8-4-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
City of Pierre, SD,	)	Docket No. CWA-VIII-91-09-P
	)	
Respondent	)	

ORDER DENYING MOTION FOR
PARTIAL ACCELERATED DECISION

The complaint in this proceeding under section 309(g) of the Clean Water Act (33 U.S.C. § 1319(g)), dated March 21, 1991, alleged, inter alia, that Respondent, City of Pierre, owns and operates a wastewater lagoon, which discharges to an unnamed tributary of the Missouri River, that the mentioned discharge is via a pipe which is a "point source" as defined in the Act and that said discharges were not authorized by the City's current NPDES permit. A schedule, showing the dates, estimated quantity and time of the discharges and the estimated duration thereof, commencing in March 1985 and ending in July 1990, is included in the complaint. It is alleged that the City has violated section 301 of the Act by discharging pollutants to waters of the United States without a permit. For these alleged violations, it is proposed to assess the City a penalty of $54,000 in accordance with section 309(g)(1) of the Act.

Answering, the City denied that the discharges involved contained pollutants, that the discharges were to a tributary of the Missouri River and that the discharges polluted either

[neither] the Missouri River or the environment in general. The City alleged that the lagoon had been constructed in 1960, that the State of South Dakota had approved the design and construction thereof, that EPA had known of the existence of the lagoon since at least 1976 and had not objected thereto, and that action to eliminate the lagoon by connecting all facilities currently discharging thereto to the City's wastewater treatment system was underway prior to the issuance of the complaint. The City contested the amount of the penalty as inappropriate and requested a hearing.

Under date of May 11, 1992, Complainant filed a Motion For Partial Accelerated Decision, contending that there is no dispute as to material fact as to the City's liability and that Complainant is entitled to judgment in his favor on that issue. In support of the motion, Complainant points out that the City's NPDES permit (No. SD-0020176) does not authorize discharges from the airport sewage lagoon (Memorandum In Support Of Motion at 2). Complainant points to a statement in the City's prehearing exchange (letter, dated June 2, 1991, at 2), which acknowledges that discharges from the lagoon contain contaminants, and appears to admit that such contaminants ultimately reach the Missouri River.[1/] Complainant

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[1/] The statement is as follows:

> The discharges from the lagoon admittedly contain contaminants, which by strict chemical definition may be described as pollutants, but the amount of such contaminants are so minimal as to not actually increase the natural pollution of the Missouri River. The amount of contaminants are less than many natural runoffs into

(continued...)

also cites a statement in the City's letter, dated November 16, 1990, submitted in response to an EPA section 308 information request, which describes the discharge point from the lagoon as a 12-inch diameter corrugated metal pipe and states that any discharge from the lagoon will enter a dry draw approximately 2.4 miles from the Missouri River.[2/]

Additionally, Complainant relies on a report, dated July 25, 1990, of an inspection, conducted on July 20, 1990, of the lagoon by representatives of the then South Dakota Department of Water and Natural Resources, accompanied by the City Engineer (Exh C to Motion). The memorandum of inspection recites that the previously unpermitted lagoon at the airport and the airport sludge lagoons were inspected, that the 3/4-acre lagoon, located by the airport, receives wastewater from Century Manufacturing Company, the Pierre Airport, and various airport businesses. The memorandum further recites that the lagoon has the capacity to discharge via a riser to an unnamed tributary and this outfall will be eliminated by

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[1/](...continued)
the river and are less than the permitted discharge from the WWTP, except as to fecal coliform. * * * *

[2/] Exh A to Motion. This letter contains the schedule of estimated dates, duration and quantity of discharges included in the complaint. A memorandum from the City Engineer, dated June 6, 1991, included in Complainant's prehearing exchange, refers to a discharge from the airport sewage lagoon to an unnamed dry draw observed on May 21 and May 22, 1991. The discharge was allegedly occurring through an elbow which was placed on the end of the discharge pipe to raise the water level in the lagoon.

September 1, 1991, when the contributor's to this system are hooked up to the City's main sanitary sewer system.

Turning to the law, Complainant emphasizes that section 301 of the Act and implementing regulations (40 CFR Part 122) prohibit the discharge of pollutants from any point source to waters of the United States without a permit (Memorandum at 3-5). Complainant says that the pipe from the lagoon is clearly a "point source" as defined in section 502(14) of the Act, that the City has admitted discharges from the lagoon, that the discharges contained pollutants as defined in section 502(6) of the Act and that the unnamed draw into which the discharges were made, although normally dry, nevertheless, constitute "waters of the United States" within the meaning of section 502(7) of the Act. In support of the latter assertion, Complainant cites, among others, United States v. Holland, 373 F.Supp. 655 (M.D. Fla. 1974) (man-made canals within Federal jurisdiction under FWPCA and whether streams are navigable in fact is not relevant) and Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978) (Congress intended the term "navigable waters" in FWPCA to be given broadest possible interpretation under Commerce Clause).[3/] Complainant also contends that the draw is a

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[3/] Although not cited by Complainant, a case perhaps more in point is United States v. Phelps Dodge Corp., 391 Fed. Supp. 1181-88 (D. Arizona 1975) (". . . legal definition of waters of the United States" within scope of the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States") (Id. at 1187).

"water of the United States," because it is a tributary of a water of the United States, i.e., the Missouri River. For these reasons, Complainant contends that discharges from the lagoon without a permit were clear violations of the Act, that the City is liable therefor and that Complainant is entitled to judgment in his favor on that issue.

If the motion is denied, Complainant requests that the ALJ enter an order, which inter alia, delineates the issues and claims upon which the hearing will proceed (Memorandum at 15).

Respondent's Opposition

Opposing the motion, the City has submitted an affidavit of David Padgett, the City's Director of Public Works (letter, dated May 22, 1992). Mr. Padgett states that, while the City has never denied that there were discharges from the airport lagoon on infrequent occasions, the conclusions Complainant seeks to draw therefrom are incorrect and a distortion of the actual facts. He points out that the lagoon at issue was constructed in 1960 with the knowledge and approval of the State and [operated] since at least 1976 with the knowledge and approval of Complainant.[4/]

[4/] Affidavit at 2. A letter from the State Department of Health, to the City, dated February 9, 1960, enclosed a report approving the plans and specifications for the lagoon (Exh C to prehearing exchange). Additionally, an attachment to a finding by the Regional Administrator, dated December 8, 1976 (City's Exh D), is to the effect that an environmental impact statement (EIS) will not be prepared in connection with the project to upgrade the City's sewer system, which was being accomplished under an EPA grant, states as follows with respect to the airport lagoon:

(continued...)

Mr. Padgett states that discharges from the lagoon occurred at irregular intervals only when climatic conditions were such that due to rain or snow the lagoon was not capable of completely containing its load. He emphasizes that the overflow pipe designed and built into the lagoon was in those instances performing the very function it was designed to perform. Mr. Padgett denies that heavy rainfalls, which would cause overflow discharges from the lagoon, were heavy rainfalls which would cause the discharges to reach the Missouri River. He asserts that he verily believes from his own knowledge that such discharges did not in fact reach the Missouri River.

Even if some of the discharges did reach the Missouri River, Mr. Padgett argues that the resulting pollution was not to the extent and in the sense that the City should be liable therefor (Affidavit at 3). He points out that with the exception of the single instance of fecal coliform, discharges from the lagoon were within limits of the City's permitted discharge. He states that the occasion for this exception is the fact that the City is required to chlorinate its discharge and points out that the permit

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4/(...continued)

The City also has a 1.0 acre wastewater lagoon system which provides total containment for wastewater originating from the municipal airport. With some minor improvements and repairs, this facility is adequate to treat the projected 1997 design flow from the airport. There is room for future expansion at the existing site if it becomes evident that the design flows will be exceeded.

was amended in October 1990 to require chlorination the year around, rather than only in the summer months as previously.

D I S C U S S I O N

While there can be no doubt that the definition of "navigable waters" in section 502(7) extends the Act's scope very broadly, there nevertheless are limits to the Act's coverage. See General Counsel Decision No. 30 (September 18, 1975), copy enclosed, wherein it was held that a discharge from the City of Ely, Nevada's sewage treatment plant was not to "navigable waters" within the meaning of the Act. The basis of the decision was that the discharge was not capable of affecting interstate commerce.

Accordingly, it is relevant and, indeed crucial to the jurisdictional basis for the complaint whether any of the discharges at issue from the lagoon reached or were capable of reaching the Missouri River. Although the answer to the question of whether the discharges were capable of reaching the River might seem obvious, climatic and soil conditions may make such a possibility remote. This may be particularly true in view of the limited duration and volume of the discharges. It should be noted that Complainant's assertion that Century Manufacturing, Inc., a discharger to the lagoon, uses the draw at issue for discharges of industrial wastewater appears to be a gross exaggeration (see Century letter, dated February 7, 1991). In any event, questions such as the foregoing make determination of the City's liability on what is in effect a motion for summary judgment inappropriate.

Complainant's motion for an accelerated decision as to the City's liability will be denied.

It should also be noted that, even if I agreed with Complainant that the City's liability had been established, substantially the same evidence would need to be heard in order to determine an appropriate penalty. For example, if discharges from the lagoon are not shown to have reached the Missouri River and the Agency's jurisdiction is based solely on the possibility such discharges could reach the River, this would clearly be relevant to the gravity of the violation. Additionally, the volume and content of discharges, if any, shown to have reached the River are relevant to the gravity of the violation.

The State's approval of the lagoon and EPA's knowledge of its existence (supra, note 4) are matters to be considered in mitigation. In this regard, Complainant's assertion that EPA's approval of the lagoon did not contemplate discharges therefrom (Memorandum at 13) would clearly be untenable, if it were shown that the Agency was furnished a copy of the Contour Map of Sewage Lagoon (City's Exh C) or similar document showing the discharge pipe, or if the Agency were otherwise shown to have had knowledge of the pipe's existence.

O R D E R

Complainant's motion for a partial accelerated decision as to the City's liability is denied. The matters discussed above are considered to adequately address issues, other than the penalty, to be resolved at the hearing.[5/]

Dated this 4th day of August 1992.

Spencer T. Nissen
Administrative Law Judge

Enclosure

[5/] In the near future, I will be in telephonic contact with counsel for the purpose of setting a mutually agreeable date for the hearing, which will be held in Pierre, South Dakota.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION**, dated August 4, 1992, in re: City of Pierre, SD, Dkt. No. CWA-VIII-91-09-P, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Secretary

DATE: August 4, 1992

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. §125.36(m)

No. 30

In the matter of National Pollutant Discharge Elimination System permit for City of Ely, Nevada, Docket No. 141-24(w), the Presiding Officer has certified an issue of law to the General Counsel for decision pursuant to 40 C.F.R. §125.36(m) (39 F.R. 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

Whether the discharge from the City of Ely, Nevada sewage treatment plant into Murry Creek constitutes a discharge into "navigable waters" as that term is defined in §502(7) of the Federal Water Pollution Control Act.

Answer

Based upon the facts presented in the stipulation agreed to by EPA's Regional Office, Region IX, and the City of Ely, 1/ the discharge in question is not a discharge into "navigable waters."

Discussion

The term "navigable waters" is defined in Section 502(7) of the Federal Water Pollution Control Act as "waters of the United States,

1/ A copy of the stipulation is attached as an appendix to this Decision.

including the territorial seas." That term was explained in an earlier opinion of this office as meaning "that pollution of waters covered by the bill must be capable of affecting interstate commerce". EPA, A Collection of Legal Opinions, Vol. I at 295 (1975). 2/ This basic test was elaborated somewhat in 40 C.F.R. §125.1(o):

> (o) The term "navigable waters" includes:
>
> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters;
>
> (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

2/ See Leslie Salt v. Froehlke, 7 ERC 1311, 1314 (N.D. Cal. 1974):

> We conclude that the Congress, enacting the FWPCA, was exercising its powers under the commerce clause to combat pollution of the nation's waters; that water pollution unquestionably affects interstate commerce and that, therefore, it was a proper exercise of the commerce power to require permits for dredging or filling which are potential causes of pollution of waters of the United States . . . .

Accord, United States v. Holland, 6 ERC 1388, 1392-93 (M.D. Fla. 1975); of course, the statute does not require proof that "a particular discharge or stream has a discernable [sic] interstate effect." United States v. Ashland Oil, 6 ERC 1991 (W.D. Ky. 1973) aff'd, 504 F. 2d 1317, 7 ERC 1114 (6th Cir. 1974). The possibility of such an effect is sufficient.

> (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by interstate commerce.

This definition is inclusive rather than exclusive. Accordingly, there may be "waters of the United States" which are not specifically included within its scope. However, the definition provides a useful starting point.

The relevant facts are as follows: the City of Ely operates a sewage treatment plant on the Georgetown Ranch, north of Ely, Nevada. The plant discharges into Murry Creek, which is directed into irrigation ditches immediately downstream from the discharge plant. Under normal conditions, no water from the irrigation ditches leaves the Georgetown Ranch, and is unlikely to do so even during snowmelt or heavy rainfall. There is nothing in the stipulation to indicate that even were any water to flow off of the Georgetown Ranch property during such an event it would thereafter enter another body of water. Occasionally, part of Georgetown Ranch is leased to farmers for cattle grazing, and cattle from Utah have grazed on the ranch and subsequently been returned to Utah.

None of the tests in 40 C.F.R. §125.1(o) appear to be met by this factual situation. The facts indicate that Murry Creek is not navigable in fact, nor is it a tributary of any waters, navigable or otherwise. It crosses no State lines. The Stipulation does not indicate that fish or shellfish are present in Murry Creek or if so, that they are taken from the Creek and sold in interstate commerce. The waters

downstream of the discharge point are not used for any industrial purpose. 3/ Finally, I do not think that cattle from Utah are the sort of "interstate travelers" the regulation drafters had in mind, even were they (the cattle) to refresh themselves regularly with draughts of City of Ely sewage effluent.

Apart from the regulation, it could be argued that the pasturage of interstate cattle could affect commerce. While this possibility exists, the potential effect is remote indeed. More importantly, this argument ignores the character of the irrigation network as a land disposal system. All the effluent from the plant is contained entirely on the Georgetown Ranch, which appears to be owned by the City of Ely. 4/ If

3/ A number of the facts in the stipulation relate to the character and uses of Murry Creek upstream from the discharge point. These facts are irrelevant to the legal determination because, except in stagnant water (which Murry Creek is not), discharges of pollutants do not affect commerce upstream from the discharge point. Thus our decision here is confined to the discharge in question and the portion of Murry Creek downstream of that discharge. We express no opinion as to the legal status of Murry Creek from its origin to its entry onto the Georgetown Ranch property.

4/ The fact that ownership of land surrounding a body of water is consolidated in one legal entity is not in itself dispositive of the issue of whether that water constitutes "waters of the United States" within the meaning of Section 502(7). What is significant here is that the water is contained on the property (i.e., there is no discharge from the water on the Georgetown Ranch to another stream or lake) and the absence of any of the uses of the water described in 40 C.F.R. §125.1(o)(4), (5) or (6).

the Utah cattle were sufficient to turn this irrigation/land disposal scheme into navigable waters, then by analogy, if a farmer allowed fishermen from another State to fish his small farm pond, the pond would become "navigable waters." Although EPA should give the term "navigable waters" its "broadest possible constitutional interpretation",5/ neither law nor reason supports extension of that term to cover these facts.

Dated: SEP 18 1975

General Counsel

5/ Conference Rept. on S.2770, Rept. No. 92-1236, 92d Cong., 2d Sess, at 144 (1972).

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

In the Matter of CITY OF ELY, NEVADA under Section 402 (a), Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sec. 1342 (a); 40 CFR 125.36 (m)	Docket No. NV0020036

S T I P U L A T I O N

IT IS HEREBY STIPULATED by and between the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX, and the CITY OF ELY, White Pine County, State of Nevada, acting by and through the undersigned, as follows:

1. The Environmental Protection Agency, Region IX, issued National Pollutant Discharge Elimination System (NPDES) Permit No. NV0020036 to the City of Ely, Nevada, on November 14, 1974, to become effective on December 14, 1974, and to expire on May 1, 1977, authorizing the City of Ely to discharge to Murry Creek from the City of Ely Sewage Treatment Plant, said plant being located north of the City on the City-owned Georgetown Ranch.

2. The City of Ely requested an adjudicatory hearing on NPDES Permit No. NV0020036 on November 24, 1974, as amended on December 17, 1974, setting forth as the only reason for the request that Murry Creek was not a water of the United States in that it was not navigable in fact or in law.

3. This request satisfying the requirements of 40 CFR 125.35(b),

EPA, Region IX, granted the request of the City of Ely on January , 1975, stating that it was not clear whether the issue presented was one of fact or law, and that in the event that the issue was determined to be a question of law, said issue would be certified for decision to General Counsel, pursuant to 40 CFR 125.36(m).

4. Therefore, the Environmental Protection Agency and the City of Ely, Nevada, hereby agree to the following set of facts concerning Murry Creek, and seek a decision of General Counsel as to whether Murry Creek is navigable within the meaning of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sec. 1321 et seq., and regulations promulgated thereunder, and therefore that the City of Ely, Nevada, is required to obtain, and abide by, an NPDES permit.

5. MURRY CREEK

a. The source of waters of Murry Creek is from springs situated and being on land owned by the City of Ely. These springs are situated at the south end of the City limits. The flow from the springs approximates four (4) second feet. The waters flow north through the City, described infra, thence outside city limits, to the Georgetown Ranch.

b. These springs are the source of the City's water supply, the waters therefrom being conducted by pipeline through a chlorination plant, from there a part of the waters, via a pipeline, go to storage tanks located on the hill just opposite the County Courthouse near the County Park, a distance of approximately one-half (1/2) mile.

Of the waters not piped to the storage tanks, part of the spring water flows through the City of Ely via Murry Creek in its natural channel, and is picked up in underground pipelines extending to the County Park, where these overflow waters join the overflow waters from storage tanks, and then course on through underground drain culverts (described in d. below) and the natural channel to the Georgetown Ranch.

c. The remaining part of the water is diverted by a pipeline installed by Kennecott Copper Corporation 46 years ago, which pipeline supplies water, thus diverted, to the Ruth-McGill Water Company for the needs of its domestic and commercial customers at Ruth, Nevada, which domestic and commercial customers' needs have the first priority to such waters as are diverted through the pipeline, pursuant to Compliance Order and Certificate of Public Convenience and Necessity issued by the Public Service Commission of the State of Nevada, certifying the Ruth-McGill Water Company as a public utility to furnish water to the needs of its domestic and commercial customers. Any remainder of such water, if such there be, then becomes available for the use of Kennecott Copper Corporation's office and shop personnel. For reference a copy of the Compliance Order and Certificate of Public Convenience and Necessity are attached hereto and made a part hereof for all purposes.

Prior to the issuance of the Compliance Order and Certificate of Public Convenience and Necessity by the Public Service Commission

the State of Nevada, Kennecott Copper Corporation furnished, through its pipeline, waters to its employees living at Ruth, Nevada, for domestic and culinary purposes. Since the date of the issuance of the Compliance Order and Certificate of Public Convenience and Necessity, the furnishing of such water supply is incumbent upon the Ruth-McGill Water Company. The transmission of this water for domestic and commercial uses at Ruth, Nevada, is solely dependent on any surplus waters being available over and above the needs of the residents of the City of Ely.

d. The waters of Murry Creek join with (1) overflow from the storage tanks, and (2) waters, if any, in Gleason Creek (described infra) at Eighth Street in the City and enter an underground conduit, approximately thirty (30) inches in diameter. These culverts traverse approximately Fifty Percent (50%) of the length of Murry Creek channel, which is approximately One and one-half (1 1/2) miles from the springs to the Georgetown Ranch.

e. The other Fifty Percent (50%) of the length of Murry Creek, which is not served by culverts, consists of the natural channel, averaging approximately four (4) square feet in cross section, and ending at the Georgetown Ranch.

f. Situated upon the Georgetown Ranch in its southwest corner is the City of Ely Sewage Treatment Plant, said plant discharging into Murry Creek as the creek flows past the plant in a northerly direction. Murry Creek is then diverted into a system of irrigation ditches; the first diversion therefor being approximately One Hundred Twenty-five feet (125') in a northerly direction from the outflow

of the waters from the Plant and is thereafter diverted into irrigation ditches at various intervals and thereafter through the central portion of the ranch. No water from the irrigation canals leaves the ranch property, nor is any water likely to leave the ranch property in the event of a storm or snowmelt.

g. The lands where the springs arise and the waters flowing therefrom are City-owned. The lands through which Murry Creek flows are all subject to drainage easements, through which the water has flowed from time immemorial.

h. A small portion of the Murry Creek Channel, referenced above, conveys water from the springs in an open concrete ditch for approximately One Hundred (100) feet adjacent to the Plaza Hotel and in front of the White Pine County High School, from which it enters the underground storm drain culvert. These openings are fenced off, and are not used for any recreational purposes.

i. Except in the summer season when the flow rate is reduced Fifty Percent (50%), the flow rate in the culvert and the channel as it flows out to the Ranch is approximately two (2) second feet of water.

j. The City of Ely leases part of the Georgetown Ranch to a local resident, who in turn leases the land, during the summer growing season, to farmers to pasture their cattle upon the forage which grows on the Ranch. On two (2) occasions cattle from the State of Utah have been pastured upon the Ranch during the summer growing season, and were returned by the owner of the cattle to the State of Utah after the summer growing season ended.

During the five (5) year period that these lands have been under lease from the City to the individual person, intermittent pasturage has been rented, i.e., actually during only two (2) years out of the five (5), to a cattleman in the State of Utah, who has transported his cattle to the Georgetown Ranch and returned them by his own transportation to the State of Utah at the end of the summer growing season.

6. GLEASON CREEK

a. Gleason Creek is located west of the City of Ely, at a distance of approximately Eighteen (18) miles.

b. Gleason Creek is a small bubbling spring, the waters flowing intermittently, and even then are dependent upon the amount of precipitation.

c. Gleason waters, in and of themselves, at no time reach anywhere near the City of Ely. The Gleason Creek on occasion does drain, from the surrounding areas, waters received from early spring thaws or thunderstorms, and on occasion, in the past, has caused flood situations to the City of Ely.

d. There is a U.S.G.S. measuring station west, but within, the City limits, which was installed for the purpose of measuring any flood waters from Gleason Creek. Only in the event of heavy spring snowmelt or summer thunderstorm do Gleason Creek waters flow into the City and merge with Murry Creek at Eighth (8th) Street

where the creek enters the underground culverts.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY-REGION IX

By _____

Date: 14 July 75

Matthew S. Walker
Chief, Proceedings Branch
Enforcement Division
100 California Street
San Francisco, California 94111

CITY OF ELY, NEVADA

By _____

Date: 5-29-75

Attorney-City of Ely
777 Aultman Street
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