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2005 AUG 4 PM 2 17

August 3, 2005

Via fax and Hand Delivery

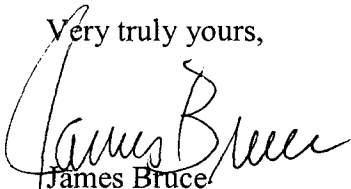
Mark E. Fesmire, P.E.  
Oil Conservation Division  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

Re: Case No. 13,486 *de novo*

Dear Mr. Fesmire:

Enclosed is Synergy's response to the application for stay filed herein.

Very truly yours,



James Bruce

Attorney for Synergy Operating, LLC

cc: Counsel of record w/encl.

BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

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

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 well<sup>1</sup> 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 agreement<sup>2</sup> 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.<sup>3</sup> Moreover, Robbins has subsequently stated that he has no objection to Synergy operating the well. **Affidavit of Patrick Hegarty, attached as Exhibit A**.

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

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

<sup>3</sup> 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,



James Bruce  
Post Office Box 1056  
Santa Fe, New Mexico 87504  
(505) 982-2043

Attorney for Synergy Operating, LLC

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 3rd day of August, 2005:

Via Fax and Hand Delivery

David K. Brooks  
Oil Conservation Commission  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

Via Fax and U.S. Mail

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Derek V. Larson  
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James Bruce

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

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


**Case No. 13,486**

**AFFIDAVIT OF PATRICK HEGARTY**

COUNTY OF SAN JUAN )  
 ) ss.  
STATE OF NEW MEXICO )

**Patrick Hegarty, being duly sworn upon his oath, deposes and states:**

1. I am over the age of 18, and have personal knowledge of the matters stated herein. I am a principal of Synergy Operating, LLC.
2. On the afternoon of August 2, 2005 I called Joseph C. Robbins at his home in North Carolina regarding the affidavit he signed and faxed to the Sutin, Thayer & Browne.
3. Mr. Robbins informed me that he had been contacted by Sarita Nair, an attorney for Edwin Smith, who told Mr. Robbins that he had gotten a "bad deal" from Synergy Operating, LLC. As a result he signed the affidavit.
4. I explained to Mr. Robbins the process of drilling the wells proposed by Synergy Operating, LLC, the cost of the wells, and the benefit he may derive from the wells. After hearing my comments, he informed me he was comfortable with Synergy Operating, LLC operating the wells.

  
Patrick Hegarty

SUBSCRIBED AND SWORN TO before me this 4<sup>th</sup> day of August, 2005 by Patrick Hegarty.

Christina Thomas  
Notary Public

**My Commission Expires:**

July 25, 2007

