

BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

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

**CASE NO. 13,486
ORDER NO. R-12,376**

**JOINT REPLY TO SYNERGY'S RESPONSE
IN OPPOSITION TO
JOINT APPLICATION FOR STAY**

Edwin Smith, LLC (Smith, LLC) and Joseph C. Robbins (Robbins) file this reply opposing Synergy's Response in Opposition to Joint Application for Stay as follows:

**I. SMITH, LLC, ROBBINS, AND TRUSTEE HAVE STANDING TO REQUEST THE
DIVISION TO STAY ORDER NO. R-12,376**

Smith, LLC owns an interest in the property sought to be pooled by Synergy. See Exhibit

1. Edwin Smith appeared at the hearing for Synergy's application as an agent for Smith, LLC.

Based on deeds entered into the record at the hearing, Smith, LLC believes that Synergy does not have standing to force-pool the subject property. Smith, LLC entered an appearance at the June 16, 2005, hearing on Synergy's force-pooling application ("June 16, 2005, hearing"). Smith, LLC, therefore, has standing to request the Division to stay Order No. R-12,376.

Robbins owns an interest in the property sought to be pooled by Synergy. Robbins entered into a farm-out agreement with Synergy because he was led to believe that Synergy had the proper legal standing and ability (separate from the farm-out agreement) to force-pool the subject property. Robbins, a North Carolina resident, did not travel to New Mexico to attend or otherwise enter an appearance at the June 16, 2005, hearing because he did not know, at that time, that Synergy's claimed interest was in fact uncertain and contrary to real property title

instruments of record in San Juan County. Upon learning that Synergy's interest in the property sought to be pooled by Synergy is in question, Robbins entered an appearance by joining the Joint Application for Stay filed July 29, 2005. Robbins, therefore, also has standing to request the Division to stay Order No. R-12,376.¹

Jerry Walmsley, Trustee for the Walmsley Trust (Trustee) manages for the Walmsley Trust, the Trust's interest in the property sought to be pooled by Synergy. Trustee entered into a joint operating agreement with Synergy because Synergy represented that it had standing, separate from the farm-out agreement with Robbins, to force-pool the subject property. Trustee entered the joint operating agreement based on Synergy's representation that it could force-pool the subject property and contingent upon Synergy providing proof of its claimed interest in the property. Trustee now believes, based on deeds entered into the record at the hearing, that Synergy does not have standing to force-pool the subject property. Trustee entered an appearance at the June 16, 2005, hearing to question Synergy's standing to force-pool and to question the allocation of interest assigned to Trustee by Synergy in the joint operating agreement. Trustee, therefore, also has standing to request the Division to stay Order No., R-12,376.

II. A GRANT OF STAY BY THE DIVISION IS NECESSARY

1. All parties to the Application for Stay have standing.

All three of the current actual possessory interest owners of the subject property, not including Synergy's claimed interest, question Synergy's standing to force-pool. If it turns out that Synergy does not have standing to force-pool, Trustee and Robbins believe they will have

¹ In spite of his appearance in the matter, Synergy failed to serve Robbins with a copy of Synergy's Response in Opposition to Joint Application for Stay, served on other parties of record on August 3, 2005. Robbins was, therefore, unaware of the affidavit of Patrick Hegarty attached in support thereof. Said affidavit is hearsay and mischaracterizes the conversation between Hegarty and Robbins.

been strong-armed into signing agreements with Synergy they otherwise would not have signed. Smith, LLC joins in the shared concern that Synergy does not have standing to force-pool and similarly believes that Synergy has attempted to strong-arm Smith, LLC into pooling the subject property.

2. Valid reasons exist to grant a stay.

Synergy's actions with respect to its application to force-pool have caused Smith, LLC, Trustee, and Robbins to question Synergy's motives and business practices and to closely scrutinize any business agreement they have entered and may enter with Synergy to operate their interests in the subject property. For example, at the hearing, Synergy's principal stated that he knew about the 1981 deed conveying a 50% interest in the subject property to the Walmsley Trust (the "1981 Deed") but that he disregarded the 1981 Deed. The implication of the 1981 Deed is that the persons from whom Synergy purportedly obtained a possessory interest in the subject property had no possessory interest to convey to Synergy. Based on the documents currently known to the parties, Synergy had no valid reason to question the validity of the 1981 deed. Yet Synergy did not disclose the existence of this deed (disproving Synergy's claimed title) when it negotiated with Trustee and Robbins to operate their actual present possessory interests in the subject property.

Most recently, Synergy misrepresented to Robbins that Smith, LLC would likely be voluntarily signing a joint operating agreement with Synergy in early August and therefore that Robbins should not support a stay, the appeal *de novo* before the Commission, or rescind the farm-out agreement. Synergy's statements are, again, misrepresentations aimed at strong-arming Robbins to enable Synergy to force-pool. Smith, LLC has no interest in signing an operating

agreement with Synergy *unless* Synergy proves it has a valid interest in the subject property, and Smith.

Further contrary to Synergy's assertions, Robbins (who joins in this response) supports a stay pending determination of Synergy's interest and is contemplating rescinding his farm-out agreement if Synergy's interest in the subject property is proven to be invalid. Robbins is considering rescinding his farm-out agreement with Synergy for two reasons. First, Robbins entered the farm-out only because Synergy represented to Robbins that it had the ability to force-pool. If Synergy's representation is proven to be false, the basis upon which Robbins entered the farm-out evaporates. A contract is not valid if based upon a misrepresentation. Second, a contract does not vest until consideration is tendered. The farm-out agreement is a unilateral contract, not a bilateral contract. In a unilateral contract the only consideration supporting the contract is actual performance. Performance under the farm-out agreement is Synergy's drilling of a well on the subject property. Therefore, Robbins may rescind the farm-out agreement at any time prior to Synergy's completion of drilling. Third, Robbins believes that his telephone conversation with Patrick Hegarty, principal of Synergy, was not accurately described in Mr. Hegarty's affidavit.

3. The requested Stay would be in keeping with the intent of the compulsory pooling statutes.

The compulsory pooling statutes were enacted to protect possessory mineral interest holders by giving them a mechanism by which they can produce their interests when other interest holders refuse to voluntarily enter a pool to produce their interests. Compulsory pooling statutes were *not* enacted to give aggressive operators with questionable interests the ability to force-pool. Compulsory pooling statutes should not be used, as here, to force owners with actual present possessory interests into a force-pool with an unscrupulous operator who obtains future

contingent interests through misrepresentation. Here, the interest holders are interested in voluntarily entering a pool to produce their interests with an operator of their choosing and whose business practices they trust. It is reasonable that the interest holders want to determine whether Synergy's interest is valid before they agree to pool and produce their interests. Once Synergy drills the force-pool well there is no going back if it is determined that Synergy does not have standing to force-pool.

4. The requested Stay is appropriate because the parties are likely to succeed on the merits.

The stay should be granted because Smith, LLC, Trustee, and Robbins are likely to succeed on the merits of their contentions that Synergy does not have standing without the Robbins farm-out to force-pool the subject area.

5. The requested Stay is appropriate because the parties will suffer irreparable harm if the Stay is not granted.

The stay should be granted because irreparable harm will ensue if the stay is not granted. Smith, LLC has been requested by Synergy to sign a joint operating agreement and AFE, and contribute over \$80,000 no later than August 8, 2005 in order to avoid being penalized later for not agreeing to be force-pooled. Synergy initiated this cash call knowing that Smith, LLC filed a request for *de novo* review of the forced-pooling order and knowing further that the deadline for the cash-call would come before Smith, LLC's request for *de novo* review could be held. This action by Synergy puts Smith, LLC in an untenable situation. Smith, LLC must choose either to refuse the cash-call, risk severe penalties for not complying, and pursue its statutory right to seek review of the force-pool order, or waive its right to seek review of the force-pool order to participate in a pool with an operator who does not have standing to force-pool and whose business practices Smith, LLC does not trust.

6. The requested Stay will not cause waste or impair correlative rights.

Any delay caused by reasonable efforts made by interest holders to determine whether Synergy has standing to force-pool cannot cause waste or impair correlative rights. Granting a stay here supports the interest holders' statutory ability and right to prevent waste and protect their correlative rights by allowing them to determine Synergy's standing to force-pool before the pool is forced. If interest holders are not allowed to determine the standing of an operator to force-pool before an operator begins drilling, then the ability of interest holders to exercise control over their own property interests is virtually extinguished.

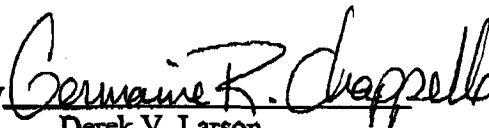
Furthermore, Synergy will not be harmed by imposing a stay. If Synergy can timely show that it has valid interests sufficient to give it standing, Synergy can perform under the Robbins farm-out. Synergy has a year within which it can perform under the farm-out and also has the ability to request extensions of that time.

III. CONCLUSION

The request by Smith, LLC, Robbins, and Trustee is reasonable and should be granted.

Respectfully Submitted,

SUTIN THAYER & BROWNE,
A Professional Corporation

By 

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Certificate of Service

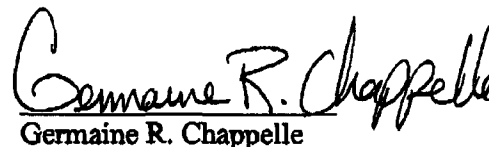
I hereby certify that a true and correct copy of the foregoing was faxed to counsel and parties of record on the 5th day of August, 2005, as follows:

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FACSIMILE TRANSMISSION COVER SHEET

Date: August 8, 2005

The original of this facsimile will be sent to you by Regular Mail. Pages: 3, including this cover sheet.

<u>TO</u>	<u>ADDRESS</u>	<u>FAX NO.</u>	<u>CONFIRM NO.</u>
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From: Germaine Chappelle

Subject: Application by Synergy Operating, LLC for Compulsory Pooling, San Juan County, New Mexico; Case no. 13,486, Order no. R-12,376

Items Sent: Exhibit A to Joint Reply to Synergy's Response In Opposition to Joint Application For Stay

Message: Attached is Exhibit A to the Joint Reply to Synergy's Response In Opposition to Joint Application For Stay that was filed on 8/5/05 with OCD.

If you do not receive all the pages or the material is not legible, call 505-883-2500.

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THIS DEED IS BEING RECORDED FOR CORRECTIVE PURPOSES.**WARRANTY DEED**

Earnest Ruby Smith, Sr. trustee of the Earnest Ruby Smith, Sr. Family Trust under a trust dated December 27, 2001, whose address is 40758 Jasper Drive, Kingsbury, California 93631 grants to Edwin Smith, LLC, a New Mexico limited liability company, all of its right, title and interest in and to the following described real estate located in San Juan County, New Mexico:

A one-half interest as tenants in common in the 160 acre parcel located in the Southwest Quarter of Section 8, Township 29 North, Range 11 West, N.M.P.M., San Juan County, New Mexico.

Subject to patents, easements, reservations, restrictions and covenants of record and taxes for the year 2004 and thereafter.

With Warranty Covenants.

Dated: 11/8/04

EARNEST RUBY SMITH, SR., TRUSTEE
OF THE, EARNEST RUBY SMITH, SR.
FAMILY TRUST, UNDER A TRUST
AGREEMENT DATED December 27,
2001

By Earnest R. Smith, Sr.
Earnest Ruby Smith, Sr.

STATE OF CALIFORNIA


COUNTY OF FRESNO

This instrument was acknowledged before me on _____,
by Earnest Ruby Smith, Sr. as trustee of the Earnest Ruby Smith, Sr. Family Trust under a
Trust Agreement dated December 27, 2001.

My commission expires: _____

Notary Public

718664.wpd


200420609 11/19/2004 02:26P
1of2 B1399 P506 R 11.00 D 0.00
San Juan County, NM Clerk FRAN HANHARDT



CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of FRESNO } SS.On NOV 8, 2004

Date

before me, STEVEN R JONES

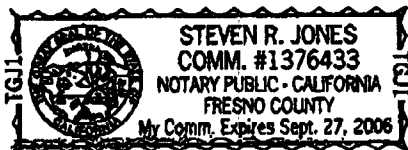
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared ERNEST LUDY SMITH, JR.

Name(s) of Signer(s)

- ☒ personally known to me
☐ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Place Notary Seal Above

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

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Signer's Name: _____

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☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER
Top of thumb here.