

**DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION**

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

Case No. 13,663

POST HEARING MEMORANDUM AND STATEMENT OF REQUESTED RELIEF

BY

EDWIN SMITH, LLC AND JOSEPH ROBBINS

Come now Edwin Smith, LLC ("Smith"), and Joseph C. Robbins ("Robbins"), by and through their attorneys Sutin, Thayer & Browne, a Professional Corporation (Derek V. Larson) and submit this, their Post Hearing Memorandum and Statement of Requested Relief as follows:

The June 29, 2006, letter from Synergy Operating, LLC's ("Synergy") counsel, Mr. Bruce, to the hearing examiner, Mr. Catanach, reinforces the undeniable fact that there are several disputed issues precluding a conclusive ruling by the Division on Synergy's pending application.

Foremost is the dispute over Synergy's alleged ownership of interests in the subject property, both as to those interests claimed by the Walmsley trust and Synergy's claim of interest from Joe Robbins. As to the former, Smith and Robbins hereby adopt the June 29, 2006, Post Hearing Memorandum of Jerry Walmsley, Trustee of the June H. Walmsley Trust. As to the latter, Synergy appears to take the position that the Farmout agreement was a bilateral contract and that Robbins must take some affirmative action to terminate it. Robbins asserts that the Farmout agreement was void *ab initio* because it was procured by fraud, that it is legally unenforceable due to lack of consideration, and that if it was valid at its inception, it was a unilateral contract and was rescinded prior to performance. 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.

Synergy cannot prevail unless it owns an 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). At best, Synergy holds colorable title. At worst, Synergy holds no interest in the subject property. However, such interest cannot be merely colorable but must, instead, be supported by substantial evidence. *Samson Res. 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.* Although Synergy raised several counter and cross claims in response to the Quiet Title complaint, it chose not to join the issue of the Robbins' Farmout agreement in that case.

Next, there is a dispute over Burlington's commitment to participate in the drilling of a new infill well or recompletion of the Claude Smith well into the Fruitland formation, and to the designation of an operator of the recompleted Claude Smith well. In spite of apparently contradictory hearsay statements by Burlington, now ConocoPhillips, no one has yet to obtain a signed authorization for expenditure.

Finally, there clearly is a dispute over who should operate the infill well. Synergy's position appears to be that Order No. R-12376-C is final (despite the pending motion for reconsideration) and unchangeable and that Synergy is the designated operator thereunder. Smith and Robbins' position is that Synergy does not own an interest in the subject property so

there is no need to obtain Synergy's approval with regard to the proposed recompletion of the Claude Smith well.

What is clear is the fact that all of these issues will be resolved by the district court in the Quiet Title case. Until these questions of fact are determined Synergy's application cannot be granted.

Wherefore, Smith and Robbins hereby request the following relief:

1. Deny Synergy's application outright given the failure of proof on the essential elements of notice and election to participate in the 105 well.
 - a. Burlington/ConocoPhillips has not elected to participate.
 - b. Margaret Hasselman Jones' heirs have not elected to participate.
 - c. Walmsley Estate has not elected to participate.
 - d. Leola Kellogg has not elected to participate.
2. Stay decision until the Quiet Title suit is decided.
3. Stay until the current operator, Smith LLC, is able to complete its Application to Dual Complete or Commingle the existing Claude Smith #1 Well.
 - a. Joe Robbins has agreed to participate in this approach
 - b. Walmsley has expressed an interest in this approach.
 - c. Burlington/ConocoPhillips has expressed an interest in this approach.
4. If pooling is to be granted, order the proceeds attributable to the litigated interests be placed into suspense.
 - a. The heirs of Julia H. Keller
 - b. The heirs of May H. Kouns
 - c. The heirs of Jennie H. Hill
 - d. The heirs of Margaret H. Jones
5. If pooling is to be granted, exclude the interest of Joseph Robbins since the Farmout agreement was rescinded and Synergy did not seek to pool Robbins' interest. Alternatively, if the Commission considers Synergy to have some claim to Robbins' interest by virtue of the Farmout agreement, then place the proceeds of that interest into suspense until title to the interest can be determined.
6. If all the litigated interests are not suspended, then at least suspend interests of the heirs of Margaret H. Jones who have not been included in the force pooling application.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was mailed to the following
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