to Synergy's claimed interest in the Property. Upon full disclosure of the title dispute and the existence of the Quiet Title action, Burlington indicated that Synergy could not continue as a party to the

JOA and that it intended to seek to be substituted as operator of the 104 well in place of Synergy. Burlington further indicated that it had not been provided with an AFE or other documentation about the 105 well. Burlington also indicated that, while it would consider voluntarily participating with Smith in the 105 well, it might also want to drill and operate that well. Should Burlington decide to drill the 105 well, Smith, Robbins and Walmsley would likely participate voluntarily.

Thus, no forced pooling order is required, warranted, or appropriate. Synergy's attempted hijacking of an interest in the Property in order to force-pool is inappropriate and the Commission should not facilitate that effort by granting Synergy an order to drill.

Smith, Walmsley, and Robbins' correlative rights must be protected. Synergy has stated that it plans to begin producing the 104 well and drilling the 105 well immediately. Walmsley, Robbins, and Smith, along with the unidentified heirs of Margaret H. Jones will suffer gross negative consequences if Synergy is allowed to do so. If Synergy begins drilling based on the present order, Smith, Walmsley, and Robbins will be unable to proceed with drilling operations on their own terms.

Synergy's position in this proceeding appears to be at odds with its normal course of proceedings. For example, in Case 13,662, Hegarty testified that prudent practices dictate that everyone in a chain of title should be notified of a pooling proceeding and further that no operator in its right mind would drill without certainty of title. Transcript of March 30, 2006 Hearing in Case 13,662, pp 16-23; *see also* Transcript of March 30, 2006 Hearing Transcript in this case, p 22, discussion of same by Derek Larson, attached as "Exhibit 6." Here it does not appear that everyone has

been notified and there is no certainty of title in this case, particularly where a quiet title complaint has been filed.

Finally, regardless of whether the non-operators of the JOA have not selected a successor operator, if Synergy has no possessory interest in the subject property it has no standing to force pool. The JOA does not give Synergy a possessory interest. Here, Synergy fails to provide substantial evidence that it has a possessory interest or right to drill in the subject property. Synergy, therefore, has no standing to force pool.

Previously Unknown Interests that were Force Pooled by the Order Have Been Found by Synergy but Synergy has Elected Not to Notify the Unknown Interest Holders of the Compulsory Pooling Proceedings of Their Right to Participate

As indicated above, during the course of the hearing on March 30, 2006, on Synergy Operating LLC's Application for Compulsory Pooling for its Duff 105 infill well, Synergy's principal, Patrick Hegarty, indicated that Synergy was not seeking to pool the interests attributable by it to the heirs of Margaret Hasselman Jones. Previously, in conjunction with the original compulsory pooling proceeding for the 104 well, Mr. Hegarty's testimony was to the effect that heirs of Margaret Hasselman Jones could not be located. Therefore, Synergy provided notice to those unlocatable heirs by way of publication of a legal advertisement in the *Farmington Daily Times* on April 20, 2005, and again on June 2, 2005. (See Applicant's Exhibit No. 6 from both the Examiner hearings and Commission hearing in Case No. 13486).

On March 30, 2006, in Case No. 13663, Mr. Hegarty testified that the apparent heirs of Margaret Hasselman Jones had been located and that he had been in communication with them, but that no well proposal or offer to lease had been sent to them. In response to questions on cross-examination however, Mr. Hegarty refused to

disclose the names of those apparent heirs or where they might be contacted. Mr. Hegarty then indicated that because the heirs had been located, Synergy was not seeking to force pool their interest. It was further stated for the record by Synergy's counsel during the course of the hearing on March 30, 2006, that the interests attributable to Margaret Hasselman Jones or her heirs were not pooled by virtue of the Division's or Commission's respective Orders even though each order clearly states that all uncommitted interests were pooled. *See* Transcript, March 30, 2006 Hearing, p. 66, attached as "Exhibit 7".

The hearing examiner expressed concern about this development and inquired of counsel whether the compulsory pooling proceeding in Case No. 13663 was premature. Because of the questions that arose due to the failure to include the Margaret Hasselman Jones' heirs in the compulsory pooling proceeding or whether they had been notified, Synergy agreed to continue the case for six weeks rather than request that the examiner take the case under advisement for rendition of an order.

The implications of this development are significant and give further impetus for the Commission's reconsideration of its Order. The failure to obtain the joinder of the claimants to the Margaret Hasselman Jones interests also provides ample basis for the request for a stay.

On April 7, 2006, it was learned that on April 3 and 4, 2006, Synergy had completed the Duff 29-11-8, No. 104 well. *See* BLM Sundry Notice dated April 7, 2006, attached as "Exhibit 8". It further appears that Synergy may be ready to place the 104 well into production and commence sales. This would be inappropriate for Synergy to

do in view of the fact that the Margaret Hasselman Jones interests are no longer subject to the compulsory orders of the Division and the Commission.

Additionally, in the March 30, 2006 Hearing, Synergy's counsel erroneously represented that the New Mexico Supreme Court held that the pooling statute can be ignored and an operator can carry working interest owners without pooling them. Exhibit 7. The case referred to by Synergy's counsel is *Bellet v. Grynberg*, 114 N.M. 690, 845 P.2d 784 (1992). Reliance on this case by Synergy's counsel is misplaced because the dispositive issue before the Supreme Court was whether prejudgment interest was applicable to the trial court's finding that Bellet owed a percentage of oil well operation costs. In the opinion, there is no language to suggest that compliance with the pooling statute was an issue before the court.

Johnson v. New Mexico Oil Conservation Comm'n, 1999-NMSC-021, 127 N.M. 120, 978 P.2d 327, however, holds that actual notice of public hearings before the Division or Commission, not just constructive notice, must be given to known persons who own a property interest in the subject matter of the hearing; and, further that if actual notice is not given and an order is rendered pursuant to such hearing, then such order is void. *Id.*, at ¶ 30. In *Johnson*, the applicant requested the Commission amend its rules to increase spacing requirements for deep wildcat gas wells. Neither the Commission, nor the applicant provided notice to Johnson, a holder of working interests and operating rights directly affected by the application. Immediately after receiving approval, the applicant initiated a force pool of Johnson's interest. *Id.*, at ¶¶ 1-13.

The Supreme Court in *Johnson* held that the Commission's order was void with respect to Johnson because Johnson was not afforded actual notice. The Court

reasoned that the following rules and statutes require the Commission and applicants to provide actual notice to known interest-holders:

1. "Evidence of failure to provide notice as provided in this rule may, upon a proper showing be considered cause for reopening the case." Additional Notice Requirements (Rule 1207), Oil Conservation Div., 19 NMAC 15.N.1207.D (Feb. 1, 1996).

2. NMSA 1978, § 70-2-23 requires reasonable notice for all oil and gas hearings: "The [D]ivision shall first give reasonable notice of such hearing ... and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard."

3. "In cases of applications..., the outcome of which may affect a property interest of other individual or entities: (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested)." 19 NMAC 15.N.1207.A(11).

Cited by Johnson, ¶¶ 18-24.

Here, Synergy knows the identity and address of potential interest holders in the Property but refuses to provide them with actual notice of either force pool proceeding regarding the Property. Further, at the March 30, 2006 hearing, Synergy's witness made clear that once the wells were placed on production, it was its intention to recoup well costs as well as the risk penalty assessment out of the share of production proceeds attributable to the owners of the force-pooled interests, including the interests of the heirs of Margaret Hasselman Jones. By doing so, Synergy is depriving the true owners of that interest of the opportunity to elect to participate in the well and to avoid

the risk penalty assessment. Their property interest is thus adversely affected and they will suffer gross negative consequences within the meaning of Rule 1221.B. Thus the Commission's Order should, at the very least, be reopened.

Absent consolidation of all interests in the unit, whether by communitization or pooling, the well may not be produced. *See* NMSA 1978, §§ 70-2-17(C) (owners of interest in oil and gas minerals in a unit that have a right to drill may seek to drill a well in that unit through voluntary communitization or force-pooling); 70-2-18 (A) (in order to drill a well in a unit, an interest owner who has a right to drill is obligated to obtain voluntary agreements to pool other interests or must force-pool other interests). Synergy has intentionally ignored its obligation to secure voluntary unitization from the heirs of Margaret H. Jones and has, instead, withheld valuable information about these proceedings from those heirs so that Synergy can acquire their purported interests. Further, under the Division's rules, the well is not entitled to an allowable under these circumstances. Division Rule 1104 provides, in part, as follows:

> C. No allowable will be assigned to any well until a standard unit for the pool in which the well is completed has been dedicated by the operator, or a non-standard unit has been approved by the Division, or a standard unit has been communitized or pooled and dedicated to the well.
>
> D. No allowable will be assigned to any well until all forms and reports due have been received by the division and the well is otherwise in full compliance with these rules.

Accordingly, absent consolidation of all interests in the Unit, whether by communitization or pooling, the well may not be produced. For this reason alone, the request for stay should be granted.

Synergy's Course of Conduct in this Matter Warrants Close Scrutiny of Synergy's Claimed Standing to Force Pool the Property:

Co-owners of mineral interests in a particular property owe each other a duty to convey the whole truth as discussed, particularly where one volunteers to convey information that may influence the conduct of the other party. *Uptegraft v. Dome Petroleum Corp.*, 764 P.2d 1350, 1353 (Okla. 1988) (one conveying false impression by disclosure of some facts and concealment of others is guilty of fraud even though his statement is true as far as it goes, since concealment is in effect a false representation that what is disclosed is the whole truth).

As a purported co-owner of possessory interests in the subject property, Synergy has a duty to disclose the whole truth to the other possessory interest owners impacted by this proceeding. Instead, in this matter Synergy has consistently disclosed partial information to the other possessory interest owners in order to secure each owner's respective participation or interest: Synergy did not disclose to Robbins that another deed in the chain of title Synergy claimed instead transferred the disputed property to June Walmsley; even though Synergy knows the identity and address of the previously unknown heirs of Margaret H. Jones, Synergy has failed to disclose to such heirs that they have a right to participate in the 104 well and is instead trying to purchase their purported interest; and Synergy failed to disclose to Burlington that significant questions existed about Synergy's chain of title before Burlington agreed to enter the JOA in December, 2005. Synergy's failure to provide the whole truth to these possessory interest owners amounts to fraudulent misrepresentation. *Id.* Synergy's pattern of misrepresentation to possessory interest owners in this matter further undermines

Synergy's presentation of evidence that it owns a possessory interest sufficient to give it standing to force pool the Property.

Conclusion:

For the reasons set forth herein the Commission should reconsider the Commission's Order by rehearing this matter and imposing a stay prohibiting Synergy from producing the 104 Well until this matter is reheard because Synergy has not produced sufficient evidence to prove Synergy owns a possessory interest in the subject Property and Synergy has further failed to consolidate all the interests in the Unit.

Respectfully Submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

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By Telephonic approval on 4/12/06
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I hereby certify that a true and correct copy of the foregoing was sent by First Class Mail on April 12, 2006 to:

Gail MacQuesten
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SUTIN, THAYER & BROWNE
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By Germaine R. Chappelle
Germaine R. Chappelle

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AFFIDAVIT OF JOSEPH C. ROBBINS

STATE OF NORTH CAROLINA)
)
COUNTY OF MOORE)

The undersigned being first duly sworn, states:

1. I, Joseph C. Robbins, own a mineral interest in the southwest quarter of Section 8, Township 29 North, Range 11 West, N.M.P.M., San Juan County, New Mexico (the "Property").

2. I am over the age of 18 years and have personal knowledge of the facts stated in this affidavit.

3. On June 6, 2005 I agreed to enter into a farmout agreement with Synergy Operating, LLC (Synergy) to farm my mineral interests the Property. This agreement is in the form of a letter agreement dated May 31, 2005 to me from Synergy Operating, LLC, Patrick Hegarty, Principal (the Farmout Agreement).

4. I was given no consideration to enter the Farmout Agreement with Synergy except for the promise that Synergy would drill a well on the Property at a future date.

5. Before Synergy drilled a well in performance of the Farmout Agreement I retained Sutin, Thayer & Browne to advise me regarding my rescission rights with respect to the Farmout Agreement because I became aware that the representations by Hegarty, which induced me to enter the Farmout Agreement, were not accurate.

6. Prior to Synergy drilling the subject well, I instructed Sutin, Thayer & Browne to provide Synergy notice of my rescission via letter to its attorney Jim Bruce.

EXHIBIT
tabbies
1

7. Additionally, on January 26, 2006, I signed and instructed Sutin, Thayer & Browne to file a Notice of Rescission (the Rescission Notice) of the Farmout Agreement with the OCD. A copy of the Rescission Notice is attached hereto as Exhibit A.

8. I attest, verify, and state that Exhibit A is an authentic copy of the Notice that I signed. Examples of my signatures can also be found on the Farmout Agreement.

9. I further attest that I had a telephone conversation with Hagarty a few days after the Notice of Rescission had been filed with the OCD. I confirmed with Hagarty in that telephone conversation that I rescinded the Farmout Agreement.

FURTHER AFFIANT SAYETH NAUGHT.

Joseph C. Robbins

SUBSCRIBED AND SWORN TO before me on the 29th day March, 2006, by Joe Robbins.

Notary Public

My commission expires:

June 5 2010

THEA McNALLY NOTARY PUBLIC MOORE COUNTY, NC My Comm. Expires June 5, 2010

MR. LARSON: No.

EXAMINER CATANACH: Okay, Exhibits 1 through 5 and 7 through 12 will be admitted.

Mr. Hall?

EXAMINATION

BY MR. HALL:

Q. Mr. Hegarty, I wonder if you could explain to us. You indicated that you're seeking to pool only the Smith interest; is that correct?

A. That is correct, but the -- That's correct, yeah.

Q. If you would turn to your Exhibit 2, it shows additional interests for the heirs of Margaret H. Jones, Margaret Hasselman Jones.

A. Right.

Q. How are those interests being treated in the context of this proceeding?

A. They're not being force pooled.

Q. Are they joined in the well?

A. We're in the process of joining those people to this well.

Q. And have they been provided with notification of this hearing?

A. No.

Q. And you say you're in the process of obtaining the joinder of those individuals. Who are you dealing

with?

A. The heirs.

Q. And has the Margaret H. Jones interest been probated?

A. To my knowledge, we're not sure, we don't know.

Q. Have you searched the records in San Juan County to determine whether or not the interest has been probated?

A. It's not been probated -- There's no record of it being probated in San Juan County.

Q. Okay. Can you tell me the names of the individuals you're working with?

A. I'd rather not.

Q. Can you tell me?

A. No.

Q. Do you know who they are?

A. Yes.

Q. Tell me, please.

MR. BRUCE: I would object, only on the basis, Mr. Examiner, that Mr. Hegarty stated he is attempting to acquire their interests, and this is a competitive situation, and we would rather not -- it took -- Mr. Hegarty can testify, it took months and months and months to locate these people, and at such time as those interests are acquired Mr. Hegarty would be glad to provide that information, but he doesn't want to give that information

away at this point.

MR. HALL: Mr. Examiner, I would ask that you direct the witness to answer the question. I don't think there's a sufficient basis to make any sort of claim that this information might be proprietary or trade secret.

MR. BRUCE: It's proprietary in the fact that they're acquiring them, and they're not pooling them.

EXAMINER CATANACH: What's the relevance to this information, Mr. Hall?

MR. HALL: There's obviously a question over the ownership of that interest. It's an interest that my clients claim, and the reason it is of some significance to you here today, these interests will be -- Let me back up. These interests were pooled for the 104 well as unlocatable mineral interest owners. And the effect of those interests having been pooled authorized, and I think authorizes, Synergy to withhold well costs from that interest, as well as the risk penalty.

Now, that's an interest that's the subject of the quiet title proceeding, and we're fearful that if those interests continue to be regarded as force-pooled interests, then my client will lose the ability to protect its interest and -- a position of the risk penalty, and recoupment of well costs out of that contested interest is inappropriate.

We'd like to know who the individuals are who are claiming that interest. It may be necessary for us to join them in the quiet title lawsuit, and I think it's certainly relevant to the inquiry here. If they're not being force pooled here, we need some clarification on that. What is the status of that interest? If there's no evidence brought to you today that those interests are, in fact, joined in the well, where does that put us?

MR. BRUCE: Mr. Examiner, I would point out that if acquired, which Mr. Hegarty believes he will do, they won't be subject to any force pooling at all, certainly not this case because they haven't been notified, and in the prior case because they will then be part of the working interest of Mr. Hegarty and they will receive their royalty interest.

The second point is that Mr. Hegarty spent a substantial amount of time and effort to locate these people, and there's nothing preventing the Walmsley Trust or Mr. Smith from doing that same effort to track them down.

As I said, at such time as they're acquired, we will notify the Division and the other parties who they are. But we do not want anything to interfere in our acquisition of this interest.

Furthermore, just like in the last case, when

Burlington had not yet signed a JOA, we did not force pool them. They have since signed a JOA. We are not seeking to force pool the heirs of Margaret H. Jones and David F. Jones at this point in time, and that's --

EXAMINER CATANACH: Well, the difference is, you disclosed Burlington in the last case, though, even though you weren't force pooling them.

MR. BRUCE: Well, and we -- But in the last hearing we didn't -- we knew who -- yes, we knew who Burlington was, but we also knew that Burlington was not going to sell its interests.

MR. LARSON: Mr. Hearing Examiner, at some point I'd like to make a comment before there's a decision.

EXAMINER CATANACH: Go ahead, Mr. Larson.

MR. LARSON: I'm concerned about what I'm seeing as a trend of practice with Synergy. In the last case we saw that Synergy attempted to either obtain a joint operating agreement with certain parties based on partial information without full disclosure of all possible ownerships of interests. They were able to obtain a farmout agreement from one of that parties in this manner, and also a joint operating agreement with Burlington.

We will explain a little bit later in our case that one of those parties, Mr. Robbins, when he learned of the other interests and the misrepresentations rescinded

that agreement. This very week, when Ed Smith contacted Burlington to discuss and obtain approval from Burlington to join in Mr. Smith's application for permit to drill the subject 105 well, we learned that Burlington was not aware and had not been made aware of any of the questions of interest with regard to Synergy.

In the prior hearing that I sat through just before this one of Case Number 13,662, the witness, Mr. Hegarty, testified -- and I quote -- that, Prudent practices dictate to notify everyone in a chain of title. Here it does not appear that everyone has been notified. He obviously has identified some parties, and they have not been given notice of this hearing.

Mr. Hegarty also stated, quote, No operator in its right mind would drill without certainty of title. Well, we certainly do not have certainty of title in this case where we have a quiet title complaint filed.

The reality is that Synergy has proven that they are willing and intend to go forward and drill a well and, in effect, *de facto* obtain a determination of parties' interest, even though a court later might determine otherwise.

In fact, Synergy drilled the Duff 104 well beginning on February 13th, prior to the Commission's order of March 23rd granting it permission to do so.

In the prior hearing, Synergy -- June 16th of last year before the Hearing Officer, Mr. Catanach -- testified that Synergy was -- had obtained a preliminary title opinion and was obtaining a formal title opinion.

At the February 9th hearing we learned that the preliminary title opinion was given by Mr. Hegarty himself, that no formal title opinion had been obtained, and Synergy indicated that they did intend to drill the well without the formal title opinion and in spite of the joint operating agreement requirement that a formal title opinion be obtained prior to drilling.

So for these reasons we believe that it is premature to consider this Application for pooling until all parties that may have any interest have been notified of these proceedings, so that they can be given the opportunity to review these proposed well drilling costs. When Mr. Smith gets on the stand, he'll testify that he has not been provided with the estimated costs for this 105 well, but that he did compare and review the costs for drilling the 104 well and believes that they are 20 to 30 percent above what they could have been drilled for. And that just points out that these unnamed or absent potential owners are going to be deprived of the opportunity to comment on those costs and to object to them.

Finally, Mr. Hegarty also testified at the

hearing before ours of the extreme expense and difficulty of challenging Synergy after a pooling order has been put in place. Those were his words. For these reasons, we believe it's premature to consider this Application.

Thank you.

MR. HALL: Mr. Catanach, may I make an additional comment, which I think is directly to the relevance issue here?

If you would refer in the Oil and Gas Act to Section 70-2-18.B, that's the applicable statutory provision here. Synergy has come before you, and they're going to ask you to fashion a compulsory pooling order that must, one way or another, deal with the interests of the heirs of Margaret Hasselman Jones.

Now, Synergy must do one of two things. They must either consolidate those interests through voluntary joinder or through force pooling. With respect to voluntary joinder there is, up to now, an utter failure of proof. And at the same time they are telling you that they don't wish to have those interests force pooled. What do you do with those interests in a force pooling order?

Well, my reading of the Statute 70-2-18.B, those interests, if they are not joined, must be accounted for at a full 8/8 without deduction for any cost whatsoever, including a risk penalty.

That also precipitates an additional question. How can this well receive an allowable if all the interests aren't consolidated?

So I think those are issues you have to deal with. It's what Synergy has brought to the table. And I think that's why the inquiry is relevant.

MS. MacQUESTEN: Mr. Hall, are you saying that we shouldn't issue pooling orders piecemeal? Is that your concern, that it creates inequalities in treatment of the various interest owners?

MR. HALL: If in fact that's what happens, you need to address the unjoined interests one way or another. I think you probably can pool without a hundred percent of the interest owners, but under the statute, I think it directs what happens with respect to the unpooled or unjoined interests. There must be an accounting to someone for 100 percent of 8/8 proceeds attributable to that interest. Who is it? Who's asserting conflicting claims to that interest, and is it something that the Division can allow without any evidence whatsoever about the claims to that interest. I mean, I think the Application puts you in a very awkward position.

And again, what is the purpose of issuing a pooling order at all? If you don't have 100 percent of the interests consolidated one way or another, you can't get an

allowable for the well.

MR. BRUCE: Mr. Examiner, I'll address the last point first. I've never seen any Division regulation that says you have to have every interest committed before an allowable is given for the well.

Secondly, I would point out that a few weeks ago the Division heard a case by one of Mr. Hall's clients where they not only drilled the well long before they ever had any interest, and they after that resisted seeking pooling. We are here seeking pooling of Mr. Smith only. If the heirs of Margaret H. Jones -- if Mr. Hegarty doesn't acquire those interests, that's his risk. There is nothing in the pooling statute that says everyone has to be pooled or pooled at one time. Mr. Hegarty has not testified as to the steps taken to acquire that interest, because we're not pooling them. They're not at issue in this hearing. That's his risk.

And one final thing, I would note that Mr. Larson said something about drilling before the Commission Hearing. If you went into that case file, Mr. Examiner, you'd find that the other parties sought to stay the drilling of the well, the Division Director denied any stay of the drilling of that well, so Mr. Hegarty was free to drill that well at any time, including before the Commission Hearing.

We are only here seeking to force pool Mr. Smith. The testimony has shown and will show that he refuses to join in this well under a JOA. What are we supposed to do to drill the well? We need to force pool him. Mr. Hegarty has testified he's acquiring the Walmsley -- excuse me, the Margaret H. Jones interests. We do not need to pool them, pure and simple.

As I said before -- I'll say it again -- as soon as that interest is tied up, we'll inform everybody. But at this point, because of the litigation filed by our opponents, we can't give them the names and these people.

EXAMINER CATANACH: Mr. Hegarty, what is the status of your negotiation with that party, or with those parties?

THE WITNESS: The status is that an offer has been made and is being considered.

(Off the record)

EXAMINER CATANACH: Mr. Bruce, I think that we've decided to require the witness to provide that information. If Synergy is not comfortable with that, your other option is to continue the case, tie up those interests, and come back. Or include them in the pooling order.

THE WITNESS: That's no problem.

MR. LARSON: Which one?

THE WITNESS: That we'll continue it.

EXAMINER CATANACH: Do you want to continue the case?

THE WITNESS: Yeah.

EXAMINER CATANACH: Okay, is that --

MR. BRUCE: Continue it for six weeks?

THE WITNESS: Yeah, that should be enough time.

EXAMINER CATANACH: Any comment from this side?

MR. LARSON: Could we have just a second?

EXAMINER CATANACH: Yeah. Why don't we take five minutes, and we'll organize here.

(Thereupon, a recess was taken at 10:35 a.m.)

(The following proceedings had at 10:42 a.m.)

EXAMINER CATANACH: Okay, the Applicant has a request on the table to continue this case for six weeks.

MR. HALL: Mr. Examiner, I think what precipitated the request was our demand that the identity of the parent claimants of the Margaret Hasselman Jones interest be disclosed. It's our preference -- We will withdraw that demand at this point. It's our preference to continue with the hearing today.

EXAMINER CATANACH: Is that agreeable, Mr. Bruce?

MR. BRUCE: Yeah.

THE WITNESS: Sure.

EXAMINER CATANACH: Okay, let's proceed then.

MR. HALL: Let's see, I believe it was me, wasn't

it?

EXAMINER CATANACH: Yeah, you're on.

Q. (By Mr. Hall) Mr. Hegarty, just so the record is clear on this, referring back again to your Exhibit Number 2, which is the breakout of the interests for the 320-acre unit, you will agree, won't you, that there are conflicting claims by my client and by Synergy to the interests for the heirs of Julia H. Keller, the heirs of May H. Kouns, the heirs of Jennie H. Hill and the heirs of Margaret H. Jones, correct?

A. Yeah, I just want to qualify one point. You said that this was a representation of the 320, and it's just a representation of the southwest.

Q. I beg your pardon.

A. Okay.

Q. I beg your pardon, you're correct about that.

A. But in answer to your question -- and I'll rephrase it that there's a title dispute or a title question between Mr. Walmsley and ourselves, referring to the heirs of Julia H. Keller, Kouns, Hill, and Margaret H. Jones, that's your question?

Q. Yes, sir.

A. Yes.

Q. And that issue is currently before the San Juan County District Court in a quiet title proceeding?

A. Correct.

Q. With respect to the Margaret H. Jones heirs' interest, did Synergy offer anyone, any claimant to that interest, the opportunity to elect to participate in the infill well?

A. Right now we are in the process of solidifying and -- what their ownership is. And so it's a discovery process, and -- but no, there's been no offer to participate in this well, because until we can confirm all that we have researched, confirm it via -- you know, probably an attorney will have to take a look at this, most assuredly, because it's -- you know, with the quiet title court decree we will be able -- this -- all of this evidence will be presented in court at that setting and will be qualified and I'm sure reviewed by you or, you know, some other attorney or a group of attorneys, as to its validity.

So the process of, you know, going through and documenting, properly documenting the paperwork, is -- that's the process in which we are in at this moment.

MR. LARSON: I'll object to the part of the response other than "no" as being nonresponsive.

Q. (By Mr. Hall) Yeah, let's clarify. The short answer to my question is, no well proposal has been submitted to the Margaret H. Jones heirs?

A. Yes, that's correct.

Q. With respect to the initial well where those interests were pooled, how are you treating the Margaret H. Jones interest with respect to the recoupment of well costs and the risk penalty?

A. I'd have to refer to Jim Bruce, being our attorney. I could -- I mean, he's the attorney. It would probably be more appropriate for him to --

Q. Let me ask it this way. Is Synergy now recouping the well costs and the risk penalty out of the Margaret H. Jones interest?

A. Well, the well is not -- there's no production, it hasn't been completed yet, it's only been drilled.

Q. From the initial well?

A. Right.

Q. I see. What are your plans for doing so?

A. Our plans is to abide by the dictates of the order as, you know, Jim Bruce, you know, tells us is the proper thing to do. This is our first force pool process, so when we get to the point of production and the recoupment of costs, we'll make certain to, you know, run by whatever we do with Jim Bruce, make certain that we not put ourselves in a precarious position.

Q. Would you be willing to place all the proceeds attributable to the Margaret H. Jones interest into

complete compliance with the agreement that he signed.

MR. LARSON: Objection as nonresponsive.

Q. (By Mr. Larson) Did you drill the well after the date of his rescission?

A. I don't --

MR. BRUCE: I would object to the fact that -- it is our position that the rescission is ineffective, and if he's trying to ask -- trying to get him to admit that the rescission is effective, we object to that.

EXAMINER CATANACH: I concur with Mr. Bruce.

Q. (By Mr. Larson) Have you informed these new heirs, unidentified heirs, of any dispute of title or question of title?

A. Well, first we're in the process of properly documenting that they actually own the interest, so that has to be established first, before we can discuss anything further.

Q. Let me ask the question differently. Have you informed them of the existence of the current quiet title suit?

A. No.

Q. Do you have any proof of service of Exhibit Number 3 to Ed Smith, which is, I suppose, the witness' cover letter to an authorization for expenditure?

A. No, I purposely didn't send this by certified

Q. (By Mr. Larson) Did you direct your attorney to provide an authorization for expenditure, for Mr. Smith's or Smith LLC's interest, to counsel?

A. No.

Q. And you did not -- or Synergy did not mail one to counsel either, directly to counsel?

A. No, no. Well, as I said, I really did feel this matter could be handled outside of the attorneys, and should be, and -- because when you drill a good well everybody wins. I just felt there a need to try and resolve this outside of the attorneys.

Q. Even those that haven't been given an opportunity or even known of the well being drilled, will win?

A. Excuse me?

Q. Even those persons that don't know that a well is being drilled or haven't been given notice of any pooling or anything like that, do those parties win?

A. Everybody wins when a well is drilled.

MR. LARSON: No further questions.

EXAMINATION

BY EXAMINER CATANACH:

Q. Mr. Hegarty, the AFE that you intend to use for this well is the one that went out with the Edwin Smith letter --

A. Yeah.

EXAMINER CATANACH: Mr. Larson?

CROSS-EXAMINATION

BY MR. LARSON:

Q. Mr. Hegarty, did you provide an authorization for expenditure to Joseph Robbins for the 105 well?

A. No.

Q. Why not?

A. He's farmed in.

Q. Did you receive a copy of the rescission notice that Mr. Robbins had us execute on his behalf?

A. Yes.

Q. Did you then have a telephone conversation with Mr. Robbins about that rescission afterwards?

A. I did.

Q. Did you object in writing to Mr. Robbins' rescission?

A. I don't think I did.

Q. Did you give Mr. Robbins any consideration for this farmout agreement?

A. The drilling of a well, yes.

Q. Now that well that you're referring to, you drilled after the time that he rescinded the farmout agreement; isn't that correct?

A. We drilled it under the terms of our agreement, which said we had till May 31st of 2006, so we're in

MR. LARSON: Should be a group of tabs, A through K or I.

MR. BRUCE: Yeah, there.

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

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

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

A. Yes.

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

A. Yes, I did.

Q. -- examined the title?

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

A. Not much.

Q. And why not?

A. Well, two things. Well, a multitude of things, but originally -- well, first of all, we got a court decree which Mr. Smith's father and the Walmsleys were a part of

documentation that substantiated the ownership -- or the breakout of this interest because we do not agree with it, particularly -- and I could go into detail if you'd like me to, but I think that would be more a question addressed to Mr. Earnest Smith.

Q. Well, anyway, the heirs of Julia Keller, May Kouns, Margaret Jones, the plaintiffs from the quiet title proceeding, are not referenced on Exhibit 8, are they?

A. They are not. Synergy, as a predecessor in interest is listed and represented to own that interest. So they accepted the assignments that we gave them and paid us accordingly.

MR. HALL: That's all I have, Mr. Examiner.

EXAMINER CATANACH: Okay, do you have any questions, Ms. Nair?

MS. NAIR: Just one question, sir.

EXAMINATION

BY MS. NAIR:

Q. In your title review, did you come across the deed on page 199 of Book 921 in the San Juan County Records, a 1981 deed, from Jennie Hasselman Hill as her -- as the sole surviving joint tenant of these various Hasselman sisters, to June Hill Walmsley?

A. Yes, we did.

Q. And how did that affect your analysis of the

AFFIDAVIT OF JOSEPH C. ROBBINS

STATE OF NORTH CAROLINA)
)
COUNTY OF Orange)

The undersigned being first duly sworn, states:

1. I, Joseph C. Robbins, own a mineral interest in the southwest quarter of Section 8, Township 29 North, Range 11 West, N.M.P.M., San Juan County, New Mexico (the "Property").

2. I have personal knowledge of the facts stated in this affidavit.

3. On or about May 3, 2005, I received a letter from Patrick Hegarty, Principal, Synergy Operating, LLC ("Synergy"), and spoke with Mr. Hegarty on the telephone. Through this communication with Mr. Hegarty I learned that Synergy was a co-owner of mineral rights in the Property. A copy of the letter is attached hereto as Exhibit A.

4. The May 3, 2005, letter from Synergy stated that the Estate had "a number of options to consider regarding this proposed well," which included to "participate,... go non-consent,... farmout,... or sell." The letter further stated that Synergy's "main objective" was "to avoid having to initiate legal action before the Oil Conservation Division to invoke a Force Pool non-consent penalty necessary to drill [Synergy's] well."

5. Based on the choice outlined by the Synergy letter between being forced to participate in the pool at a financial out-of-pocket cost and possibly a 256% penalty or signing a farm-out agreement at no cost and in exchange for relinquishing a minor

EXHIBIT

contingent royalty interest, I made the decision to sign a farm-out agreement with Synergy.

6. In making the decision to sign the farm-out agreement with Synergy, I relied on Synergy's representation that it owned a percentage of mineral rights in the Property.

7. I would not have signed the farm-out agreement with Synergy had I understood at the time I signed the farm-out agreement that Synergy's representation that it owned a percentage of mineral rights in the Property was in question.

8. Based on information that the interest claimed by Synergy is also claimed by Jerry Walmsely, Trustee, Bypass Trust U/W June H. Walmsely (the Walmsely Trust) I now believe that Synergy's ownership of a percentage of mineral rights in the Property is in question.

9. I am contemplating rescinding the farm-out agreement with Synergy because I relied on Synergy's representation that it owned a percentage of mineral rights in the Property and Synergy's ownership of such rights is now in question and because there was no consideration for the farm-out agreement at the time I signed it and Synergy has not yet performed under the farm-out agreement.

10. Because the Order of the Division executed on July 1, 2005 grants Synergy's application to force the pool only on the basis that Synergy had standing to force the pool due to the farm-out agreement with me, I believe that this Order should be stayed until the two separate requests for *de novo* review filed by the Walmsely Trust

and Edwin and Earnest Smith of the Order have been decided by the New Mexico Oil Conservation Commission.

11. If it is determined that Synergy did not have standing to invoke a force pool proceeding before Synergy approached me to obtain a farm-out agreement, I believe my interest will be detrimentally affected by allowing the Order granting Synergy's motion for compulsory pooling to stand and that I will be prevented from exercising my correlative right to drill a well on the Property using an operator of my own choosing.

FURTHER AFFIANT SAYETH NAUGHT.

Joseph C. Robbins

Joseph C. Robbins

SUBSCRIBED AND SWORN TO before me on the 29th day July, 2005, by Joe Robbins.

LESLIE A. LEE NOTARY PUBLIC MY COMM. EXP. 11-19-09 CHATHAM COUNTY, NC

Notary Public

My commission expires: 11-19-09

751940

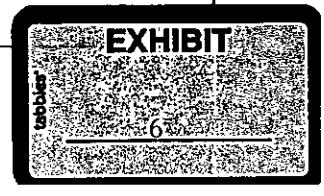
that agreement. This very week, when Ed Smith contacted Burlington to discuss and obtain approval from Burlington to join in Mr. Smith's application for permit to drill the subject 105 well, we learned that Burlington was not aware and had not been made aware of any of the questions of interest with regard to Synergy.

In the prior hearing that I sat through just before this one of Case Number 13,662, the witness, Mr. Hegarty, testified -- and I quote -- that, Prudent practices dictate to notify everyone in a chain of title. Here it does not appear that everyone has been notified. He obviously has identified some parties, and they have not been given notice of this hearing.

Mr. Hegarty also stated, quote, No operator in its right mind would drill without certainty of title. Well, we certainly do not have certainty of title in this case where we have a quiet title complaint filed.

The reality is that Synergy has proven that they are willing and intend to go forward and drill a well and, in effect, *de facto* obtain a determination of parties' interest, even though a court later might determine otherwise.

In fact, Synergy drilled the Duff 104 well beginning on February 13th, prior to the Commission's order of March 23rd granting it permission to do so.



STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	)	
APPLICATION OF SYNERGY OPERATING, L.L.C., FOR COMPULSORY POOLING, SAN JUAN COUNTY, NEW MEXICO	)	CASE NO. 13,662

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: DAVID R. CATANACH, Hearing Examiner

March 30th, 2006

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, DAVID R. CATANACH, Hearing Examiner, on Thursday, March 30th, 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.

* * *

interests. So then in effect, they would be coming into Synergy through the force pool process.

So in answer to your question, it would affect our title to that extent, or affect our ownership.

Q. Okay, but if you're not -- if you're concerned about whether or not some of these were valid or not, wouldn't you want to force pool those interest owners that --

A. Yes --

Q. -- didn't --

A. -- very definitely, and that's what I'm hop- -- you know, that's the purpose of including those entities in here. And if that's not clear, then I appreciate your question and I hope that it is clear.

Q. Well, why wouldn't you not give them personal notice of this case then?

A. Well, the fact is, all of these individuals -- like for example, Groucho Marx, we'd have to do some research in terms of finding out who their heirs are. And -- you know, and then contacting them, that sort of thing.

As far as all the corporations are concerned, you know, those -- many of those corporations no longer exist. Like, for example, McCulloch. You know, we tracked that down to Maxxam, and there's other entities, you know, of

that nature.

But I mean, you know, the title opinion basically is what we're going to rely upon in terms of, you know, satisfying ourselves what interests -- to the best of our abilities, what interests -- you know, what potential parties potentially still own an interest.

But if you're saying like, for example, because of these title questions, you're wanting us to basically track down every, you know, heir -- because a lot -- you know, these people aren't alive, you know, any longer, and --

Q. Well, I mean, if they own a valid interest in this unit, I'm not sure that you can just simply pool them by providing publication notice in a newspaper.

A. Okay.

Q. If there are indeed heirs to these interest owners, I mean, they -- if they do own valid interests, why wouldn't you negotiate with these parties the same as you would anybody else?

A. Well, the question is, I mean, to answer what -- to clean up that particular problem, once we got confirmation of what these lots were, you know, at various points of time, and the BLM will sign off on that, then we can have that certainty of -- you know, that the interests were actually assigned.

But you know, I mean, in answer to your question, that's a risk -- the risk that we're taking is that somebody at some later date could come back and, you know, say, I don't think that you properly notified me or gave me a chance to participate in this well and -- you know, so that's a risk we're assuming.

But I think once we get the BLM to -- you know, to confirm the history of the survey, then we'll know for certainty, you know, that those assignments are valid.

So it's -- you know, it's a difficult issue. And certainly we want to do whatever is best to protect our interest, because we're spending a great deal of money and effort to drill this well and get these, you know, revenues producing. And so certainly we want to minimize our risks as best we can.

Q. Is the Application a bit premature, do you think?

A. Well, I don't think so, because I think we did everything that one could possibly do to -- you know, outside of receipt of the BLM -- they have not responded to our letters. And I'm not sure, maybe we have to go down there and, you know, go to their superiors or something. I don't know how you make an issue -- How do you make the BLM do something, is my question, you know, to -- because we've asked it and -- you know.

But we feel confident that we've done everything

necessary, and ultimately we're taking the risk as an operator to drill this well and -- you know. But these interests are so minute, you know, for them, they would have to spend an exceptional amount of money, you know, if they wanted to basically fight the issue.

But if they -- you know, if somebody wanted to do the research and come back and say, Look, you know, I think you missed -- you know, let's say one lot was missed or something like that, you know, it would take a -- it would be very difficult for them to, you know, come back and challenge us, you know.

But certainly we'd want to minimize whatever risk there was, so -- I mean, that's totally -- if you feel that we need to do, you know, more, we can -- we -- you know, how can I -- can I get the title people to basically -- you know, I can submit a copy of this opinion and then, you know -- and have a third party verify that everything's been done that can be done to contact these people.

Q. Well, what if your title opinion says that there are certain interest owners that do own an interest in this, apart from Maxxam?

A. Well --

Q. Then what do you do at that point? Because you have not contacted those parties --

A. Okay --

Q. -- you have not negotiated with those parties --

A. You know, I mean that's their -- you know, when we are dealing with an issue here that because the way Compass sold their interests, and they were a promoter company, you know, it gets down to a question of assumption of risk, and the operator has to make that decision, what are they comfortable assuming? Because, you know, if -- and if we get a -- you know, a third-party opinion that says that we're -- you know, this interest isn't covered, obviously we've got to go after that or we're assuming a great deal of risk, you know, in that they could come back and take that interest from us, so on and so forth. You know, and then there would be the question of, you know, so we're opening up a can of worms.

Q. Well, my question about whether the Application is premature -- I mean, wouldn't it have made more sense to wait till the title opinion is done to know who these people are?

A. Well, the title opinion is done, but we still -- like I said, until the BLM, you know, gives us some verification as to what these lots are, you know -- But I'm just telling you that in my opinion it's not done until we get that, and we're doing everything we can to get that verification. But certainly the title opinion, you know, if we could be -- have a great deal of assurity that, you

know, what's been assigned actually covered the acreage, then, you know, we feel comfortable we've got the matters dealt with.

And you know, the point is, I can submit the copy of the title opinion, I could submit the letters to the BLM -- and I don't know if you -- you know, what avenues we can go through to make the BLM, you know, do this. It's just going to take a great deal of work. Or if we can have a third party go in and maybe get -- do the work and then maybe get the BLM to sign off on it, so that at this particular date the lots were this. I know it can be done, it's just a matter of going into the records.

But you know, until we get that done there's -- But as far as the title opinion is concerned, we've got that completed, it's just a matter of getting the BLM, you know -- at that point, then, it will be complete, you know, so...

But the intent truly was to assign the interest. I don't -- you know, one could certainly say the intent was to assign their interest, but when you've got a complication as to, you know, differences of opinion as to what the lots were at various points in time in history, that creates doubt.

Q. So your title opinion does state that these were all transferred back to Maxxam?

A. Yeah, yeah, it does.

Q. So basically your question is whether or not they're valid?

A. Well, yeah, exactly. I mean, until you know exactly what acreage was assigned, it's -- you don't really know, you know, and that's a valid concern.

But certainly, I mean, you know, no operator in their right mind would assume -- would drill a well and not have a high degree of certainty of their ownership, you know. I mean, the risks are too great. And so there's a prudent operator rule, I think, here, you know. And if we're willing to assume that risk, then I think --

MS. MacQUESTEN: But aren't you asking us to protect you from a certain amount of risk in that these other entities outside of Maxxam may come back, and you're asking us to issue a ruling pooling those entities?

THE WITNESS: Well, you know, if you don't -- yeah, if you don't feel comfortable pooling those entities, then you shouldn't pool them. I mean, you know, I'd have to -- You know, now certainly Maxxam, or only those entities that we contacted, if there's that sort of -- you know, that's fine.

MS. MacQUESTEN: From the documentation we have here, the only entity you've contacted was Maxxam, and that's --

THE WITNESS: That's correct.

MS. MacQUESTEN: -- the only evidence we have in this case.

THE WITNESS: Right. So if you've got that concern, then I'd say limit your force pooling to Maxxam. Then the onus is on us to make certain that, you know...

But I think -- But I think from our standpoint, we want to do everything that we possibly could to notify everyone in the chain of title. I think that's just a prudent practice to do, and we attempted to do that.

MR. CATANACH: Have you guys addressed the nonstandard proration unit issue, Mr. Bruce?

MR. BRUCE: No, I haven't, Mr. Examiner, and that's why -- you know, I forget exactly what the acreage is that can be approved by the District Office, but that's why the case --

THE WITNESS: Well, I spoke --

MR. BRUCE: -- needs to be readvertised.

THE WITNESS: I did. We spoke with the geologist in the Aztec office, Steve Hayden -- Hayden, and he -- we were originally going to make this an east-half proration unit, because that's a full 320. And he told us to -- if we made them a north half/south half, you know, as far as the Fruitland Coal was concerned, then it wouldn't require any additional hearing, but -- because there was just

voluntary joinder in the well. There's nothing wrong with that.

As a matter of fact, if those parties are not pooled, they're simply carried in the well. I do not have the case cite, but there's a case with our old friend, Jack Grynberg, that issued a few years ago, a Supreme Court of New Mexico case that said pooling -- in essence, it ignored the pooling statute and said you could carry working interest owners without pooling.

Therefore, all this fluff over the heirs of Jones is meaningless. We are not seeking to pool them. And as I stated earlier, if they are now locatable, if these are indeed the heirs, I will state for the record that they're not pooled into the first well yet until they -- because if they're locatable, then notice wasn't given to them. We thought we had them, but we didn't. And we can clear that up at a later date. There is nothing wrong in doing that.

Secondly, I'll move on to this alleged rescission. This is a contract signed between two parties, Synergy and Mr. Robbins. One party cannot rescind that contract, period. It's just a matter of simple contract law. When you have an agreement between two parties, both parties have to agree to rescind.

Furthermore, this memo says Robbins can rescind when there has been no performance. Well, the farmout was

Form 3160-5
(June 1990)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
Budget Bureau No. 1004-0135
Expires March 31, 1993

SUNDRY NOTICES AND REPORTS ON WELLS
Do not use this form for proposals to drill or to deepen or reentry to a different reservoir
Use "APPLICATION FOR PERMIT -" for such proposals

SUBMIT IN TRIPLICATE

5. Lease Designation and Serial No.: **NMNM-03877**

6. If Indian, Allottee or Tribe Name:

7. If Unit or CA, Agreement Designation:

1. Type of Well: [ ] Oil Well [X] Gas Well [ ] Other

8. Well Name and No.: **Duff 29-11-8 # 104**

2. Name of Operator: **Synergy Operating, LLC** OGRID (16348)

9. API Well No.: **30-045-33350**

3. Address and Telephone No.: **P.O. Box 5513, Farmington, NM 87499 (505) 325-5449**

10. Field and Pool, or Exploratory: **Basin Fruitland Coal**

4. Location of Well (Footage, Sec, T. R., M, or Survey Description)
Unit D, 955' FNL, 885' FWL, Sec 08, T29N - R11W
320 acres (W/2)

11. County or Parish, State: **San Juan Co., NM**

12. CHECK APPROPRIATE BOX(S) TO INDICATE NATURE OF NOTICE, REPORT, OR OTHER DATA

TYPE OF SUBMISSION	TYPE OF ACTION	
[ ] Notice of Intent	[ ] Abandonment	[ ] Change of Plans
[X] Subsequent Report	[ ] Recompletion	[X] New Construction
[ ] Final Abandonment Notice	[ ] Plugging Back	[ ] Non-Routine Fracturing
	[ ] Casing Repair	[ ] Water Shut-Off
	[ ] Altering Casing	[ ] Conversion to Injection
	[ ] Other	[ ] Dispose Water

(Note: Report results of multiple completion on Well Completion or recompletion Report and Log Form)

13. Describe Proposed or Completed Operations (Clearly state all pertinent details, and give pertinent dates, including, estimated date of starting work. If well is directionally drilled give subsurface locations and measured and true vertical depths for all markers and zones of pertinent to this work.

03-28-2006 MIRU Jet West Wireline. Run GR-CCL log from PBTD (1978') to surface.

04-03-2006 MIRU Wireline & PP equipment. PT Lines 4500#. PT 5-1/2" Casing to 1500# for 30 mins. Chart Pressure Test. PT Casing to 3500#. Blue Jet Perforate Lower Fruitland Coal Intervals as follows: 1896' to 1912' (16') - 4 SPF = 64 holes, and 1864' to 1867' (3') - 2 SPF = 6 holes = total 70 holes. BD Coal w/ H2O. Acidize Fruitland Coal Perfs from 1864' to 1912' w/ 500 gals 7.5% HCl acid, 85 balls, displace w/ KCl water. ISIP 790#. Total Fluid to Recover 80.6 bbls. Wireline run Junk Basket, Recover Ball sealers. SDFN.

04-04-2006 MIRU Frac Crew. SM. PT Lines. Foam Frac Fruitland Coal (1864' to 1912') w/ 65Q N2 Linear Foam 39,300# 20/40 & 10,800 # Super LC, 35 BPM, 2250 ATP. Liq Flush, ISIP 1480#, 299 bbls, 332K N2. Wireline Set CIBP at 1852'. Perforate 2nd Stage FTC, 1818' to 1828' (10') - 2 SPF, 20 holes, 1778' to 1787' (9') - 2 SPF, 18 holes, 1708' to 1714' (6') - 3 SPF 18 holes, 25 Feet total, 56 holes. Acidize w/ 500 gals 7.5% HCl & 75 balls. Good Ball-Off, 3 breaks. Run JB. Recover Balls. Foam Frac Fruitland Coal (1708' to 1828') w/ 65Q N2 Linear Foam, 69,680 lbs 20/40 & 11, 580 # Super LC 35 BPM, 1815 ATP, Foam & Liq Flush. ISIP 1170#, 402 bbls, 423K N2. RU Flowback, Begin FB on 1/2" Choke.

04-05-2006 Finalize Flowback of Upper FTC, 19.5 hrs, Final 75# on 1/2" choke, Estimated at 544 MCFD.

14. I hereby certify that the foregoing is true and correct

Signed: _____ Title: Engineering Manager Date: 04-07-2006

This space for federal or state office use

Approved by: _____ Title: _____ Date: _____
Conditions of approval if any

Title 18 U.S.C. Section 1001, make it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction

EXHIBIT
tabbies 8

Burlington had not yet signed a JOA, we did not force pool them. They have since signed a JOA. We are not seeking to force pool the heirs of Margaret H. Jones and David F. Jones at this point in time, and that's --

EXAMINER CATANACH: Well, the difference is, you disclosed Burlington in the last case, though, even though you weren't force pooling them.

MR. BRUCE: Well, and we -- But in the last hearing we didn't -- we knew who -- yes, we knew who Burlington was, but we also knew that Burlington was not going to sell its interests.

MR. LARSON: Mr. Hearing Examiner, at some point I'd like to make a comment before there's a decision.

EXAMINER CATANACH: Go ahead, Mr. Larson.

MR. LARSON: I'm concerned about what I'm seeing as a trend of practice with Synergy. In the last case we saw that Synergy attempted to either obtain a joint operating agreement with certain parties based on partial information without full disclosure of all possible ownerships of interests. They were able to obtain a farmout agreement from one of that parties in this manner, and also a joint operating agreement with Burlington.

We will explain a little bit later in our case that one of those parties, Mr. Robbins, when he learned of the other interests and the misrepresentations rescinded