

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

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

CASE NO. 14033

**PRE-HEARING STATEMENT**

This Pre-Hearing Statement is submitted by Miller Stratvert P.A. (J. Scott Hall) on behalf of Jerry Walmsley, Trustee, Bypass Trust U/W June H. Walmsley, ("Walmsley Trust"), as required by the Oil Conservation Commission.

**APPEARANCES**

**ATTORNEYS**

James Bruce, Esq.  
Post Office Box 1056  
Santa Fe, New Mexico 87504

**OPPONENT'S ATTORNEY**

J. Scott Hall, Esq.  
Miller Stratvert P.A.  
Post Office Box 1986  
Santa Fe, New Mexico 87504-1986

Derek V. Larson, Esq.  
Sutin, Thayer & Browne  
Post Office Box 1945  
Albuquerque, New Mexico 87103

**APPLICANT**

Synergy Operating, LLC

**OPPONENT**

Jerry Walmsley, Trustee

Edwin Smith, LLC

## STATEMENT OF THE CASE

### **JERRY WALMSLEY, TRUSTEE**

Synergy Operating, LLC seeks to force pool mineral interests from the surface to the base of the Fruitland Coal Formation underlying the W/2 of Section 8 T28NR11W. Jerry Walmsley, Trustee is the owner of mineral interests in the SW/4 of Section 8. The W/2 of Section 8 was previously force-pooled under Order No. R-12376 pursuant to an application filed on behalf of Synergy in Case No. 13486 for the drilling of the Duff 29-11-8 Well No. 104. This case was also the subject of a hearing de novo before the Commission (see Order No. R-12376-C).

Subsequently, in Case No. 13663, Synergy filed a new application to force pool interests in the W/2 of Section 8 for the drilling of the Duff No. 105 infill well. On September 12, 2006, the Division entered Order No. R-12629, which was subsequently extended on June 28, 2007 by Order No. R-12629-A. Both the Duff 104 and Duff 105 wells have been drilled and are currently producing.

The lands that are the subject of Case Nos. 14033, 13486 and 13663 are also subject of a quiet title proceeding pending before the 11<sup>th</sup> Judicial District Court. (*Edwin Smith, LLC et al. v. Synergy Operating, LLC, et al.; No. D-1116 CV 06-59-6*). The court has ordered that all proceeds attributable to the interests whose ownership is disputed (SW/4) be held in suspense. A hearing on the Plaintiffs' Motion for Summary Judgment on the merits of the quiet title action is presently scheduled for November 29, 2007, the same day Synergy's Application in Case No. 14033 is set for examiner hearing.

Synergy's trial counsel requested concurrence on a motion to continue the hearing on the summary judgment motion, citing only to the pendency of a hearing before the Division, but

without referencing Case No. 14033. Notably, Synergy has not provided notice of its application in this matter to the plaintiffs in the quiet title proceeding.

On inquiry, Synergy's trial counsel was unable to provide satisfactory explanation for the need for further administrative proceedings affecting the W/2 of Section 8. Consequently, on November 14, 2007, trial counsel for the plaintiffs in the quiet title proceeding filed a motion with the 11<sup>th</sup> Judicial District Court seeking an order directing Synergy to withdraw its Application in this matter. A copy of the Plaintiffs' Motion To Maintain Status Quo is attached. It is the Plaintiffs' intention to proceed with the hearing on their motion for summary judgment before the Court on November 29, 2007.

#### **PROPOSED EVIDENCE**

JERRY WALMSLEY, TRUSTEE

WITNESSES

None.

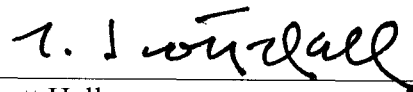
EXHIBITS

#### **PROCEDURAL MATTERS**

As indicated.

MILLER STRATVERT P.A.

By:



J. Scott Hall  
Attorneys for Jerry Walmsley, Trustee  
Post Office Box 1986  
Santa Fe, New Mexico 87504-1986  
(505) 989-9614

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was faxed to counsel of record on the 21 day of November, 2007 as follows:

James Bruce, Esq.  
Post Office Box 1056  
Santa Fe, New Mexico 87504  
(505) 982-2151/Facsimile

David Brooks, Esq.  
New Mexico Oil Conservation Division  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87504  
(505) 476-3462/Facsimile

Derek Larson, Esq.  
Sutin Thayer & Browne P. C.  
Post Office 1945  
Albuquerque, New Mexico 87103  
(505) 888-6565/Facsimile



J. Scott Hall

**STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT COURT**

EDWIN SMITH, LLC, a New Mexico limited liability company; and JERRY T. WALMSLEY, trustee of the June Walmsley Bypass Trust under the will of June H. Walmsley dated April 7, 1992,

Plaintiffs,

v.

No. D-1116 CV 06-59-6

**Class 1:** SYNERGY OPERATING, LLC, a New Mexico limited liability company;  
JODIE YATES-SIMON; ROBERT E. KOUNS;  
CHARLA VARNER; KIMBERLY BRAUTIGAM;  
DEBRA KOUNS LAY; KRISTI CLARK;  
F. KEVIN KURTZ;

**Class 2:** RICHARD H. KOUNS, if living, if deceased,  
THE UNKNOWN HEIRS OF RICHARD H. KOUNS,  
deceased; CLARA PRANGLEY, if living, if deceased,  
THE UNKNOWN HEIRS OF CLARA PRANGLEY,  
deceased; ANNEMARIE KELLER, if living, if deceased,  
THE UNKNOWN HEIRS OF ANNEMARIE KELLER,  
deceased; MARGARET K. DUNN, if living, if deceased,  
THE UNKNOWN HEIRS OF MARGARET K. DUNN,  
deceased; F. NORMAN KURTZ, if living, if deceased,  
THE UNKNOWN HEIRS OF F. NORMAN KURTZ,  
deceased; MELBA ANDERSON KOUNS, if living,  
if deceased, THE UNKNOWN HEIRS OF MELBA  
ANDERSON KOUNS, deceased; DAVID F. JONES,  
if living, if deceased, THE UNKNOWN HEIRS OF  
DAVID F. JONES, deceased;

**Class 3:** THE UNKNOWN HEIRS OF: MARGARET  
HASSELMAN JONES, deceased; JULIA HASSELMAN  
KELLER, deceased; MAY HASSELMAN KOUNS,  
deceased; JENNIE HASSELMAN HILL, deceased;  
EVELYN K. KURTZ, deceased; ROBERT H. KOUNS, deceased;

**Class 4:** ALL UNKNOWN CLAIMANTS OF INTEREST  
IN THE PREMISES ADVERSE TO PLAINTIFFS,

Defendants.

and

SYNERGY OPERATING, LLC, THEROLYN K. WILLIAMS, ANNEMARIE KELLER, JODIE YATES SIMON, ROBERT E. KOUNS, CHARLA VARNER and KIMBERLY BRAUTIGAM,

Counter-plaintiffs and Cross-plaintiffs,

vs.

Case No. D-1116 CV-06-59-6

**Class 1:** EDWIN SMITH, LLC and JERRY T. WALMSLEY, trustee,

Counter-defendants, and

**Class 2:** MARGARET K. DUNN, if living, if deceased, THE UNKNOWN HEIRS OF MARGARET K. DUNN, deceased; RICHARD H. KOUNS if living, if deceased, THE UNKNOWN HEIRS OF RICHARD H. KOUNS, deceased; CLARA PRANGLEY, if living, if deceased, THE UNKNOWN HEIRS OF CLARA PRANGLEY, deceased; F. NORMAN KURTZ, if living, if deceased, THE UNKNOWN HEIRS OF F. NORMAN KURTZ, deceased; MELBA ANDERSON KOUNS, if living, if deceased, THE UNKNOWN HEIRS OF MELBA ANDERSON KOUNS, deceased; DAVID F. JONES, if living, if deceased, THE UNKNOWN HEIRS OF DAVID F. JONES, deceased,

Cross-defendants, and

**Class 3:** THE UNKNOWN HEIRS OF: MARGARET HASSELMAN JONES, deceased; JULIA HASSELMAN KELLER, deceased; MAY HASSELMAN KOUNS, deceased; JENNIE HASSELMAN HILL, deceased; EVELYN K. KURTZ, deceased; ROBERT H. KOUNS, deceased,

Cross-defendants, and

**Class 4:** ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO PLAINTIFFS,

Cross-defendants, and

**Class 5:** MILDRED DELANO, WILLIAM SCHMITT, GERALDINE CHIPUSIO, WILLIAM BROWN, MYRNA SCHMITT, CAROYLN EVANS, RACHEL EVANS, DOMINIQUE EVANS,

Additional parties, and

**Class 6:** LEOLA KELLOGG, if living, if deceased, THE UNKNOWN HEIRS OF LEOLA KELLOGG, deceased; ROBERT ROY PRANGLEY, if living, if deceased, THE UNKNOWN HEIRS OF ROBERT ROY PRANGLEY, deceased; JOY LYNN PRANGLEY, if living, if deceased, THE UNKNOWN HEIRS OF JOY LYNN PRANGLEY, deceased; RITA KOUNS, if living, if deceased, THE UNKNOWN HEIRS OF RITA KOUNS, deceased,

Additional parties.

**PLAINTIFFS' MOTION TO MAINTAIN STATUS QUO  
AND FOR EXPEDITED HEARING  
WITH CONSOLIDATED BRIEF IN SUPPORT**

COMES NOW, Plaintiffs Edwin Smith, LLC, and Jerry T. Walmsley trustee of the June Walmsley Bypass Trust under the will of June H. Walmsley dated April 7, 1992, and hereby move the Court, pursuant to Rule 1-066 NMRA 2007, for an order prohibiting Defendant Synergy from taking any action affecting the legal interests at issue in this lawsuit until this Court has issued its determination on the merits.

### **BACKGROUND**

On October 23, 2007, counsel for Defendant Synergy Operating LLC ("Synergy") requested the concurrence of counsel for Plaintiff Edwin Smith, LLC in a motion to continue the summary judgment hearing in this case scheduled for November 29, 2007, at 10:00 a.m. Synergy's attorney stated that Synergy has a force pool hearing before the Oil Conservation Division ("OCD") that same date in another matter.

According to the OCD's website, on November 29, the OCD will hear an application by Synergy for compulsory pooling of the mineral interests directly at issue in this case. See OCD calendar, Case No. 14033 (Exhibit 1 hereto). Presumably, Synergy's application is an attempt to obtain an OCD finding that Synergy has certain rights in the mineral interests at issue in this case that have not yet been adjudicated by this Court. In other words, Synergy's actions before the OCD are an effort to usurp or circumvent this Court's authority to determine the ownership of the mineral interests at stake in this litigation. The Court should not permit Synergy to do so.

### **ARGUMENT**

It is inappropriate for Synergy to attempt to litigate the merits of this case before the OCD, which has no jurisdiction to do so. If the OCD approves Synergy's application, the OCD could effectively grant Synergy all or a substantial part of the ultimate relief sought by Synergy in this lawsuit. This is an inequitable result and potential waste of judicial resources in the event this Court determines title in favor of the Plaintiffs instead of Synergy. Synergy should be required to maintain the status quo pending a determination from this Court on the merits of the claims and defenses asserted herein.



In cases involving disputes over land, New Mexico Courts have commonly issued preliminary orders that restrained the parties from disturbing the status quo. See *Frostenson v. Marshall*, 25 N.M. 215, 180 P.2d 287 (1919) (temporary injunction against continued trespass); *Griffen v. Jones*, 25 N.M. 603, 186 P. 119 (1919) (order preventing maintenance of a fence "till the final hearing in this cause"); *Cook v. Klopfer*, 86 N.M. 111, 520 P.2d 267 (1974) (parties temporarily restrained and enjoined from "doing anything with the land in question"); *State Ex Rel. Baxter v. Egolf*, 107 N.M. 315, 757 P.2d 371 (Ct.App. 1988) (preliminary injunction preventing defendants from storing materials or cutting vegetation on plaintiff's property). In the present case, basic principles of fairness and judicial dictate that Synergy's attempt to circumvent this Court's authority should be enjoined, and the status quo should be maintained during the pendency of this action.

The properties at issue bear two producing oil and gas wells which generate sufficient revenue streams to satisfy the security requirements of Rule 1-066. Therefore, good cause exists to support Plaintiffs' request to waive any need for additional security.

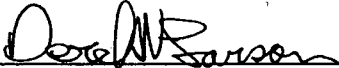
Counsel for the Kurtz Defendants has stated that they JOIN in this motion. Synergy's counsel has been contacted regarding this motion, pursuant to the requirements of, but was unable to state a position by the time this motion was filed due to the exigencies of the circumstances giving rise to the motion.

WHEREFORE, Plaintiffs Edwin Smith LLC and Jerry T. Walmsley requests that  
the Court:

1. grant an expedited hearing on this motion;
2. order Synergy to withdraw its application for compulsory pooling in  
OCD Case Number 14033;
3. prohibit Synergy from applying to the OCD for any relief affecting  
the mineral interests at issue before this Court;
4. prohibit Synergy from taking any action which might affect the  
rights, responsibilities, or obligations of any of the parties to this  
proceeding with regard to the mineral interest at issue herein;
5. Waive the furnishing of security; and
6. award such other and further relief as the Court deems just and  
proper.

Respectfully submitted,

SUTIN, THAYER & BROWNE  
A Professional Corporation

By:   
Derek V. Larson  
C. Shannon Bacon  
P. O. Box 1945  
Albuquerque, NM 87103  
(505) 883-2500

J. Scott Hall  
Miller Stratvert, PA  
P.O. Box 1986  
Santa Fe, NM 87504-1986  
(505) 989-9614

Attorneys for Edwin Smith LLC  
Jerry T. Walmsley

We hereby certify and verify under penalty  
of perjury that we have faxed and mailed  
a copy of the foregoing pleading to:

Kyle M. Finch  
Finch & Olson, P.A.  
P.O. Box 2721  
Farmington, NM 87499

Attorneys for Defendants Synergy Operating, LLC, AnneMarie Keller, Charla Varner,  
Robert E. Kouns, Jodie Yates-Simon, Kimberly Brautigam and Therolyn K. Williams

Gerald G. Dixon  
Jennifer M. Rozzoni  
Dixon, Scholl & Bailey, PA  
P.O. Box 26746  
Albuquerque, NM 87125-6746

Attorneys for Defendants F. Norman Kurtz, F. Kevin Kurtz and Kristi Kurtz Clark

this fourteenth day of November 2007.

SUTIN, THAYER & BROWNE  
A Professional Corporation

By:  \_\_\_\_\_

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