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NO.
STATE OF NEBRASKA
OFFICIAL
JUN 24 1994
DEPT. OF JUSTICE

DATE: June 24, 1994

SUBJECT: Enforcement of Nebraska Criminal Laws Restricting Gambling Against Activities on Riverboats Conducting Casino Gambling on the Missouri River Under Iowa Law.

REQUESTED BY: The Honorable E. Benjamin Nelson, Governor

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

Recently, voters in Pottawattamie County, Iowa, approved, pursuant to Iowa law, the operation of riverboats conducting casino gambling on the Missouri River. In light of this approval, you have asked our opinion regarding what authority the State of Nebraska has to enforce its criminal laws restricting gambling activities against the conduct of riverboat gambling authorized under Iowa law "on those portions of the Missouri River which are under Nebraska jurisdiction." You also ask "what federal or state departments or agencies have been vested with the authority to enforce Nebraska jurisdiction and laws on the Missouri River?"

I. The Nebraska-Iowa Boundary Line.

The Congressional Act admitting Nebraska to statehood in 1864 established the eastern boundary of Nebraska as "the middle of the channel" of the Missouri River. 13 Stat. c. 59, § 2. An earlier act of Congress established the western boundary of the State of Iowa as "the middle of the main channel" of the Missouri River. 9 Stat. c. 82. The original congressional act admitting Iowa to statehood provided that Iowa "shall have concurrent jurisdiction on

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the river Mississippi, and every other river bordering" the State of Iowa, if the rivers "shall form a common boundary" with Iowa "and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both." 5 Stat. c. 48, § 3. In 1892, the United States Supreme Court, in an action brought by Nebraska against Iowa, held that the boundary line in the Missouri River at Carter Lake, Iowa, was to be located based on application of the principle that the boundary "is a varying line" so far as affected by "changes of diminution and accretion in the mere washing of the waters of the stream," but not where the river is shifted by avulsion. In the case of avulsion, the Court stated that "[b]y this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel;. . . . unless the waters of the river returned to their former bed, [such center line] became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel." ***Nebraska v. Iowa,*** 143 U.S. 359, 370 (1892). The Court, referring to the change of course of the channel of the river, leaving the Iowa community of Carter Lake on the western side of the Missouri, stated "that in 1877, the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel." ***Id.*** Finding that this change in course of the Missouri came within the "law of avulsion", the Court found that the boundary between the states remained the center line of the old channel.

In 1943, the State of Nebraska and Iowa agreed by compact to a permanent location of the boundary line "by adopt[ing] [the] line at Carter Lake, and for the rest of the boundary line fix[ing] the line `in the middle of the main channel of the Missouri River', defined as the `center line of the proposed stabilized channel of the Missouri River as established by the United States engineers' office, Omaha, Nebraska,. . . ." ***Nebraska v. Iowa,*** 406 U.S. 117, 119-20 (1972); Iowa-Nebraska Boundary Compact of 1943; 57 Stat. 494. Thus, with respect to your particular question concerning the Nebraska-Iowa boundary in relation to Pottawattamie County, Iowa, the boundary line is generally the middle of the main channel of the Missouri River, except the boundary line does extend west of the current river channel into Carter Lake, Iowa.[1]

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[1] It is our understanding that the boundary line established by the 1943 compact, referencing the "middle of the main channel", does not equate, at all points on the river, to the actual stabilized channel. Nebraska nevertheless recognizes the line established by the location of the proposed main channel set forth by the 1943 boundary as the boundary line between the states, to the extent this line differs from the actual course of the river following efforts to stabilize the channel.

II. Nebraska's Authority to Enforce its Criminal Laws Against Offenses Committed Within Its Boundaries.

The general rule regarding the authority of a state to enforce its criminal laws against offenses on rivers forming state boundaries is stated in 22 C.J.S. Criminal Law § 163 (1989) as follows:

> Unless the boundaries are otherwise legally fixed, the center of the navigable channel of a river separating two states determines the territorial jurisdiction of crimes committed on the river waters, except where by constitutional provision, by act of Congress, or by compact between both states are given concurrent jurisdiction over the waters.

In ***Miller v. McLaughlin***, 118 Neb. 174, 224 N.W. 18 (1929), ***aff'd*** 281 U.S. 261 (1930), the Nebraska Supreme Court considered whether Nebraska could be enjoined from enforcing a statute making it unlawful to take fish from waters of the State of Nebraska with nets, traps, or seines. Miller, a Nebraska resident, asserted that Nebraska could not prevent him from possessing and using such equipment on the west side of the Missouri river, within Nebraska's boundary, because Iowa permitted the ownership and use of such fishing equipment. Miller contended that, as Congress had granted Nebraska and Iowa "concurrent jurisdiction" over the river, Nebraska could not enforce its law on Missouri River waters in Nebraska between the middle of the main channel to the Nebraska bank. 118 Neb. at 176-77, 224 N.W. at 19-20. Rejecting this contention, the Nebraska Supreme Court stated:

> The jurisdiction of Nebraska is not limited to the western bank of the river, unless the restriction is imposed by the words `shall have concurrent jurisdiction' as they appear in [5 Stat. c. 48, § 3]. The meaning of the expression has been the subject of judicial discussion and some diversity of opinion. <u>The better view seems to be that those words do not prevent one state from exercising generally civil and criminal jurisdiction over that part of the river within her own boundaries.</u> The power to make treaties has been committed to the federal government and not to individual states. One state cannot require another to unite in treaties, laws, contracts, or compacts. If Iowa and Nebraska, with a common boundary in the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by Congress, the river is not for that reason a zone without police protection, where offenses known to criminal law may be committed with impunity. The exigency of preserving order along the border does not necessarily await the concurrent action of two states. Their interests may conflict and they may never agree. The concurrent jurisdiction authorized by Congress is not `over' or `in' the river,

> but `on' the river. Each state, as to river waters within her own boundaries, has rights and powers not committed to the adjoining state.

118 Neb. at 177-78, 224 N.W. at 20.

The United States Supreme Court affirmed the decision of the Nebraska Supreme Court. 281 U.S. at 264. The Court noted that "[t]he grant of concurrent jurisdiction [did] not deprive Nebraska of power to legislate with respect to its own residents within its own territorial limits." *Id.* at 263. It further stated:

> While the two states have not concurred in this legislation, there is no conflict between them. Each has legislated only as to that part of the river which is within its own territorial limits. It is unnecessary to consider questions which might arise if Nebraska undertook to prohibit the fishing on Iowa's part of the river, or if Miller were a citizen of Iowa and fished under an Iowa license.

Id.

The decision in ***Miller v. McLaughlin*** confirms that Nebraska may enforce its laws as to activities conducted within its boundaries. The states retain exclusive authority and control up to their respective boundaries, free from interference by the other. ***Smith v. State***, 64 Wash. 2d 323, 391 P.2d 718 (1964); ***Smoot v. Fischer***, 248 S.W.2d 38 (Mo. Ct. App. 1952). Nebraska does not, of course, have jurisdiction to enforce its laws against acts done by express license of Iowa within the boundaries of the State of Iowa. ***Nielsen v. Oregon***, 212 U.S. 383 (1909). While it could be argued that ***Miller*** is distinguishable to the extent Nebraska may seek to enforce its laws against non-Nebraska citizens or residents, we do not believe this distinction is significant. Nebraska can certainly enforce its criminal laws against non-citizens or non-residents who commit crimes within its borders. Thus, we conclude that Nebraska has jurisdiction to enforce its criminal laws restricting gambling activities within its boundaries.

III. Authorities Responsible for Enforcement of Nebraska Law,

While your question is not specific, we assume your principal concern is the enforcement of Nebraska criminal statutes prohibiting certain gambling activities. *See* Neb. Rev. Stat. §§ 28-1101 to 1117 (1989, Cum. Supp. 1992, and Supp. 1993). Enforcement of these criminal statutes would be undertaken in the same manner as Nebraska criminal laws are generally enforced, primarily through the respective county sheriffs, and, if criminal prosecutions are instituted, through the appropriate county attorney. The boundaries of Nebraska counties bordering the Missouri river extend "to the eastern boundary line of the State of Nebraska as established by the Iowa-Nebraska Boundary Compact of

1943;. . . ." *See* Neb. Rev. Stat. § 22-128 (1991) (Douglas County); § 22-177 (Sarpy County); § 22-189 (Washington County). Neb. Rev. Stat. § 29-1301 (1989) generally provides that criminal actions must be brought in the county in which the offense is committed. Neb. Rev. Stat. § 29-1301.02 (1989) provides that venue for criminal offenses "committed in this state, on board a vessel navigating a river. . . may be tried in any county through, on, or over which the vessel. . . passes in the course of its voyage or trip, or in which the voyage or trip terminates." Thus, enforcement of Nebraska criminal statutes involving illegal gambling within the state's borders would be the responsibility of those persons generally responsible for the enforcement of Nebraska's criminal laws.

Very truly yours,

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APPROVED BY:

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