

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

IN THE MATTER OF THE HEARING CALLED BY)
THE OIL CONSERVATION COMMISSION FOR THE)
PURPOSE OF CONSIDERING:)
)
APPLICATION OF HARVEY E. YATES COMPANY) CASE NO. 13,817
FOR AN EXCEPTION FROM OIL CONSERVATION) de novo
COMMISSION RULE 19.15.2.50.(A) NMAC)
)

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
WILLIAM C. OLSON, COMMISSIONER

April 19th, 2007

Santa Fe, New Mexico

2007 MAY 4 AM 10 54

This matter came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, April 19th, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

I N D E X

April 19th, 2007
Commission Hearing
CASE NO. 13,817

	PAGE
APPEARANCES	3
ARGUMENTS:	
By Ms. MacQuesten	7
By Mr. DeBrine	17
By Ms. MacQuesten	30
By Mr. DeBrine	31
DECISION OF THE COMMISSION	32
REPORTER'S CERTIFICATE	36

* * *

A P P E A R A N C E S

FOR THE COMMISSION:

CHERYL BADA
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FOR THE APPLICANT:

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Bank of America Centre
500 Fourth Street NW, Suite 1000
P.O. Box 2168
Albuquerque, New Mexico 87103-2168
By: EARL E. DEBRINE, JR.
and
ADAM GREENWOOD

FOR THE OIL CONSERVATION DIVISION:

GAIL MacQUESTEN
Deputy General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

* * *

ALSO PRESENT:

Vernon Dyer, Heyco
Gordon Yahney, Heyco

* * *

1 WHEREUPON, the following proceedings were had at
2 9:04 a.m.:

3 CHAIRMAN FESMIRE: The Commission will now call
4 Case Number 13,817. It's the *de novo* Application of Harvey
5 E. Yates Company for an exception from Oil Conservation
6 Commission Rule 19.15.2.50.(A) NMAC.

7 At this time the Oil Conservation Commission will
8 hear arguments on the motion to dismiss filed by the Oil
9 Conservation Division in this case.

10 Are the attorneys in this case present?

11 MR. DEBRINE: Yes, Mr. Chairman, Earl DeBrine and
12 Adam Greenwood with the Modrall Sperling firm for the
13 Applicant, Harvey E. Yates Company. In the audience are
14 Vernon Dyer and Gordon Yahney of Heyco.

15 MS. MacQUESTEN: Mr. Chairman, Gail MacQuesten.
16 I'll be representing the Oil Conservation Division in this
17 matter.

18 CHAIRMAN FESMIRE: Are there any other attorneys
19 present for this case?

20 Mr. DeBrine, would you -- your associate's name?
21 I didn't --

22 MR. DEBRINE: Adam Greenwood.

23 CHAIRMAN FESMIRE: Since the motion is yours, Mr.
24 DeBrine, I guess we'll ask if you have an opening
25 statement.

1 MS. MacQUESTEN: Actually, the Division --

2 CHAIRMAN FESMIRE: Oh, I'm sorry, it is -- Not a
3 good morning this morning, I apologize.

4 Ms. MacQuesten, do you have an opening statement?

5 MS. MacQUESTEN: Yes, I do. Actually, argument.
6 There will be no evidence presented today, it is strictly a
7 motion hearing.

8 CHAIRMAN FESMIRE: Okay.

9 MR. DEBRINE: Mr. Chairman, I have a preliminary
10 matter to raise.

11 The Division in its reply brief on the motion
12 referenced the Commission's Order R-12,172 and the finding
13 set forth within that order, and I have a sneaking
14 suspicion that the William C. Olson testimony referred to
15 in the Commission's order is Commissioner Olson. And if
16 that's the case, then I raise for the Commission as to
17 whether Commissioner Olson should sit and hear and decide
18 this matter if he personally participated and gave
19 testimony in connection with the proceeding that led to the
20 adoption of the order.

21 I don't think there's any Commission rules that
22 specifically deal with that, but just as a matter of
23 administrative law and procedure it appears to be
24 problematic. I just raise that for the Commission.

25 CHAIRMAN FESMIRE: So before we start,

1 Commissioner Olson, that is the same William C. Olson,
2 isn't it?

3 COMMISSIONER OLSON: That is correct.

4 CHAIRMAN FESMIRE: Okay. And do you feel that
5 your testimony in that case would in any way hamper your
6 ability to make a fair decision in this case?

7 COMMISSIONER OLSON: I don't believe it would.

8 CHAIRMAN FESMIRE: Ms. MacQuesten, do you have a
9 response to that?

10 MS. MacQUESTEN: Mr. Chairman, I don't think that
11 Mr. Olson's participation in that hearing would disqualify
12 him from hearing this case, any more than the Commission
13 would be disqualified from hearing a case on the rule that
14 they adopted.

15 CHAIRMAN FESMIRE: Okay. Counsel, do you have
16 any suggestion in this case?

17 MS. BADA: I think given that he was -- in that
18 capacity, was an employee of the Division and was
19 representing the Division's position, and in this capacity
20 he's a Commissioner, I don't think that would be a problem.

21 CHAIRMAN FESMIRE: Okay. Mr. DeBrine, given Mr.
22 Olson's response and the advice of counsel, I think I'll
23 overrule your motion at this time.

24 MR. DEBRINE: Thank you, Mr. Chairman.

25 CHAIRMAN FESMIRE: Thank you.

1 Ms. MacQuesten, with Mr. DeBrine's permission I
2 guess you can proceed.

3 MS. MacQUESTEN: May it please the Commission, we
4 are here today on the OCD's motion to dismiss Heyco's
5 Application. We are asking the Commission to dismiss
6 Heyco's Application because the Commission cannot give
7 Heyco what it is asking.

8 To address this motion and to understand the
9 OCD's position, we must first be clear on what Heyco is
10 asking for.

11 Heyco is asking for an exemption from the pit
12 permit requirements of Rule 50. They are not asking for an
13 exception to a particular requirement of the pit rule, such
14 as an exception from the liner requirements or an exemption
15 from the location requirements. They are asking that the
16 pit for the BRU Number 6 Exploratory Well be exempt from
17 the permitting process itself.

18 What will that mean? It will mean that there is
19 no up-front agreement on how that pit is to be constructed,
20 used or closed. You see, Rule 50 sets goals for pits, but
21 it doesn't always specify how those goals are to be met.
22 For Example, 50.F states that pits must be properly closed,
23 but it doesn't say how. It's the permitting process itself
24 that determines how the pit will be closed, because the
25 rule provides that the Division may require the operator to

1 file a closure plan that becomes part of the pit permit.

2 Another example is 50.C.(b).(1) [sic], liners for
3 drilling pits. It provides that liners shall be designed,
4 constructed and maintained so as to prevent contamination
5 of fresh water, protect public health and the environment.
6 But the rule doesn't specify how to do that. It's up to
7 the operator and the OCD to come to an agreement during the
8 permitting process. Often the operator agrees to follow
9 the OCD guidelines or proposes their own liner
10 requirements, and if the OCD agrees that becomes part of
11 the permit.

12 But if the BRU Number 6 Well is exempt from the
13 permitting process itself, there will be no opportunity to
14 tell Heyco, up front, how to construct, use, maintain or
15 close this pit. Heyco has made a number of representations
16 regarding how it will construct, use and close the pit, but
17 those representations are irrelevant. They won't be part of
18 a permit.

19 You won't have a permit that says, You may have
20 this pit if you use an air-drill system; if the pit only
21 contains local groundwater, produced water, wellbore
22 cuttings, drilling mud additives; if you line it with a 12-
23 mil plastic liner. Any of the representations that Heyco
24 has made in its Application won't be part of a permit,
25 because they're asking you to allow the pit without going

1 through the permit process.

2 Because there would be no permit process, you
3 would also not have the opportunity to add any additional
4 conditions beyond what Heyco has represented.

5 Now I'm not here today to litigate what those
6 extra conditions might be, but there's one example that
7 comes to mind. When the Commission adopted Rule 21.B it
8 expressed concern that the netting requirements of Rule 50
9 would not be adequate to protect the wildlife in Sierra and
10 Otero Counties. The concern was that the netting
11 requirement was designed for livestock in Rule 50, but that
12 wouldn't be adequate to protect wildlife. If Heyco is
13 exempted from the pit-permit process for this pit, there
14 will be no opportunity to impose additional conditions such
15 as additional netting requirements.

16 Taking the pit out of the permit process itself
17 also changes the burdens. The pit-permit process is
18 designed to prevent damage before it happens. Under the
19 permit process, the operator must tell us what he is going
20 to do, how he is going to construct, use and close that
21 pit. If the OCD agrees, those terms are built into the
22 permit. And if the operator doesn't meet those permit
23 terms, he's in violation of the permit.

24 But if you exempt the pit from the permit
25 requirement, it will be up to the operator to decide how to

1 construct, operate and close that pit. And if the OCD
2 disagrees with what the operator is doing, the OCD would
3 have to take action and prove that what the operator is
4 doing is harmful and should be stopped. Usually, that's
5 going to occur after the damage has happened.

6 Now why is Heyco asking for this extraordinary
7 exemption, an exemption from the process itself?

8 They are asking that they be exempt from the
9 permitting process to avoid Rule 21.B. Rule 21.B forbids
10 the OCD from issuing permits for pits in selected areas of
11 Sierra and Otero Counties. Heyco's reasoning is, if they
12 can get the Commission to agree that they don't need a
13 permit for their pit at the BRU Number 6, then they won't
14 be in violation of Rule 21.B.

15 Now what they're asking for is extraordinary,
16 when you consider the history and purpose of Rule 21.B.
17 The whole point of that rule was that getting a pit permit
18 under Rule 50 would not be enough to protect this special
19 area. The Commission looked at the impact of digging pits
20 in this area, where it is difficult to reclaim the land;
21 the impact of pits on wildlife; the concern that pits are
22 more likely to leak than closed-loop systems and damage the
23 soil and the water.

24 And anytime you're looking at a fragile
25 environmental area, you're looking at cumulative impact.

1 The question when the Commission adopted Rule 21.B wasn't
2 whether one isolated pit would have an adverse impact on
3 the Chihuahuan Desert grassland and the plants and animals
4 there, but what would the cumulative effect be of allowing
5 pits in this area? The conclusion of the majority of the
6 Commission was that the risk was too great to allow any pit
7 permits in this area.

8 Now if this is what Heyco is asking for, an order
9 allowing a pit in the selected areas without having to go
10 through the pit-permitting process, the question before the
11 Commission on today's motion is, can you give them what
12 they are asking for? My argument is that the answer is no,
13 you cannot give them what they are asking for, for two
14 reasons.

15 First, Rule 50 itself, the rule they are seeking
16 the exemption from, does not provide for exemptions from
17 the permitting process itself.

18 The second argument is, even if you construe Rule
19 50 to allow an exemption from the permitting process
20 itself, Rule 21.B would prohibit the Commission from
21 issuing an order that allows pit in the protected areas.

22 So I have two arguments, the Rule 50 argument and
23 the Rule 21.B argument. I'd like to address the Rule 50
24 argument first.

25 Does Rule 50 allow exemptions from the permitting

1 process? We have to look at the exemption provision
2 itself. It's Rule 50.G.(3). It states, The Division may
3 grant an exception from any requirement if the operator
4 demonstrates that such exception will not endanger fresh
5 water, public health or the environment.

6 In the context of Rule 50, when the exception
7 refers to an exception for any requirement, it must mean a
8 requirement imposed in the permitting process, such as the
9 liner requirement, such as the location requirement,
10 surface restoration requirements, a specific requirement
11 set out in Rule 50. If you say, as Heyco does, that an
12 operator can get an exception from the permitting process
13 itself, that does away with the pit rule itself.

14 Look at the history of why the Commission adopted
15 the pit rule. It put that rule in place to enable the
16 Division to manage the hazards associated with pits and to
17 conform New Mexico to national standards. This is a quote
18 from the Commission rule adopting Rule 50.

19 Another quote, To enable the Division to have
20 reliable information regarding the nature and location of
21 pits and to consider site-specific factors in applying its
22 guidelines. It doesn't make sense to say that we can just
23 exempt individual pits from that system. Rule 50 set up a
24 system for tracking and managing pits, gathering
25 information on pits. If you say that you can then exempt

1 some pits, that system falls apart.

2 It's especially troublesome to say that you can
3 exempt pits from the permit requirements in an area so
4 deserving of special protections that the Commission in
5 Rule 21.B decided that having a permit under Rule 50
6 wouldn't be enough to protect that area.

7 And that brings us to the second argument. Even
8 if you say Rule 5 can allow just an exemption from the
9 entire permitting process, our argument is that Rule 21.B
10 would prohibit you from issuing an order that would allow a
11 pit in the selected areas of Otero and Sierra Counties
12 where this pit would be located.

13 Rule 21.B provides, The Division shall not issue
14 permits for pits under Rule 50 for pits located in the
15 selected areas.

16 An order issued under Rule 50 exempting the pit
17 from the permitting process, which is what Heyco is asking
18 for, is itself a permit. And Rule 21.B forbids the
19 issuance of permits in the selected areas. Look at the
20 definition of the noun "permit" in *Black's Law Dictionary*.
21 And I'm using the Fifth Edition from 1979. It states, In
22 general, any document which grants a permit -- I'm sorry,
23 let me start over:

24 Any document which grants a person the right to
25 do something, a license or grant of authority to do a

1 thing, a written license or warrant issued by a person in
2 authority empowering the grantee to do some act not
3 forbidden by law but not allowable without such authority.

4 If you issue an order allowing Heyco to have a
5 pit without going through the pit-permitting process,
6 that's allowing Heyco to do something that would not be
7 allowable but for that order. In other words, you're
8 giving them a permit to have an unpermitted pit. You can't
9 issue a permit for a pit in this area, because Rule 21.B
10 forbids the issuance of pit permits in this area.

11 In conclusion, Heyco wants a permit to have an
12 unpermitted pit. The reason they structured it this way
13 was to avoid the prohibition under Rule 21.B. But you
14 cannot give them what they're asking for. Rule 50 does not
15 contemplate exemptions from the permitting process itself.
16 But even if you construe it otherwise, exempting a pit from
17 the permitting process is itself a pit permit, and that
18 cannot be issued under Rule 21.B. Thank you.

19 CHAIRMAN FESMIRE: Thank you, Ms. MacQuesten.
20 Questions from the Commissioners?

21 COMMISSIONER BAILEY: I'll be glad to. Ms.
22 MacQuesten, are you saying that the Commission does not
23 have the authority to put any provisions in an order that
24 would mimic or confirm any of the other requirements of
25 Rule 50?

1 MS. MacQUESTEN: Because what Heyco is asking for
2 is an exemption from the pit-permitting process itself, I
3 believe that's true. All you could say is, issue an order
4 saying you may have a pit without going through the pit-
5 permitting process. It's the pit-permitting process that
6 allows us to put conditions on the pit.

7 COMMISSIONER BAILEY: I think we're getting away
8 from the motion, which is to have a hearing. You're saying
9 that we should deny them even the opportunity to present an
10 argument, because under your interpretation we would not be
11 able to give them what they wanted. If there's the
12 possibility that your interpretation is not the same as
13 what the Commission would have, then are we not giving them
14 a fair opportunity?

15 MS. MacQUESTEN: If as a matter of law they're
16 not entitled to what they're asking for, no purpose is
17 served by having a hearing.

18 I didn't go into this point in this main
19 argument, but I think it's important -- Why I went into
20 such detail about what they're asking for is to help
21 understand why we're saying you cannot give them what
22 they're asking for.

23 I think it also is important to understand what
24 this hearing would be, if you decided to have a hearing.
25 They're asking for an exemption from the pit-permitting

1 process itself. What they would have to show is why this
2 pit should be exempted from the pit-permitting process.
3 Not that how they're going to construct this pit is going
4 to be safe or it is going to not raise any of the issues
5 that the Commission was concerned about in Rule 21.B, but
6 that the exception they're seeking, exempting a pit from
7 the whole permitting process, is not going to harm the
8 environment, harm water, harm human health, would be a very
9 different hearing than what appears from their Application
10 where they want to talk about the specifics of the pit.
11 That won't be at issue.

12 COMMISSIONER BAILEY: That's all I have to ask.

13 CHAIRMAN FESMIRE: Commissioner Olson?

14 COMMISSIONER OLSON: Ms. MacQuesten, how do you
15 deal with the issue, I guess, that Heyco is raising, that
16 the permit is a requirement and the way the regulation
17 reads it says you can get an exemption from any
18 requirement? It seems -- Is there a problem in the
19 construction of the rule, in Rule 50, that would allow that
20 interpretation? Because I don't think that was the intent,
21 that there would be unpermitted activities.

22 MS. MacQUESTEN: Well, I think you've hit the
23 nail on the head, that you look at the intent of the rule.
24 And I think that if you do, it's clear that what the
25 Commission was trying to do was set up a structure so that

1 we could manage the hazards of pits, know what was out
2 there, know the type of pit, and be able to track them.
3 And if you look at that intent, the rule would not allow
4 you to exempt anything from that intent.

5 Now frankly, I can see that if we had a different
6 case in front of us, if an operator came in and said a
7 specific type of pit simply isn't worth tracking,
8 unfortunately, you've given a broad definition of "pit",
9 Commission, and it draws in this type of pit that doesn't
10 deserve tracking, please exempt this type of pit from your
11 pit-permit requirements, I think it's possible you could do
12 that. I think the preferable route would be to amend the
13 rule to do that so that it was clear to everyone that that
14 type of pit was exempted.

15 But that's not what we have here. We have a pit
16 connected to one well in a specific location, and they're
17 just saying, Please drop this pit off your radar. And I
18 don't think that's what the rule contemplated.

19 COMMISSIONER OLSON: I think that's the only
20 question I had. Thank you.

21 CHAIRMAN FESMIRE: Ms. MacQuesten, thank you.
22 Mr. DeBrine?

23 MR. DEBRINE: Mr. Chairman, Commissioner Bailey,
24 Commissioner Olson, may it please the Commission, I think
25 the problem is, the Division just completely misconstrues

1 what Heyco is seeking in this proceeding. Last fall it
2 filed its Application for an exemption from Rule 50 to
3 allow it to use a reserve pit when drilling its BRU Number
4 6 well, which is located in what is known as the protected
5 area of Otero Mesa.

6 Now the land underlying the lease and Heyco's
7 lease is a federal lease, and there are issues with respect
8 to what is the relative jurisdiction of this Commission and
9 the BLM with respect to oil and gas development activities
10 on a federal lease.

11 But putting aside those issues, when Heyco filed
12 its Application last fall, it set forth very detailed
13 reasons as to why it believes that a reserve pit was
14 necessary in drilling this exploratory well. And based on
15 Heyco's analysis and the statements in its Application,
16 Heyco feels very strongly that a reserve pit is necessary
17 and that the use of a closed-loop drilling system creates a
18 greater threat, both to the safety of human health and
19 potentially the environment, than the use of a reserve pit
20 would do in this particular instance.

21 And there was no intention, and the Application
22 cannot be reasonably read as seeking a rogue pit out in the
23 middle of the Otero Mesa. The Application fully
24 contemplates, and it's expected -- and Heyco in its
25 Application said it will demonstrate as to the specific

1 characteristics of the pit, and the Commission will pass on
2 those issues and make a factual determination.

3 And it was contemplated that any order issued by
4 the Commission -- or initially the Division, and now we're
5 in front of the Commission -- that there would be specific
6 conditions placed on Heyco with respect to the use of that
7 pit. And at a minimum, going in, we assumed that the
8 Commission would apply its criteria set forth in Rule 50
9 and impose those conditions as part of any order.

10 Now there's also specific requirements that Heyco
11 has to comply with under federal law, and the BLM obviously
12 has their own regulations with respect to the use of pits
13 and liners and the like, and the construction of pits, and
14 Heyco intends to follow those, and it said in its
15 Application it would follow any additional conditions
16 imposed by the Commission.

17 All Heyco is doing is asking the Commission to
18 apply the plain language of Rule 50 and Rule 51. Rule 50
19 was set forth in, I believe, 2003, after a very detailed,
20 comprehensive rulemaking process. Lots of testimony was
21 heard, specific regulations was adopted setting forth all
22 the requirements with respect to the use of pits within
23 state land, the State of New Mexico.

24 Rule 21 came along a couple years later, but the
25 language of the two must be read together and, Heyco

1 believes, can be read together because the two interplay.

2 If you look at Rule 21, all the Commission, if it
3 wanted, could have stated in very clear and explicit terms
4 that pits are prohibited in every instance. But that's not
5 what the Commission did when it enacted Rule 21. It said
6 that the Commission shall not issue permits under Rule
7 19.15.2.5 NMAC for a pit.

8 And so that takes you to Rule 50. And you look
9 at Rule 50, and what are the requirements under Rule 50 if
10 you want to use a pit? Rule 50 specifically contemplates
11 that there will be exemptions allowed for pits, and Heyco
12 is seeking to utilize that exemption in order to gain the
13 Commission's specific approval, just in this instance, to
14 use a reserve pit in drilling its BRU Number 6 well in the
15 Bennett Ranch Unit.

16 So if you look at the specific language in Rule
17 50, as Commissioner Olson noted, it specifically says the
18 Division may grant an exemption from any requirement. And
19 that language is very broad.

20 Obviously one of the requirements of Rule 50 is a
21 permit. Now the Division raised today a new argument that
22 a permit is really just any permission given by someone.
23 That's not what Rule 50 talks about. Rule 50 talks about a
24 specific piece of paper, a permit used to cover a
25 particular pit.

1 This isn't going to be outside of the system.
2 The Commission will issue an order with respect to Heyco's
3 Application, it will impose any conditions it deems fit.
4 Heyco is just asking for the opportunity to demonstrate to
5 the Commission that a reserve pit is the safest and best
6 way to go in drilling the BRU Number 6 well that's at issue
7 in its Application.

8 Now the Commission, in really an unprecedented
9 move, for the Division an unprecedented move, initially
10 denied Heyco that initial hearing before the Division. Its
11 application was dismissed without a hearing, we never had
12 an opportunity to even make argument before the Division.

13 And so, as permitted by the Commission's Rule,
14 we've filed an Application for *de novo* hearing. And if you
15 look at the Commission's Rules, they clearly contemplate
16 that an evidentiary hearing will be held, and that's what
17 we're asking for.

18 We believe that the evidence will show, and --
19 once the Commission is asked to call on their expertise as
20 petroleum engineers, as hydrologists, as geologists and
21 apply the science and determine what is in the best
22 interest of the State of New Mexico with respect to the
23 development of this particular well. What is the
24 particular interest, what will prevent waste and protect
25 correlative rights? That's the penultimate responsibility

1 of the Commission.

2 We don't believe that the Commission intended to
3 tie its hands for all time in Rule 21 to where it would
4 abandon its statutory function to make those determinations
5 as to what, in a case-by-case basis, is in the best
6 interest of the development of resources in the state.

7 And we believe that if Rule 21 is read that way,
8 then it creates Constitutional problems, because there's a
9 conclusive presumption that any operator is unable to
10 overcome. And we don't believe the Commission intended to
11 tie its hands for all time to deny operators the ability to
12 show that an exemption under Rule 50 should be granted so
13 that the use of reserve pit should be utilized when
14 drilling within the protected area covered by Rule 21.

15 That's all we're asking the Commission to do.
16 We're asking for a right to have an evidentiary hearing, to
17 present evidence with regard to the safety of the pit, and
18 to meet Rule 50's criterion that the pit that's being
19 proposed will not present any threat to groundwater or to
20 the human environment.

21 CHAIRMAN FESMIRE: Commissioner Bailey, do you
22 have any questions of Mr. DeBrine?

23 COMMISSIONER BAILEY: No.

24 CHAIRMAN FESMIRE: Commissioner Olson?

25 COMMISSIONER OLSON: Mr. DeBrine, I guess -- I

1 don't know, maybe I'm a little confused. You're saying --
2 it seems to me in what your Application is that you're
3 saying you don't need a permit. Is that -- So we'd have an
4 unregulated activity? Is that what you're asking for?

5 MR. DEBRINE: No, it wouldn't be an unregulated
6 activity. There would be a specific order issued by the
7 Commission with respect to Heyco's Application. There
8 would be conditions set forth in the terms of that order,
9 and the Commission would have enforcement responsibility.
10 If Heyco were to deviate from any conditions the Commission
11 were to impose, then there would be the full penalty of
12 enforcement authority of the Commission, just like any
13 other order issued in any proceeding that comes before the
14 Commission. There are often conditions attached in
15 connection with those orders, and violations -- there's
16 consequences for those violations.

17 This wouldn't be an unregulated activity. The
18 Commission would issue whatever conditions it deems
19 appropriate, so that the concerns expressed in Rule 50 and
20 Rule 21 are satisfied.

21 COMMISSIONER OLSON: But then aren't you asking
22 the Commission to permit connectivity?

23 MR. DEBRINE: Well, I don't want to get involved
24 in nomenclature. A permit is a term of art under Rule 50.
25 We're not asking for a Rule 50 permit, we're asking for an

1 exemption under Rule -- from a requirement for a permit
2 under Rule 50, which Rule 50 specifically allows for. Do
3 you want to call that a permit? The Commission will be
4 giving permission to Heyco to utilize a pit. It will be
5 utilizing its authority under Rule 50 to waive a specific
6 requirement for a permit set forth in Rule 50 for that
7 permit.

8 COMMISSIONER OLSON: It just -- I don't know, it
9 just seems to me that if you're asking for something that
10 has a number of conditions of how to operate something, you
11 actually are -- I don't know whether you want to call it
12 permission, permit, seems to me to be the same thing, just
13 depends on -- you're just calling it something different.
14 It has the same intent, is to allow an activity under
15 certain conditions to be protective of human health, the
16 environment, groundwater, et cetera, as we are mandated
17 under our statute.

18 So it sounds like you're just taking something
19 and calling it something -- a permit, and essentially
20 calling it something -- not a permit.

21 CHAIRMAN FESMIRE: An order.

22 COMMISSIONER OLSON: An order, yeah. So...

23 MR. DEBRINE: We believe that is what Rule 50
24 contemplates. With regard to any of the requirements in
25 Rule 50, if you're asking for the Commission to waive any

1 requirement, whether it's waive a liner or anything else,
2 you're asking for permission and a permit in that sense.

3 One of the specific requirements in Rule 50 is a
4 permit. We are just asking the Commission to waive the
5 requirement for a permit. Obviously, any relief we get
6 from the Commission -- We're asking for an exemption. The
7 relief given will give the go-ahead to use the -- use of a
8 reserve pit in drilling the BRU Number 6, if it is
9 permission that is being granted. But it's not a permit,
10 *per se*, under Rule 50.

11 COMMISSIONER OLSON: So did you actually file for
12 a permit with the Division?

13 MR. DEBRINE: We did not.

14 COMMISSIONER OLSON: Why not?

15 MR. DEBRINE: Because the -- As stated, as
16 written, the -- Rule 20 [*sic*] says permits cannot be issued
17 for the protected area. So you have to go to Rule 50 to
18 ask the Commission, and -- just as the Commission does with
19 respect to a variety of rules it issues. There are
20 applications heard all the time for exemptions from the
21 Commission's rules. We believe this is no exception. We
22 are utilizing the plain language of the rule to ask for
23 exemptions that are specifically allowed for, and that was
24 the basis for the petition and the relief that was sought.

25 COMMISSIONER OLSON: I guess that's the only

1 questions I have.

2 CHAIRMAN FESMIRE: Mr. DeBrine, do you believe
3 that the Commission could waive a provision in Rule 21.B,
4 specifically the no-pit requirement?

5 MR. DEBRINE: I believe the Commission, when
6 fulfilling its statutory command to prevent waste and
7 protect correlative rights, can determine in a case-by-case
8 basis that the provisions of Rule 21 should not be applied,
9 yes.

10 CHAIRMAN FESMIRE: Is there a portion of the law
11 that you could direct me to that -- In my reading of Rule
12 21, there is no provision for waiver of parts of that Rule,
13 of provisions in that Rule. Is that not your
14 interpretation?

15 MR. DEBRINE: Within the language of the rule
16 itself, there is no specific language that provides for a
17 waiver. But the way -- the way -- You have to interpret
18 Rule 20 [sic] consistent with Rule 51 [sic]. Rule 20
19 refers you to Rule 50, as to the circumstances in which
20 permits shall be issued. Rule 50 itself -- and presumably
21 the Commission was aware of Rule 50 and how Rule 50 works,
22 it chose to bring itself under Rule 50, under Rule 21.
23 There wasn't an absolute prohibition enacted, language to
24 that effect wasn't utilized. The Commission chose to refer
25 to Rule 50, and so the two must be read consistently, and

1 the interplay between the two of them is how you get an
2 exemption that Heyco is seeking.

3 CHAIRMAN FESMIRE: Okay, but for instance, in
4 Rule 50 where, you know, the Commission enacted rules that
5 allow it to waive certain provisions of that, that's
6 specifically set out in the Rule, isn't it?

7 MR. DEBRINE: Yes, and that is what we're asking
8 the Commission to do, to utilize that. But when you enact
9 a rule that refers to Rule 50, you still bring yourself
10 within that specific exemption.

11 CHAIRMAN FESMIRE: Would that --

12 MR. DEBRINE: It's Heyco's -- Excuse me.

13 CHAIRMAN FESMIRE: Go ahead, I'm sorry.

14 MR. DEBRINE: It's Heyco's position that the
15 Commission has the ultimate authority to waive the
16 application of its rule in a particular instance when an
17 adequate showing is made with respect to the Commission's
18 ultimate responsibilities by statute. And we believe that
19 we can make that showing here as well, and we're asking the
20 Commission to do that.

21 CHAIRMAN FESMIRE: Okay. So in essence, what
22 you're asking the Commission to do is use Rule 50 to
23 provide a waiver provision in Rule 21. The fact that Rule
24 21 references Rule 50 for certain purposes, and that
25 reference allows us to waive certain provisions of Rule 21;

1 is that correct?

2 Your reference to -- Our reference to Rule 50 and
3 Rule 21 allows us to incorporate not only the part that is
4 referenced, but also the waiver provision of 50 for pits in
5 the Otero and Sierra Counties, right?

6 MR. DEBRINE: Right, that's correct, the two
7 rules have to be read together, and that is the interplay
8 we believe that was contemplated when the rules were
9 enacted, or at least that's the plain language of the rule
10 now, as Heyco interprets it.

11 CHAIRMAN FESMIRE: Okay. And it's your position
12 that we can still impose any conditions -- that the
13 Commission or the OCD, depending on where you're at -- that
14 they could still impose conditions necessary to manage that
15 pit; is that correct?

16 MR. DEBRINE: Any is a broad term, and without
17 getting into juris- --

18 CHAIRMAN FESMIRE: That's why I've got in quotes
19 here.

20 MR. DEBRINE: Without jurisdictional conflicts, I
21 don't know the answer to that question as to whether the
22 BLM would feel that conditions that might be imposed by
23 this Commission would intrude on its authority with respect
24 to the management of federal lands. But certainly with
25 respect to Heyco's Application, it is contemplating that

1 the Commission will impose conditions that it intends to
2 abide by.

3 CHAIRMAN FESMIRE: Okay. Could the Division or
4 the Commission, if necessary, impose the condition in the
5 lack of permit or, you know, what we don't have right
6 there, to use, for instance, closed-loop systems?

7 MR. DEBRINE: Well, then there'd be no point in
8 Heyco's Application, because the whole purpose of what
9 we're seeking is to avoid the use of a closed-loop system,
10 because we believe we can demonstrate that that is an
11 inferior method of doing and accomplishing the Commission's
12 goals set forth in Rule 50 and Rule 20.

13 CHAIRMAN FESMIRE: Okay. Mr. DeBrine, with all
14 due respect, that goes around the question that I asked.
15 Could we impose that condition if we accepted your
16 interpretation?

17 MR. DEBRINE: I think the Commission probably has
18 the basic authority to impose whatever conditions it feels
19 are appropriate.

20 CHAIRMAN FESMIRE: Okay. And given your
21 interpretation, how would we enforce the conditions of that
22 lack of permit? And I say that half facetiously, but, you
23 know, for lack of a better phrase. If we don't have a
24 permit, how would we enforce the conditions? I think
25 that's part of the crux of Ms. MacQuesten's argument.

1 MR. DEBRINE: Just like it enforces the terms of
2 any orders issued by the Commission. If there's
3 noncompliance, then there's consequences for noncompliance.
4 You initiate a proceeding, enforcement proceeding, in the
5 Division for violation of the terms of the order.

6 CHAIRMAN FESMIRE: That's all I had.

7 Ms. MacQuesten, would you have anything in
8 closing?

9 MS. MacQUESTEN: Mr. Chairman, Commissioners,
10 Heyco recognizes it can't have a pit without getting
11 authority from the OCD or the Commission. It's asking you
12 to put that authority in the form of something called an
13 order rather than a permit. But if you issue an order
14 saying, You may have a pit if you do this, this, this and
15 this, that's a permit. Whether you call it an order or you
16 put "permit" in the title, you are authorizing them to do
17 something that they could not do without that written
18 document that you are giving them.

19 Rule 21.B prohibits the issuance of permits for
20 pits in the area where Heyco wants their pit. They have
21 chosen not to frame this issue as seeking an exception from
22 Rule 21.B. So whether 21.B permits exceptions or not is
23 not on the table today. They are only asking you for an
24 exception under Rule 50 to issue something that they can
25 avoid Rule 21.B by calling it "order", rather than a

1 permit.

2 But if you allow them to have a pit by order, it
3 is the same as issuing a permit, and it is prohibited under
4 21.B.

5 CHAIRMAN FESMIRE: Mr. DeBrine, do you have
6 anything to close?

7 MR. DEBRINE: Only to add that that's a new
8 argument made today by Ms. MacQuesten. We are not seeking
9 a permit, and the Application cannot reasonably be read as
10 seeking that. We are seeking an exemption that's
11 specifically allowed by Rule 50, and we ask the Commission
12 to grant our Application, or at least today deny the motion
13 to dismiss and give us the evidentiary hearing contemplated
14 by the Commission's rules and the due-process clauses of
15 the United States and New Mexico Constitution.

16 CHAIRMAN FESMIRE: Okay, thank you very much.

17 Why don't we take a five-minute break, and we'll
18 reconvene at ten minutes to 10:00 and figure out how we're
19 going to handle this.

20 Thank you all, very much.

21 MR. DEBRINE: Thank you, Mr. Chairman.

22 (Thereupon, a recess was taken at 9:45 a.m.)

23 (The following proceedings had at 9:53 a.m.)

24 CHAIRMAN FESMIRE: Okay, let's go back on the
25 record. Let the record reflect it's approximately ten

1 minutes to ten o'clock.

2 At this time the Commission is going to go into
3 executive session for the exclusive purpose of considering
4 the legal arguments in Case Number 13,817, the Application
5 of Harvey E. Yates Company for an exception from the Oil
6 Conservation Commission rule, and specifically the motion
7 to dismiss by the Oil Conservation Division.

8 At this time we'll go into executive session.
9 Thank you all.

10 MS. BADA: -- vote on that.

11 CHAIRMAN FESMIRE: Oh, I'm sorry. Is there a
12 motion to that effect?

13 COMMISSIONER BAILEY: I so move.

14 COMMISSIONER OLSON: Second.

15 CHAIRMAN FESMIRE: All those in favor?

16 COMMISSIONER BAILEY: Aye.

17 COMMISSIONER OLSON: Aye.

18 CHAIRMAN FESMIRE: Let the record reflect that
19 the motion was unanimously passed, and we will now go into
20 executive session. And thank Counsel Bada.

21 (Off the record at 9:54 a.m.)

22 (The following proceedings had at 10:15 a.m.)

23 CHAIRMAN FESMIRE: Okay, at this time we'll go
24 back on the record. Let the record reflect that it is
25 10:15, the Commission has come out of executive session.

1 During the executive session we did nothing but consider
2 the legal arguments before us in Case Number 13,817.

3 At this time I believe Commissioner Olson has a
4 motion to make?

5 COMMISSIONER OLSON: Yes, I'd like to make a
6 motion to grant OCD's motion to dismiss the Heyco
7 Application without prejudice.

8 CHAIRMAN FESMIRE: Is there a second? And I will
9 second the motion.

10 All those in favor, signify by saying "Aye".

11 COMMISSIONER OLSON: Aye.

12 CHAIRMAN FESMIRE: Aye.

13 All those opposed?

14 COMMISSIONER BAILEY: Nay.

15 CHAIRMAN FESMIRE: Let the record reflect that
16 Commissioners Fesmire and Olson voted in favor of the
17 motion, Commissioner Bailey voted against it.

18 Commissioner Olson, do you want to explain the
19 reason for your motion?

20 COMMISSIONER OLSON: I think the main rationale
21 is that the Rule 50 cannot be used to provide a waiver or
22 exception to Rule 21 itself. That seems to be the intent
23 of what the action is that's going on here. I guess the
24 question is whether or not there is a general mechanism
25 that could be used within the authority of the Commission

1 to consider an exception to Rule 21, it should be done that
2 way, and not through the use of Rule 50.

3 CHAIRMAN FESMIRE: Commissioner Bailey, did you
4 want to put anything on the record?

5 COMMISSIONER BAILEY: I believe the plain reading
6 of Rule 21 allows the Commission to order the use of a pit
7 under certain conditions as imposed by the OCC, and so I
8 must disagree with the dismissal of this motion. And I
9 still do believe that Heyco has the right for a hearing
10 under their conditions.

11 CHAIRMAN FESMIRE: I will agree with Commissioner
12 Olson, and to a certain extent with Commissioner Bailey.
13 We did dismiss the case without prejudice on the other
14 issue, but the argument before the Commission today, I
15 think, was pretty -- the Oil Conservation Division was
16 persuasive in their argument, and that was the reason I
17 made that decision.

18 So are there anything else on the record on the
19 case before us now?

20 Okay, with that we will proceed to the next case
21 on the docket.

22 (Off the record at 10:18 a.m.)

23 (The following proceedings had at 10:20 a.m.)

24 MR. DEBRINE: Mr. Chairman, I'm sorry, I was
25 trying to get the Chair's attention. Let's see if we can

1 get Gail back in here.

2 Just a matter of clarification concerning the
3 Commission's ruling and dismissing it without prejudice.
4 That means that Heyco is free to file a new Application
5 before the Division to seek an exemption under Rule 21; is
6 that the contemplation of the Commission's ruling?

7 CHAIRMAN FESMIRE: That was my intention when I
8 voted for this rule.

9 COMMISSIONER OLSON: That was mine as well.

10 MR. DEBRINE: Okay, thank you, Mr. Chairman.

11 CHAIRMAN FESMIRE: You bet.

12 Thank you, Ms. MacQuesten.

13 * * *

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL April 23rd, 2007.



STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2010