

**OPINION
73-51**

July 2, 1973 (OPINION)

Mr. Patrick A. Conmy
Police Commissioner
517 East Thayer Avenue
Bismarck, ND 58501

Dear Mr. Conmy:

This is in response to your letter in which you state that the city ordinance provides that the city limits to the west shall include all those portions of Section 5, Section 6, and Section 31 lying east of the "center of the Missouri River". You further advise that the definition of the boundary of Burleigh County, North Dakota, also uses the phrase "to the center of the Missouri River". You further State that because of low water levels in the river this year, sandbars have developed along the Missouri River, some of which are in Sections 5, 6, and 31. A substantial portion of the existing sandbar has physical access from the east bank of the river, yet it lies considerably to the west of what would be the center of the river, were the river level higher.

You advise that a question has arisen as to the responsibility for law enforcement upon the sandbar area and more particularly which law is in force. You also provide us with the information that fines arising out of city ordinance violations are credited to the general fund of the city, whereas fines arising out of violations of State law are credited to the school fund.

You also express concern over the question whether the costs of law enforcement in this area or, for that matter, anywhere within the city limits of Bismarck should be borne solely by the contributions of the City of Bismarck.

You then ask the following questions:

- " . What does the phrase 'center of the Missouri River' mean?
Is it:
 - a) Center of the existing 'main channel'?
 - b) Where the main channel has forked and created an island, is it the center of a measurement taken from the extreme edges of all interconnected waterways?
 - c) Is the 'center of the river' a measurement taken from river banks themselves, regardless of the presence of sandbar formation?
 - d) If it is from riverbanks, what is the definition of a riverbank, in terms of last year's high water mark, as opposed to this year's high water mark, or as opposed to what might occur next year?

2. Is not the Sheriff's Department of Burleigh County charged with the primary responsibility for enforcement of all State laws within the confines of Burleigh County?
3. Does the presence of an incorporated city within the boundaries of Burleigh County in any way affect the responsibility of the sheriff, or absolve him from the responsibility for enforcement of State law within the confines of the county?
4. Is there any legal bar or prohibition against the city of Bismarck referring all matters relating to the protection of persons or property within the confines of the City of Bismarck, to the Burleigh County sheriff's department for patrol investigation and handling?
5. Are State traffic laws applicable to driving violations occurring on the streets of the City of Bismarck?
6. Is there any reason related to the protection of the health and safety of the citizens of North Dakota for the duplication of State criminal and traffic laws through city ordinance enactments?"

As to question number 1, there appear to be numerous definitions and judicial determinations of the phrases main channel, center of the river, middle of the river, etc. Each of the judicial determinations took into account specific facts of the river and the purpose and intent of the phrase used. Such terms have not been used consistently, particularly where the river in one instance was a navigable stream as distinguished from a river which is not navigable. We also sense a difference in the application and construction of such terms where it involves the establishment of boundaries between the States or countries.

The official statutory description of Burleigh County as contained in section 11-01-09 uses the term "main channel of the Missouri River". Section 206 of the North Dakota Constitution, in defining the boundaries of the State of North Dakota, uses the term "main channel of the Red River".

The middle of the river, the middle of the Main channel and the center of the main channel are terms which have similar meanings and are sometimes used interchangeably, thus making such terms synonymous, yet the precise meaning may vary with the purposes and intents for which the term or terms were used. As an example of the difficulty in arriving at the exact, true and precise meaning we refer to the case of State of Iowa v. State of Illinois, 37. L. Ed. 59, in which the United States Supreme Court had under consideration the boundary between the State of Illinois and Iowa. The Court in effect held that where the boundary lines is a navigable river which separates the jurisdiction of one state from the other, the line is the middle of the main channel of the river. "Thus, the jurisdiction of each state extends to the thread of the stream, that is, to the 'midchannel', and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed." It then adjudged and declared that the boundary line between the State of

Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River. Some bridges were mentioned in the case, and the Court was asked to determine the point of jurisdiction and in response thereto ordered a commission be appointed to ascertain the boundary line on such bridges and to report back to the Court for further action. This is given only as an illustration of the difficulty encountered. As a further reference, Words and Phrases Volume 6A Page 31, Words and Phrases Volume 26 Page 62, and Words and Phrases Volume 37A Page 493, all contain judicial determinations of the phrases in question. Volume 1, McQuillin Municipal Corporations, Section 282, Pages 774 and 775, states that in Pennsylvania, where a township, borough or city is bounded by a navigable stream, the nature of such stream shall be determined to be the boundary line between the township, boroughs or cities, as the case may be. The same authority also states that the boundary formed by a river is not changed by the river changing its course. This, of course, has reference to a river going out of its bed.

It is generally accepted that state law applies throughout the state, including municipalities, counties and townships. This concept has been reinforced by Senate Bill 2046 which is now Chapter 104 of the 1973 Session Laws which provides:

"SECTION 1. Section 12.1-01-05 of the North Dakota Century Code is hereby created and enacted to read as follows:

12.1-01-05. CRIMES DEFINED BY STATE LAW SHALL NOT BE SUPERSEDED BY CITY ORDINANCE OR BY HOME RULE CITY'S CHARTER OR ORDINANCE. No offense defined in this title or elsewhere by law shall be superseded by any city ordinance, or city home rule charter, or by an ordinance adopted pursuant to such a charter, and all such offenses shall have full force and effect within the territorial limits and other jurisdiction of home rule cities.

"SECTION 2. EFFECTIVE DATE. Section 12.1-01-05 shall take effect on July 1, 1975.

SECTION 3. Section 12-01-02.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

12-01-02.1. CRIMES DEFINED BY STATE LAW SHALL NOT BE SUPERSEDED BY CITY ORDINANCE OR BY HOME RULE CITY'S CHARTER OR ORDINANCE. No offense defined in this title or elsewhere by law shall be superseded by any city ordinance, or city home rule charter or by any ordinance adopted pursuant to such charter, and all such offenses shall have full force and effect within the territorial limits and other jurisdictions of cities, and home rule cities."

Section 40-06-01 of the North Dakota Century Code provides as follows:

"40-06-01. JURISDICTION OF GOVERNING BODY. Except as otherwise provided by law, a governing body of a municipality shall have jurisdiction:

1. Over any commons or public grounds belonging to such municipality and with the consent of the majority of the owners thereof shall have power to regulate the banks, shores, and wharves of that portion of any navigable stream within the corporate limits; and
2. In and over all places within one-half mile of the municipal limits for the purpose of enforcing health and quarantine ordinances and regulations and police regulations and ordinances adopted to promote the peace, order, safety, and general welfare of the municipality."

This section gives the municipal government authority to enforce certain ordinances and police regulations within one-half mile of the city limits.

Our knowledge on the distance of the Missouri River bed suggests that the one-half mile will give adequate leeway, so it will not be necessary to define with precision the boundary line.

In referring to the various terms used such as center, midchannel, middle of the river, we also recognize that such terms are not synonymous with median of the opposing banks or the median of the riverbed.

It would appear that the ruling of the United States Supreme Court in Iowa v. Illinois would most likely be the rule of law applied here.

Any effort to answer the questions more specifically would require data and facts which we do not have presently available.

As to question number 2, the duties of the sheriff are set out in Section 11-15-03 and as pertinent to the subject matter under discussion are as follows:

1. Preserve the peace;
2. Arrest and take before the nearest magistrate, or before the magistrate who issued the warrant, all persons who attempt to commit or who have committed a public offense;
3. Prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge;
- * * *
5. Command the aid of as many male inhabitants of his county as he may think necessary in the execution of his duties;
- * * *
0. Perform such other duties as are required of him by law."

Section 40-20-05 as pertinent to the question under consideration provides as follows:

"40-20-05. CHIEF OF POLICE AND POLICE OFFICERS - POWERS AND DUTIES. The chief of police shall perform such duties as shall be prescribed by the governing body for the preservation of the peace. The chief of police shall have the authority to administer oaths to police officers under his supervision. Within the city limits, and for a distance of one and one-half miles in all directions outside the city limits, the police officers and watchmen of the city shall perform the duties and exercise the powers of peace officers as defined and prescribed by the laws of this state. They shall serve and execute any warrant, writ, process, order, or notice issued to them by a police magistrate within the city in any civil or criminal action or proceeding for or on account of a violation of any city ordinance or in any action or proceeding in which the city is a party or is interested beneficially. The police, within the limits prescribed in this section, may serve and execute all writs and process issued by justices in civil actions. In addition to the duties set out in this section, the police shall perform such other duties as may be prescribed by ordinance or statute."

It is noted that the statute contains the provisions "shall perform the duties and exercise the powers of peace officers as defined and prescribed by the laws of this state". A peace officer is defined in Section 12-01-04(13) as follows:

"'Peace officer' signifies any sheriff, coroner, constable, policeman, or marshal and any other officer or officers whose duty it is to enforce and preserve the public peace; and"

The same term is also defined in Section 29-05-10 as follows:

"A peace officer is a sheriff of a county or his deputy, or a coroner, constable, marshal, or policeman of a township, city, or village."

In addition to the foregoing, Section 44-04-06 provides as follows:

"44-04-06. PEACE OFFICERS TO REPORT LAW VIOLATIONS. The state's attorney, assistant state's attorney, sheriff, deputy sheriff, constable, marshal, or police officer of any county, township, city, or village in this state, having any evidence, knowledge, or notice of any violation of any liquor, gambling, cigarette, snuff, pool hall, bawdyhouse, prostitution, white slave, or habit forming drug laws of North Dakota shall investigate the same and shall seek evidence of such violation, and the names of witnesses by whom such violation may be proved, and in the case of any peace officer shall report the same to the state's attorney of the county in which such violation occurs and shall give him assistance in the prosecution of the violators of said laws."

From the foregoing provisions of law, it becomes quite clear that both the sheriff and the city police officers have a duty and responsibility of preserving the peace. It also appears, by taking into account the legal and political status of the two entities; namely, the city and the county, that the sheriff would be primarily

concerned with enforcement of state law. However, this does not mean that it is the sheriff's duty exclusively because the statutes, referred to above, clearly indicate that there is concurrent jurisdiction between the law enforcement officials of the county and those of the city.

In answer to question number 3, it would not appear that the mere fact that an incorporated city exists within the boundaries of a county, that the sheriff's responsibility of enforcing state laws is eliminated. The basic duties of the sheriff have not been changed because an incorporated city is within the confines of the county. The sheriff, however, has no legal obligation to enforce ordinances, whereas it does appear that city police officers have an obligation to enforce state laws.

As to question number 4, we are not aware of any legal bar or prohibition which would prevent the city from referring all matters relating to the protection of persons or properties within the confines of the city to the sheriff's department for patrol, investigation and handling except as such matters pertain to the enforcement of a city ordinance. While we are not aware of any legal bar or prohibition, we do not believe that the city, by so doing, may abrogate the duties and responsibilities imposed upon the city police officers by Section 40-20-05.

As to question number 5, state traffic laws generally are applicable within a city except as provided for in Section 39-07-04 which permits cities to expand upon or complement state laws. (See also Section 33 of Chapter 301 of the 1973 Session Laws which limits city ordinances as to noncriminal traffic transgressions.)

Under Sections 40-05-01 and 40-05-02, cities are given authority to enact ordinances covering a wide range of subjects. For example, under Section 40-05-02(15) authority is given to enact ordinances prohibiting the driving of a motor vehicle while under the influence of intoxicating liquor or narcotics. The North Dakota Supreme Court, in *State v. Colohan*, 286 N.W. 888, stated that the ordinance was in reality an extra hazard for the drunken driver. However, the opinion of the United States Supreme Court in *Waller v. Florida*, 25 L. Ed. 2d. 435, throws a different light on the subject, and requires a reexamination of prior concepts. The *Waller* case in effect holds that a trial under a city ordinance constitutes a bar to a trial for an offense under state law based upon the same substantive facts. In brief, double jeopardy applies for trials under city ordinances and state laws.

The Legislature must have been aware of the legal consequences of the *Waller* case and as a result enacted Senate Bill 2046 now designated as Chapter 104 of the 1973 Session Laws which prohibits a city from superseding state laws.

The composite effect of the *Waller* case and Senate Bill 2046 greatly limits the authority the city may have in enacting regulations governing traffic.

In this respect we are enclosing a copy of an opinion issued to R. G. Nerison, Assistant City Attorney, Jamestown, North Dakota, dated

November 27, 1972, pertaining to ordinances on the possession, sale, use and trafficking in marijuana and on a controlled substance. The discussion therein should help explain the problems that can arise.

As to question number 6, we must recognize that the subject matter is more in the nature of discretionary judgment, than legal. We are, however, firmly impressed with the basic legal concept that concurrent jurisdiction exists, in the area in question, in both the officials of the City of Bismarck and the officials of Burleigh County, particularly the law enforcement officials of both. It appears quite obvious that a spirit of cooperation and harmony must prevail for either to be successful. We do not believe any concept of law will permit either one or the other to abrogate the basic duties and responsibilities imposed upon each. The duties and responsibilities can be carried out more effectively to the benefit and welfare of the citizens of both jurisdictions if the respective officials of both jurisdictions make an outright honest effort to cooperate and work in harmony in all respects. The cooperation would include sharing of the work load and cost and expenses connected therewith. In making these observations, we, of course, recognize that the sheriff's office is not only obligated to perform certain law enforcement functions in the City of Bismarck, but throughout the entire Burleigh County. Money and manpower, of course, will necessarily be a determinative factor as to how much effort can be placed in the City of Bismarck without disregarding the other areas in the county.

I trust this answers your inquiry.

Sincerely yours,

ALLEN I. OLSON

Attorney General