

BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

APPLICATION SYNERGY OPERATING,
LLC FOR COMPULSORY POOLING,
SAN JUAN COUNTY, NEW MEXICO.

2005 AUG 4 PM 2 17

Case No. 13,486
Order No. R-12,376

RESPONSE OF SYNERGY OPERATING, LLC
IN OPPOSITION TO
JOINT APPLICATION FOR STAY

Synergy Operating, LLC (“Synergy”) files this response in opposition to the Joint Application for Stay filed by Edwin Smith, LLC (“Smith LLC”), Joseph C. Robbins (“Robbins”), and Jerry Walmsley, Trustee (the “Trustee”), collectively referred to as “Movants.”

I. FACTS.

This case concerns the pooling of interests from the surface to the base of the Basin-Fruitland Coal Gas Pool underlying the W½ of Section 8, Township 29 North, Range 11 West, N.M.P.M., San Juan County, New Mexico. Synergy proposes to drill its Duff 29-11-8 Well No. 104, in the NW¼ of Section 8, and seeks to dedicate the W½ of Section 8 to the well to form a standard 320 acre gas spacing and proration unit.

Synergy sought to force pool Edwin Smith (individually), Earnest Smith, and the heirs of Margaret Jones. **Hearing Transcript at 9.** Synergy did not seek to force pool the Trustee (**Hearing Transcript at 10**), because the Trustee has signed an operating agreement. **Synergy Exhibit 10.** In addition, Synergy did not seek to force pool Robbins, because he has signed a farmout agreement. **Hearing Transcript at 32.**

Movants have filed a Joint Application for Stay of Order No. R-12,376, which is basically a renewal of an Application for Stay filed a month ago by Smith LLC, which was denied by the Division. **Order No. R-12,376-A.** Movants have again failed to show that they

are entitled to a stay under the pertinent statutes and regulations, and the Joint Application for Stay must also be denied.

II. LAW.

Issuance of a stay is governed by Division Rule 1220.B: An applicant must show that a stay is necessary to prevent waste, protect correlative rights, or prevent gross negative consequences to an affected party. In addition, in a series of recent rulings the Division has relied upon the requirements for granting a stay mandated by the Rules of Civil Procedure. **See Order Nos. R-12,108-D, R-12,275-A, and R-12,343.** Thus, Movants must also show:

- (a) A likelihood of success on the merits;
- (b) Irreparable harm unless a stay is granted; and
- (c) No harm to other interested parties.

NMRA 1-074. Movants cannot satisfy any of these requirements.

III. ARGUMENT.

1. Lack of Standing: As a preliminary matter, Smith LLC and Robbins are not parties of record to this proceeding, and therefore have no right to apply for a stay. In addition, the Trustee has signed an operating agreement with Synergy. **See Synergy's Motion to Dismiss Applications for Hearing De Novo, filed on August 2, 2005.** Therefore, they have no standing to apply for a stay, and the Joint Application for Stay must be denied.

2. Waste and Correlative Rights: The issues of waste and correlative rights can be dealt with summarily: Waste is prevented, and correlative rights are protected, when a well is drilled. Granting a stay will delay the drilling of a well, and therefore cause waste and impair correlative rights. Movants have presented no evidence of how their correlative rights will be impaired by the drilling of a well by Synergy.

3. Success on the Merits: Similarly, Movants have not shown a likelihood of success on the merits. Their basic assertion challenges the working interest title of Synergy. The evidence before the Division shows that Synergy has obtained assignments covering 25% of the working interest in the SW¼ of Section 8. **Synergy Exhibit 7**. The assignors of these instruments have been paid production proceeds for many years by Edwin Smith from a Pictured Cliffs well¹ located in the SW¼ of Section 8, and in fact Smith paid Synergy production proceeds after its acquisition of these interests. **Hearing Transcript at 16**. While the Trustee challenges Synergy's title under these assignments (**Hearing Transcript at 30**), at the very least Synergy has a *prima facie* claim to title.

In addition, Synergy has a farmout agreement² from Robbins on his 3.125% interest in the SW¼ of Section 8. **Exhibit 1 attached to Smith LLC's original Application for Stay**. Robbins makes reference, in his affidavit attached to the Joint Application for Stay, about "rescinding" the farmout. It is hornbook law that one party cannot unilaterally rescind a contract, and thus the farmout remains in effect.³ Moreover, Robbins has subsequently stated that he has no objection to Synergy operating the well. **Affidavit of Patrick Hegarty, attached as Exhibit A**.

¹ The Pictured Cliffs owners in the SW¼ of Section 8 also own the Fruitland Coal rights. **Hearing Transcript at 18-19**.

² A farmout gives the farmee the right to operate a well. **Maralex Resources, Inc. v. Gilbreath, 134 N.M. 308, 76 P.3d 626**.

³ Movants also cite lack of consideration for the farmout. However, consideration was given by Synergy for the farmout -- drilling of wells at no cost to Robbins, and foregoing compulsory pooling and the risk charge available under a pooling order.

The foregoing instruments establish that Synergy has valid title in the SW¼ of Section 8, and has the right to drill and operate a well in the W½ of Section 8. Therefore, under the pooling statute, the Division (or the Commission) “shall pool” the well unit. **NMSA 1978 §70-2-17.C.** If Robbins and the Trustee have issues with working interest ownership, those issues must be pursued in District Court, and not before the Division or the Commission.

4. Lack of Harm or Negative Consequences: Finally, although Movants cite “irreparable damage” if a stay is not granted (**Joint Application for Stay, paragraph 14**), they give no example of how they will be harmed. They state that they will be harmed because they want to drill a well “using an operator of their choosing.” **Joint Application for Stay, paragraph 15. The fact of the matter is that Robbins and the Trustee have already chosen an operator – Synergy – by executing a farmout (Robbins) and an operating agreement (the Trustee).** Also, Smith LLC owns no interest in the well unit, and thus has no right to choose an operator. Their position is without merit.

To the contrary, Synergy will be harmed by a stay: The Robbins farmout has a time limit, and failure to drill will result in loss of rights by Synergy. And, as noted above, all parties benefit by the drilling of a well and selling gas at current favorable prices.

IV. CONCLUSION.

Movants have failed to prove the need to stay Order No. R-12,376, and Synergy requests that the Joint Application for Stay be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following counsel of record, in the manner indicated, this 7th day of August, 2005:

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