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DATE: September 14, 1994

SUBJECT: Restriction of Use of Air Boats or Motor Boats on Rivers of this State

REQUESTED BY: Rex Amack, Director
 Nebraska Game and Parks Commission

WRITTEN BY: Don Stenberg, Attorney General
 Linda L. Willard, Assistant Attorney General

You have asked for an opinion regarding whether the Nebraska Game and Parks Commission has the regulatory authority to restrict the use of air boats or motor boats on rivers of this state. It is our determination that the Commission cannot restrict the use of air boats or motor boats on waters of this state without enabling legislation.

You state in your letter that landowners along one of the state rivers wish to limit the use of air boats in the river because they contend that hunters and others use air boats as a means of access to their property and then trespass on the property. Further, they expressed concern for their safety because the trespassers (hunters) discharge firearms along the river and also force wildlife from the vicinity of the river.

It is unclear what precisely the landowners in this case expect the Commission to accomplish through adoption of rules and regulations. Clearly, the Commission may not declare it illegal to use air boats or motor boats on certain waters of the state.

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The Legislature cannot delegate its power to create criminal offenses and prescribe penalties to an administrative or executive authority. Such powers are exclusively legislative and may not be delegated to the executive branch of the government under the doctrine of division of powers contained in the State Constitution. *State v. Cutright*, 193 Neb. 303, 226 N.W.2d 771 (1975); and *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960). The Legislature may, however, define a crime and set a penalty therefore but delegate the implementation of the details to an administrative agency. It is not unconstitutional for the manner and method of enforcing a law to be delegated to an administrative agency. *State v. Sprague*, 213 Neb. 581, 330 N.W.2d 739 (1983).

The Commission does possess certain authority to regulate boats of this state under the State Boat Act, Neb. Rev. Stat. §§ 37-1201 through 37-1274 (1988). Neb. Rev. Stat. § 37-1201 (1988) states, "[i]t is the policy of the state to promote safety for persons and property in and connected with the use, operation, and equipment of vessels and to promote uniformity of laws relating thereto." Further, Neb. Rev. Stat. § 37-1266 (1988) states that "[t]he commission is hereby authorized to make special rules and regulations with reference to the operation of vessels, including water skiing and other related activities, on any specific water or waters within the territorial limits of this state."

The State Boat Act does set out penalties for violation of the Act at Neb. Rev. Stat. §§ 37-1270 through 37-1272 (1988). However, the provisions of the State Boat Act deal primarily with registration of vessels, proper safety equipment, and proper (non-negligent, non-reckless, and non-intoxicated) operation of vessels on the waters of the state.

Neb. Rev. Stat. § 81-805(5) (1987) also grants the Game and Parks Commission authority to enact regulations permitting boating, water skiing, and other water related activities on all or any portion of any area under its ownership or control. Pursuant to this statute, engaging in any of these activities without Commission approval is a misdemeanor.

In addition, Neb. Rev. Stat. §§ 37-401 through 37-404 (1987) permit landowners along a river to establish a wildlife reserve or sanctuary. Once the reserve or sanctuary is established, the Commission may make such rules and regulations as may be necessary to protect game, wild fowl, or song birds thereon. Pursuant to Neb. Rev. Stat. § 37-410, the killing or intentional disruption of wildlife or fish on waters closed by the Commission as a reserve or sanctuary is a misdemeanor.

The concerns expressed to the Commission in the instant case do not relate to safe operation of vessels on the waters of the

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state nor do they relate to Commission controlled land or designated sanctuary land. Instead, they relate to prohibiting operation of motor boats and air boats in public waters of the state in order to limit trespass on private property. There is no enabling legislation which would allow the Commission to generally prohibit air boat and motor boat traffic on any portion of the rivers of this state. Further, there is no enabling legislation which would allow the Commission to prohibit or limit where and when an individual may exit or enter a river. The laws dealing with trespass on private property are more appropriate for dealing with these situations.

It is our conclusion that there is currently no legislation making it illegal to use an air boat or motor boat on the rivers and public waters of this state. Therefore, the Game and Parks Commission has no authority to enact rules and regulations restricting use of motor boats or air boats on the rivers or any portion of the rivers of this state unless enabling legislation is first passed by the State Legislature.

Sincerely,

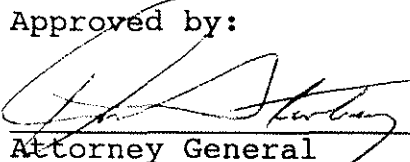
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Approved by:



Attorney General