



April 17, 2007

Adam H. Greenwood  
505.848.9727  
Fax: 505.848.9710  
ahg@modrall.com

VIA FACSIMILE  
AND FEDERAL EXPRESS

Ms. Florene Davidson  
Oil Conservation Division  
1220 South St. Francis Drive  
Santa Fe, NM 87505

Re: In the Matter of the Application of Harvey E. Yates Company for an  
Exemption to Commission Rule 19.15.2.50(A) - Case No. 13817

Dear Ms. Davidson:

Attached is a copy of Harvey E. Yates Company's Surreply to Motion  
to Dismiss.

Additionally, we are sending by FedEx an original and six copies of the  
Surreply to Motion to Dismiss.

Very truly yours,

Adam H. Greenwood

AHG/ssc  
Enclosures

Modrall Sperling  
Roehl Harris & Sisk P.A.

Bank of America Centre  
500 Fourth Street NW  
Suite 1000  
Albuquerque,  
New Mexico 87102

PO Box 2168  
Albuquerque,  
New Mexico 87103-2168

Tel: 505.848.1800  
www.modrall.com

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

IN THE MATTER OF THE APPLICATION  
OF HARVEY E. YATES  
COMPANY FOR AN EXEMPTION TO  
COMMISSION RULE 19.15.2.50(A)

CASE NO. 13817

SURREPLY TO MOTION TO DISMISS

The Harvey E. Yates Company ("HEYCO") continues to respectfully request that the Oil Conservation Commission (the "Commission") reject the Oil Conservation Division's (the "Division") attempt to deny HEYCO a hearing on its application for an exemption to Rule 19.15.2.50(A). HEYCO is filing this surreply because in its Reply in Support of Motion to Dismiss ("Reply"), the OCD has for the first time raised a "third issue."<sup>1</sup> The arguments presented in the OCD's "third issue" do not adequately explain why HEYCO should be prevented from presenting evidence to show that its proposed reserve pit will not endanger fresh water, public health, or the environment.

ARGUMENT

The OCD's new third issue is as follows: "if the Commission determines that an operator may use Rule 50.G to seek an exemption from the requirement that a pit be permitted, what showing must the operator make?" Reply at 4. The OCD argues that HEYCO must show that the entire pit permitting scheme is somehow unworkable or invalid. But this is not the standard contained in the regulations. Rule 50(A) expressly states that exemptions from the requirement of having a permit are to be granted according to the standards contained in 50(G). Rule 50(G) contains clear standards for granting exemptions: the operator must show that "the granting of such exemption will not endanger fresh water, public health or the environment." This is the only showing that HEYCO need make. This is what the OCD has repeatedly tried to prevent HEYCO from doing. The OCD has yet to give any convincing argument that the purposes and objectives of Rule 21 and Rule 50 will not be met if HEYCO is able to show that its proposed pit will not endanger fresh water, public health or the environment.

The only argument the OCD makes in support of its new third issue is the anomalous argument that neither the OCC nor the OCD have the power to enforce the conditions on exemptions it may grant. This argument clearly misconstrues the applicable regulations. Exemptions under Rule 50 are clearly conditioned on a showing that fresh water, public health, or the environment will not be endangered. If an operator violates the specific assurances that are part of that showing then the operator would no longer be within the granted exemption and would be subject to the same consequences and penalties as the operator of an unauthorized pit would be. Further, the OCC could state the conditions that HEYCO must comply with as part of

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<sup>1</sup> Reply briefs should not raise new issues. See *Hale v. Basin Motor Co.*, 110 N.M. 314, 321, 795 P.2d 1006, 1013 (1990). However, HEYCO is willing to forgo having the reply brief struck, believing that in the long run the OCC will benefit from seeing the OCD's new "third issue" threshed out.

its order granting the exemption. HEYCO would then be required to comply with the terms of that order. Rule 19.15.1.12 gives the OCD authority to enforce applicable rules and regulations, including Rule 50(G)'s requirement that exemptions not endanger fresh water, public health, or the environment. Rule 19.15.1.41 unequivocally states that "[a]ny person who conducts any activity pursuant to a permit, administrative order or other written authorization or approval from the division shall comply with every term, condition and provision of such permit, administrative order, authorization or approval."

The OCD also badly misstates HEYCO's intent. The OCD has no basis whatsoever for implying that HEYCO will not honor its commitments. In its application for exemption to the OCD, HEYCO explained that an underbalanced (air drill) system that would require the use of a reserve pit is critically necessary to adequately test the presence of underpressured reservoirs in HEYCO's lease. HEYCO's is more than willing to cooperate with the OCD and the OCC in developed case-specific safeguards to ensure that the proposed reserve pit does not endanger fresh water, public health, or the environment. In fact, in its application for exemption, HEYCO has already volunteered to implement important safeguards. In the context of a motion to dismiss, it is inappropriate for the OCD to imply that HEYCO's representations as to the safeguards it will implement are inaccurate. Decisions as to inaccuracy should not be made without a hearing, which is why the non-movant party's representations are always taken to be accurate in deciding a motion to dismiss. *See Swinney v. Deming Bd. of Educ.*, 117 N.M. 492, 493 (1994)(stating that in ruling on motions to dismiss, "we will assume as true all facts well pleaded").

HEYCO is eligible for the Rule 50(A) exemption if it can demonstrate that its proposed pit would not endanger fresh water, public health or the environment, which HEYCO is willing and able to do if given a hearing. The OCC should therefore allow HEYCO to have a fair hearing and deny the Division's Motion to Dismiss.

**WHEREFORE**, the Harvey E. Yates Company respectfully requests that the Oil Conservation Division's Motion to Dismiss be denied.

Respectfully Submitted,

By: 

Earl E. DeBrine, Jr.

Adam Greenwood

Walter E. Stern

Modrall, Sperling, Roehl, Harris, & Sisk, P.A.

Post Office Box 2168

Albuquerque, New Mexico 87103-2168

Telephone: (505) 848-1800

Facsimile: (505) 848-1891

Email: [eed@modrall.com](mailto:eed@modrall.com)

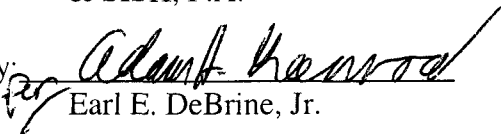
ATTORNEYS FOR HARVEY E. YATES COMPANY

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed to the following counsel of record this 17th day of April, 2007:

Cheryl Bada, Esq.  
NM Energy, Minerals & Natural Resources Department  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87504

Gail MacQuesten, Esq.  
Assistant General Counsel  
NM Energy, Minerals & Natural Resources Department  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87504

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By:   
Earl E. DeBrine, Jr.

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