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### **PRELIMINARY STATEMENT**

In this brief, Defendant and Appellee, Gary Dean Ogden, Jr., will be referred to as “Ogden.” Plaintiff and Appellant, State of South Dakota, will be referred to as “State.”

References to pertinent documents will be designated as follows:

Settled Record . . . . . SR [page]  
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### **JURISDICTIONAL STATEMENT**

This is an appeal of an Order Granting a Motion to Dismiss entered by the Honorable Kasey Sorensen, Magistrate Court Judge, First Judicial Circuit, Union County, South Dakota. The Order was entered on January 13, 2025. SR 99. On February 18, 2025, the State filed the Notice of Entry of Order. SR 105-106. The State filed its Petition for Permission to Appeal in a timely manner on February 27, 2025. On April 4, 2025, this Court entered an Order Granting Petition for Discretionary Appeal. SR 109. This Court has jurisdiction to hear this appeal under SDCL § 23A-32-5.

## STATEMENT OF LEGAL ISSUES AND AUTHORITIES

The broad issues before this Court are:

**A. WHETHER THE MAGISTRATE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DISMISSED THE INFORMATION.**

The magistrate court erred and abused its discretion when it dismissed the charges based upon its pre-trial factual determination regarding venue, and its holding that the court lacked subject-matter jurisdiction.

**Relevant Cases and Statutes:**

*State v. Haase*, 446 N.W.2d 62(S.D. 1989)  
*State v. Osborn*, 155 Ind. 385, 58 N.E. 491(1900)  
*State v. Springer-Ertl*, 1997 S.D. 128, 570 N.W.2d 39  
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**B. WHETHER THE MAGISTRATE COURT ERRED IN RULING THAT THE SOUTH DAKOTA-NEBRASKA BOUNDARY COMPACT, CODIFIED IN SDCL § 1-2-8, FEDERALLY PREEMPTS SDCL §§ 41-15-2 AND 42-8-67.**

The magistrate court erred in ruling that the South Dakota-Nebraska Boundary Compact, codified in SDCL § 1-2-8, federally preempts SDCL §§ 41-15-2 and 42-8-67.

**Relevant Cases and Statutes:**

*New York v. New Jersey*, 598 U.S. 218 143 S. Ct. 918, 215 L. Ed. 2d 208 (2023).  
*Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823.  
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## STATEMENT OF CASE

On August 23, 2024, Ogden was charged by an Information with the following criminal offenses: Count 1A - Boating Under the Influence in violation of SDCL § 42-8-45(1); Count 1B - Boating Under the Influence in violation of SDCL § 42-8-45(2); Count

2 - Boat Lights Required in violation of SDCL § 32-3A-1(1); Count 3 - Obstructing Law Enforcement in violation of SDCL § 22-11-6; and Count 4 - Resisting Arrest in violation of SDCL § 22-11-4(2). SR 9-12; Appx. 6-9.

On September 23, 2024, Ogden filed a Motion to Dismiss For Lack of Jurisdiction pursuant to SDCL § 23A-8-2. SR 13-17; Appx. 10-14. Ogden alleged, *inter alia*, that the officer's initial stop took place on the Nebraska side of the Missouri River and, thus, outside the jurisdiction of South Dakota. *Id.* On October 10, 2024, the State filed a brief in response, arguing that Ogden's Motion should be denied because the Information was valid on its face and noting that the magistrate court may not inquire into the sufficiency of the evidence. SR 19-24; Appx. 15-20. The State further argued that South Dakota has concurrent jurisdiction over the Missouri River. SR 20-23; Appx. 16-19. Ogden filed a Reply Brief on November 1, 2024. SR 25-28; Appx. 21-24.

A hearing on Ogden's Motion was held on November 15, 2024. SR 30, 40. At that time, over objections from the State, the trial court proceeded to hear testimony from the arresting officer, Josh Vanden Bosch. SR 42-46, 56-78; T 3-7, ln. 23 (T 3) – ln. 2 (T 7) and T 17-39, ln. 20 (T 17) – ln. 4 (T 39); Appx. 25-53.

On December 6, 2024, the trial court issued its Memorandum Opinion granting Ogden's Motion to Dismiss. SR 30-34; Appx. 54-58. In issuing its Opinion, the trial court relied in part upon this Court's decision in *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶ 11, 931 N.W.2d 707, 710-11 (internal citations and quotations omitted) saying, "Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide." SR 31; Appx. 55. Additionally, the court held that, "To resolve the question, the court may hold hearings, consider live testimony, or review affidavits and documents."

*Id.* The court considered the evidence presented by the Defendant and made a factual determination where the arrest and observation of boating occurred. *Id.* The court noted that the State has the burden to establish jurisdiction and that the State failed to submit any evidence establishing where the relevant events occurred. SR 34; Appx. 58. The court held that the South Dakota-Nebraska Boundary Compact (codified in SDCL § 1-2-8) was a federal law that preempted SDCL §§ 41-15-2 and 42-8-67. SR 33; Appx. 57.

On December 20, 2024, Ogden filed his Proposed Order granting Motion to Dismiss and Findings of Fact and Conclusions of Law (“FOF and COL”). SR 94. On January 3, 2025, the State objected to Ogden’s proposed FOF and COL and concurrently proposed alternative FOF and COL that same day. SR 82-93; Appx. 59-70. The trial court subsequently entered its FOF and COL and Order Granting Dismissal on January 13, 2025. SR 96-99; Appx. 71-74. The State also filed its initial Notice of Appeal on January 22, 2025 (Appeal No. 30984). SR 100-104; Appx. 75-76. This Court entered an Order dismissing Appeal No. 30984 on February 10, 2025. SR 107-108; Appx. 77. Notice of Entry of the trial court’s Order Granting Dismissal was filed and served on February 18, 2025. SR 105-106; Appx. 78-79. The State then filed its Petition for Discretionary Appeal in a timely manner on February 27, 2025, and this Court subsequently entered an Order granting the same on April 4, 2025. SR 109; Appx. 80. Accordingly, this Brief follows.

### **STATEMENT OF FACTS**

On July 27, 2024, at approximately 9:30 p.m., South Dakota Conservation Officer Josh Vanden Bosch initiated a stop of a boat on the Missouri River due to the boat operating after sunset without proper navigation lights. SR 4 and 59; T 20, ln. 13-20;

Appx. 2 and 34. The boat was being operated by Ogden. SR 4 and 59; T 20, ln. 17-20;

Appx. 2 and 34. According to the Probable Cause Statement executed by Officer Vanden Bosch:

I (WCO Josh Vanden Bosch) stopped a boat on the Missouri River in Union County for operating the boat after sunset without proper navigation lights at approximately 9:30pm (well past dark). The operator of the boat, later identified as GARY OGDEN, was struggling to pull his boat to the center of the river. OGDEN's speech was very slurred and slow. We eventually tied up to the boat, which had a large amount of empty beer cans in the bottom of the boat. There was a strong odor of alcohol coming from OGDEN. OGDEN's eyes were watery and bloodshot, and his balance was very unsteady. OGDEN was having difficulty standing. There was an open Miller Lite in the driver's cupholder.

SR 4; Appx. 2.

Approximately 20 minutes after the initial encounter, including Ogden resisting getting into the patrol boat during which time Officer Vanden Bosch had to "jump into OGDEN's boat and physically grab him[.]", Ogden was arrested for the public offense of operating a boat under the influence, among other charges. SR 1-4; Appx. 1-2. Ogden was transported to the Union County Jail. SR 4; Appx. 2. Officer Vanden Bosch executed two Uniform Summons and Complaints alleging that Ogden committed the offenses of Boating Under the Influence (SDCL § 42-8-45), Operating Boat without Navigation (ARSD 41:04:05:18), Obstruction Law Enforcement (SDCL § 22-11-6) and Resisting Arrest (SDCL § 22-11-4) SR 1-2. Officer Vanden Bosch executed a Probable Cause Statement in conjunction with the Uniform Complaints. SR 3-4; Appx. 1-2.

### **STANDARD OF REVIEW**

This Court reviews a trial court's grant of a motion to dismiss an indictment under an abuse of discretion standard. *State v. Vatne*, 2003 S.D. 31, ¶ 8, 659 N.W.2d 380, 383. However, "the trial court's review of an indictment is limited by statute." *State v.*

*Carothers*, 2006 S.D. 100, ¶ 8, 724 N.W.2d 610, 615. Consequently, when determining if the trial court abused its discretion, this Court must engage in statutory interpretation. “Statutory interpretation and application are questions of law and are reviewed by this Court under the *de novo* standard of review.” *State v. Miranda*, 2009 S.D. 105, ¶ 14, 776 N.W.2d 77, 81 (internal citations omitted). In a *de novo* review, no deference is given to the trial court’s decision. *Thom v. Barnett*, 2021 S.D. 65, ¶ 13, 967 N.W.2d 261, 267.

## **ARGUMENT**

### **A. THE MAGISTRATE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DISMISSED THE INFORMATION.**

The magistrate court erred and abused its discretion when it dismissed the charges based upon its pretrial factual determination regarding venue, and its holding that the court lacked subject-matter jurisdiction. In doing so, it relied upon this Court’s decision in *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶ 11, 931 N.W.2d 707, 710-11, a case concerning a civil tort claim. In that case, the question of subject matter jurisdiction rested upon the rules of civil procedure: SDCL § 15-6-12(b)(1). Here, however, the magistrate court is bound by the Rules of Criminal Procedure: SDCL § 23A-8-2. SDCL § 23A-8-2 provides the specific grounds upon which a trial court may dismiss an indictment or information. This statute provides:

Upon motion of a defendant made pursuant to subdivision 23A-8-3 (1), (2) or (3), the court must dismiss an indictment or information in any of the following cases:

- (1) When it is not found, endorsed, and presented or filed as prescribed by this title;
- (2) When the names of the witnesses are not inserted at the foot of the indictment or information or endorsed thereon;
- (3) When it does not substantially conform to the requirements of this title;
- (4) When more than one offense is charged in a single count;
- (5) When it does not describe a public offense;



(6) When it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other bar to the prosecution;

(7) When the grand jury which filed the indictment had no legal authority to inquire into the offense charged because it was not within the jurisdiction of the grand jury or because the court was without jurisdiction of the offense charged;

(8) When a person was permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, except as provided in § 23A-5-11; or

(9) When a defendant charged by information did not have or waive a preliminary hearing before the information was filed.

These nine grounds for dismissal of an indictment are exclusive. *State v. Vatne*, 2003

S.D. 31, ¶ 14, 659 N.W.2d 380 at 383-4; *State v. Springer-Ertl*, 1997 S.D. 128, ¶ 7, 570 N.W.2d 39, 40-1.

This Court has consistently held that, “the trial court cannot inquire into the legality or sufficiency of the evidence upon which an indictment is based when considering a dismissal under SDCL § 23A-8-2.” *Springer-Ertl*, 570 N.W.2d at 40-1; *See also State v. Dorhout*, 513 N.W.2d 390, 392 (S.D. 1994); *State v. Schladweiler*, 436 N.W.2d 851, 854 (S.D. 1989); *State v. Hoekstra*, 286 N.W.2d 127, 128 (S.D. 1979); *see also Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L. Ed. 397 (1956). Rather, “[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” *State v. Cameron*, 1999 S.D. 70, 596 N.W.2d 49, 52.

This Court has held that “[s]ubject-matter jurisdiction entails the power of a court to hear a case, determine the facts, apply the law, and set a penalty.” *State v. Haase*, 446 N.W.2d 62, 64 (S.D. 1989) (quoting *Zelenka v. State*, 83 Wis.2d 601, 266 N.W.2d 279 (1978)). The magistrate court has subject matter jurisdiction to try and determine all cases of misdemeanors. SDCL § 16-12B-11. This jurisdiction is determined by the

indictment. *State v. Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d 105, 107 (citing *State v. Janssen*, 371 N.W.2d 353, 356 (S.D. 1985) ("a valid and sufficient [indictment] confers subject matter jurisdiction upon the court."); *State v. Osborn*, 155 Ind. 385, 58 N.E. 491, 493 (1900) ("jurisdiction over the subject-matter of the offense charged depends upon the allegations of said indictment or affidavit and information and not upon the actual facts").

Applied here, the jurisdictional question only relates to whether the magistrate court has jurisdiction to sit as the court on the Union County charges, and it cannot be denied that is the case. The Information in the present case charges that the Defendant "on or about the 27<sup>th</sup> day of July, 2024, in the County of Union, State of South Dakota..., did commit the public offense of Boating Under Influence." The charges listed in the Information are alleged to have occurred in Union County, the Information was found, endorsed, and presented or filed as prescribed by Title 23A *et seq.* of South Dakota Codified Law, and as such the magistrate court had subject matter jurisdiction. *See* SDCL §§ 23A *et seq.*; SDCL 23A-8-2.

Venue, separate from jurisdiction, "refers to the county in which the prosecution is to be brought." *State v. Haase*, 446 N.W.2d 62, 64. (S.D. 1989) (internal citations omitted). The State has the burden of proving proper venue by a preponderance of the evidence. *State v. Iwan*, 2010 S.D. 92, ¶ 9, 791 N.W.2d 788, 789. Venue is generally proper in the "county in which the offense is alleged to have been committed." *Haase*, 446 N.W.2d at 64 (*citing* S.D. Const. Art. VI, Sec. 7; SDCL § 23A-16-3).

For a venue allegation to be sufficient, it "must appear in an indictment or information that the offense charged was committed in the county in which the prosecution is instituted." *Haase*, 446 N.W.2d at 64 (*citing* SDCL § 23A-6-7(4); *State v.*



*Jerke*, 38 N.W.2d 874 (S.D. 1949)). However, no direct evidence is required to prove venue. *State v. Thomason*, 2015 S.D. 90, ¶ 28, 872 N.W.2d 70, 77 (citing *State v. Green*, 192 N.W.2d 712, 715 (S.D. 1971)). Rather, “venue is sufficiently established ‘if the circumstances and evidence tend to the conclusion in a manner satisfactory to the jury that the place of the crime corresponds with that set forth in the information.’” *Thomason*, ¶ 28, 872 N.W.2d at 77 (internal citations omitted). Moreover, venue is a question for the trier of fact. *See Haase*, 446 N.W.2d at 65-66. SDCL § 23A-16-8 provides that, “[w]hen a public offense is committed partly in one county and partly in another county, or the acts or effects thereof constituting or requisite to the offense occur in two or more counties, the venue is in either county.”

Applied here, the magistrate court erred when it inquired into the legality or sufficiency of the evidence and testimony when considering dismissal. The magistrate court determined it had jurisdiction to examine the underlying facts regarding the location where Ogden was encountered on the Missouri River in determining the question of venue before trial, when venue is a question to be determined at trial – not pretrial. Any inquiry into jurisdiction is limited to whether the court had jurisdiction to hear the charged misdemeanor offenses. That inquiry is limited to the facts as alleged in the charging document, namely in this case, the Information. *See Osborn*, 58 N.E. at 493. Further, SDCL §§ 41-15-2 and 42-8-67, which will be addressed below, specifically establish that both courts and conservation officers of this state have jurisdiction over the entire boundary waters of this state to the further most shorelines.

**B. THE MAGISTRATE COURT ERRED IN RULING THAT THE SOUTH DAKOTA-NEBRASKA BOUNDARY COMPACT, CODIFIED IN SDCL § 1-2-8, FEDERALLY PREEMPTS SDCL §§ 41-15-2 AND 42-8-67.**

Although a decision on the first issue could be dispositive in this matter for purposes of reversing the magistrate court's decision and order to dismiss and remanding the case, since the magistrate court ruled that the South Dakota-Nebraska boundary compact, SDCL § 1-2-8, preempts SDCL §§ 41-15-2 and 42-8-67, the State respectfully requests this Court to examine the second issue, namely whether the courts and the conservation officers of this state have jurisdiction over the entire boundary waters of this state to the furthestmost shorelines. SDCL §§ 41-15-2 and 42-8-67.

In 1989, South Dakota and Nebraska entered into an interstate boundary compact. SDCL § 1-2-8. The compact establishes a compromise boundary line between Dakota County, Nebraska, and Union County, South Dakota, "at the centerline of the designed channel of the Missouri River." *Id.* In recognition of this compromise boundary line, the compact states that,

"On the effective date of this compact, the state of South Dakota hereby relinquishes to the state of Nebraska all sovereignty over *lands* lying on the Nebraska side of said compromise boundary and the state of Nebraska hereby relinquishes to the state of South Dakota all sovereignty over *lands* lying on the South Dakota side of the compromise boundary."

*Id.* (emphasis added).

"While contractual in nature, an interstate compact is not just a contract, but also a federal statute enacted by Congress that preempts contrary state law." *Texas v. New Mexico*, 602 U.S. 943, 949–50, 144 S. Ct. 1756, 1762, 219 L. Ed. 2d 539 (2024) (citations omitted). However, when a compact does not address a particular issue, courts must consider background principles of law that would have informed the parties'

understanding when they entered the compact. *New York v. New Jersey*, 598 U.S. 218, 224, 143 S. Ct. 918, 924, 215 L. Ed. 2d 208 (2023).

Two background principles are central to the South Dakota-Nebraska Boundary Compact. The first is “the background notion that a State does not easily cede its sovereignty.” *New York v. New Jersey*, 598 U.S. 218, 225, 143 S. Ct. 918, 925, 215 L. Ed. 2d 208 (2023). In fact, “dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing...transfer of sovereignty itself.” *United States v. State of Oregon*, 295 U.S. 1, 14, 55 S. Ct. 610, 615, 79 L. Ed. 1267 (1935).

The second principle is embedded in the first: the public trust doctrine. This Court already recognized years ago that “history and precedent have established the public trust doctrine as an inherent attribute of sovereign authority.” *Parks v. Cooper*, 2004 S.D. 27, ¶ 44, 676 N.W.2d 823, 837 (citing *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 455, 13 S. Ct. 110, 119, 36 L. Ed. 1018 (1892)). To that end, this Court has “recognized the public trust doctrine’s applicability to water, independent of bed ownership.” *Cooper*, ¶ 46, 676 N.W.2d at 838. In *Cooper*, this court stated unequivocally, “that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public.” *Id.* ¶ 46, 676 N.W.2d at 839.

These two principles form the foundation for two relevant South Dakota statutes: SDCL §§ 41-15-2 and 42-8-67. SDCL § 41-15-2 states that:

“For the purpose of enforcing any of the laws under this title and the rules promulgated pursuant to this title, the courts of this state, and the conservation officers of this state, have jurisdiction over the entire boundary waters of the state, to the furthestmost shore line. Concurrent jurisdiction of

the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa, and Nebraska over all boundary *waters* between such states and this state, and the whole of such boundary *waters*, is hereby recognized.”

SDCL § 41-15-2 (*emphasis added*). SDCL § 42-8-67 states that:

“For the purposes of this chapter, the courts and the conservation officers of this state have jurisdiction over the entire boundary *waters* of this state to the furthestmost shorelines. The concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa and Nebraska over all boundary *waters* between those states and this state, is hereby recognized.”

SDCL § 42-8-67 (*emphasis added*). Additionally, federal law also recognizes concurrent jurisdiction over the boundary waters:

“The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917.”

33 U.S.C.A. § 11; Appx. 81.

The South Dakota-Nebraska Boundary Compact only addresses the ownership of *lands* on either side of the compromise boundary; not ownership of the *waters* overlying those lands. This is because “at times courts have found some land as located in Nebraska and at other times the courts have found the same land as located in South Dakota.”

SDCL § 1-2-8. Consequently, issues arose relating to allotting taxes and claims to private title by each state’s respective citizens. *See Id.*

Thus, in order to determine ownership of the waters overlying those lands, this Court must consider the two aforementioned background principles: that is, 1) that a state does not easily cede its sovereignty, and 2) the public trust doctrine.

It is clear that South Dakota has not ceded its sovereignty over the boundary waters in Union County since both SDCL §§ 41-15-2 and 42-8-67 establish concurrent jurisdiction over *all* boundary waters of the State.

This Court has consistently applied the so-called Harmonious Reading Canon in cases such as the one present. According to that canon of construction,

“When analyzing two statutes touching upon the same subject matter, there is a presumption that the Legislature intended the two to coexist and that it did not intend an absurd or unreasonable result. Even where statutes appear to conflict, it is [the Court’s] responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable.”

*State v. Bettelyoun*, 2022 S.D. 14, ¶ 29, 972 N.W.2d 124, 133 (internal citations omitted); *see also Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502, 138 S. Ct. 1612, 1619, 200 L. Ed. 2d 889 (2018). In other words, statutes are to be construed to give effect to each statute and so as to have them exist in harmony. *State v. Woods*, 361 N.W.2d 620, 622 (S.D. 1985).

Applying the Harmonious Reading Canon to the statutes at issue in the present case, the language in SDCL § 1-2-8 can be read in harmony with SDCL §§ 41-15-2 and 42-8-67. While the language in the compact plainly concerns the land beneath the waters of the river and not the waters themselves, the language in SDCL §§ 41-15-2 and 42-8-67 concerns the actual waters that make up the boundaries of the state. Consequently, South Dakota retains its sovereignty over the boundary waters. Additionally, SDCL §§ 41-15-2 and 42-8-67 demonstrate that South Dakota takes seriously its responsibility under the

public trust doctrine. Both statutes establish South Dakota's jurisdiction over the boundary waters, specifically, to enforce the laws of the State.

This harmonious reading adheres to the presumption that the Court must give to the State: namely, that "dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing...transfer of sovereignty itself." *United States v. State of Oregon*, 295 U.S. 1, 14, 55 S. Ct. 610, 615, 79 L. Ed. 1267 (1935).

Moreover, this harmonious reading would also comport with Congress's intent as expressed in 33 U.S.C.A. § 11. The language in that federal statute reads that "[t]he consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them" to determine jurisdiction of offenses over their boundary waters. The inclusion of the phrase "or any two or more of them" suggests that any of those states could make that determination independently.

### **CONCLUSION**

Based upon the foregoing law and argument, the State respectfully requests that this Court reverse the magistrate court's Memorandum Decision and Order Granting Motion to Dismiss. The magistrate court erred and abused its discretion when it dismissed the Information, and, moreover, both federal and state law grant South Dakota concurrent jurisdiction over the waters of the Missouri River.

### **REQUEST FOR ORAL ARGUMENT**

The State hereby requests oral argument on all issues and matters raised in this appeal.



Dated this 19<sup>th</sup> day of May, 2025.

RESPECTFULLY SUBMITTED,

/s/Nick Michels

Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks  
523 E. Capitol Ave.  
Pierre, SD 57501  
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/s/Paul Bachand

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/s/Jenna Severyn

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### CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, State of South Dakota, the Department of Game, Fish, and Parks, hereby certifies that on the 19<sup>th</sup> day of May, 2025, a true and correct copy of Appellant's Brief was served by Odyssey File and Serve upon:

Jacklyn M. Fox  
329 Pierce Street, Ste. 200  
PO Box 27  
Sioux City, Iowa 51102  
[jfox@craryhuff.com](mailto:jfox@craryhuff.com)

and 1 original was mailed (or hand delivered) to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at:

[SCClerkBriefs@uds.state.sd.us](mailto:SCClerkBriefs@uds.state.sd.us)

Dated this 19<sup>th</sup> day of May, 2025.



Paul Bachand  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks  
P.O. Box 1174  
Pierre, SD 57501  
[pbachand@pirlaw.com](mailto:pbachand@pirlaw.com)



### CERTIFICATE OF COMPLIANCE

Paul Bachand, the attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

- a. Appellant's Brief does not exceed 32 pages;
- b. The body of Appellant's Brief was typed in Times New Roman 12-point typeface; and
- c. The body of Appellant's Brief contains 4,382 words and 21,560 characters with no spaces and 25,881 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.

Dated this 19<sup>th</sup> day of May, 2025.

A handwritten signature in black ink, reading "Paul Bachand", written over a horizontal line.

Paul Bachand  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks  
P.O. Box 1174  
Pierre, SD 57501  
pbachand@pirlaw.com

## APPENDIX

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF Union

FIRST  
JUDICIAL CIRCUIT

State of South Dakota,

63CR/24-000363

Plaintiff,

PROBABLE CAUSE  
STATEMENT

vs. OGDEN, Gary Dean

Name: Gary Dean OGDEN Jr.

DOB: 04/08/1975

Address: 565 W 3<sup>rd</sup> St

City, State, Zip South Sioux City, NE 68776

1. I am a law enforcement officer for the South Dakota Game, Fish & Parks
2. I declare and shall affirm under the penalties of perjury that this probable cause statement has been examined by me, and to the best of my knowledge, and belief, is in all things true and correct.

Please consider this information to determine initial probable cause to hold the Defendant.

Dated this 27 day of July, 2024

  
\_\_\_\_\_  
Officer Signature

Arrest Date

SDCL

Offense

07/27/2024

42-8-45

Boating Under Influence

07/27/2024

22-11-6

Obstruction

07/27/2024

22-11-4

Resisting Arrest

07/27/2024

41-04:15:18

Operate boat without navigation lights

Other pertinent information for bond consideration:

Alcohol Use: Yes ☒ No ☐ PBT refused

Filed on: 7/29/2024 Union County, South Dakota 63CR/24-000363

- Page 3 -

Probable Cause Narrative: I (WCO Josh Vanden Bosch) stopped a boat on the Missouri River in Union County for operating the boat after sunset without proper navigation lights at approximately 9:30pm (well past dark). The operator of the boat, later identified as GARY OGDEN, was struggling to pull his boat to the center of the river. OGDEN's speech was very slurred and slow. We eventually tied up to the boat, which had a large amount of empty beer cans in the bottom of the boat. There was a strong odor of alcohol coming from OGDEN. OGDEN's eyes were watery and bloodshot, and his balance was very unsteady. OGDEN was having difficulty standing. There was an open Miller Lite in the driver's cupholder.

We conducted a safety compliance check with OGDEN and informed him for the reason of the stop. OGDEN continued to show several indicators of alcohol impairment. OGDEN refused to board our boat for sobriety tests. OGDEN allowed me to check his eyes while standing in his boat. I began to perform the HGN test. OGDEN showed lack of smooth pursuit and distinct and sustained nystagmus, before failing to follow the stimulus anymore. OGDEN's eyes were shutting, and he was nearly tipping over. OGDEN refused all other tests. OGDEN continued to refused to get into the patrol boat.

I told OGDEN that he was under arrest, and he needed to put on a life jacket and get into the patrol boat. OGDEN continued to argue and stumble around the boat. I eventually had to jump into OGDEN's boat and physically grab him. I put a life jacket on him and buckled it. OGDEN resisted getting into the patrol boat. I had to physically force OGDEN into the patrol boat. We eventually got OGDEN into the patrol boat. OGDEN refused to listen to WCO Kirchner's orders and had to be brought to the bottom of the boat. OGDEN was placed in handcuffs at approximately 9:50pm. A sober driver for the boat was attained and released the boat with his wife. OGDEN remained highly uncooperative the entire boat ride. OGDEN refused blood draw. OGDEN is currently being detained at the Union County Jail.

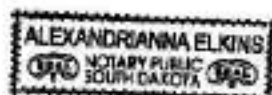
Dated at E/k Pott SD on this 27 day of July, 2024

  
Signature of Affiant

WILDLIFE CONSERVATION OFFICER  
Official Title

Subscribed and sworn to me on this 27 day of July, 2024

My commission expires:




  
Notary Public

63CR124-000363

STATE OF SOUTH DAKOTA  
COUNTY OF UNION**FILED**

JUL 29 2024

State of South Dakota  
Plaintiff,- vs -  
Gary Dean Ogden  
Defendant
  
 UNION COUNTY CLERK OF COURTS  
 FIRST JUDICIAL CIRCUIT COURT OF SD
BOND SPECIFYING METHODS  
AND CONDITIONS OF RELEASE

I understand that I have been ordered released upon the following conditions:

☐ PERSONAL RECOGNIZANCE  
☐ UNSECURED BOND

The defendant promises to appear at all scheduled hearings.

The defendant will execute a bond binding him/her to pay Union County the sum of (\$0.00) in the event he/she fails to appear as required.

☐ 10% DEPOSIT

The defendant will execute a bond binding him/her to pay Union County the sum of (\$0.00) and will deposit with the Clerk of Courts the sum of (\$0.00) not being more than 10% of the bond.

☒ CASH APPEARANCE

The defendant will execute a bond in the amount of (\$500.00)

Cash Only (By the deposit of an equal amount of cash.)

☒ Cash/Surety (May secure by the undertaking of sufficient sureties.)

☐ OTHER CONDITIONS

The defendant will comply with each of the following conditions:

<input type="checkbox"/> No contact with alleged victim(s)	<input type="checkbox"/> No like offenses
<input type="checkbox"/> No use of alcohol / illegal drugs	<input type="checkbox"/> Must complete 24/7 program
<input type="checkbox"/> No establishments serving alcohol	<input type="checkbox"/> Obey all laws

☒ COURT DATE

Defendant shall appear in court in Union County, on 8/29/24 9:00 AM, and at such other places and times as this court may order or direct.

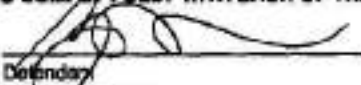
**Charges:**

22-11-4 - Resisting Arrest (M1); 22-11-6 - Obstructing Officer, Jailer, Firefighter (M1); 42-6-45 - DUI-Operation of Boat Under Influence

I have read and understand the methods and conditions of my release which have been checked above and the penalties and forfeitures applicable in the event I violate any condition or fail to appear. I understand that if I violate any condition of my release, a warrant for my arrest will be issued immediately. After arrest, the terms and conditions of any further releases will be redetermined. If I fail to appear before the Court as required an additional charge of failure to appear may be instituted against me.

I AGREE TO COMPLY FULLY WITH EACH OF THE OBLIGATIONS IMPOSED OF MY RELEASE.

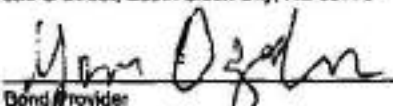
Signed

  
 Defendant  
 Gary Dean Ogden  
 926 G Street, South Sioux City, NE 68776

Date

7-29-24

Signed

  
 Bond Provider  
 Gary Ogden  
 420 E 28th St, South Sioux City, NE 68776

Date

7-29-24

63CR124-000363

## Union County Sheriff's Office

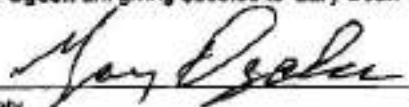
Release Posted Bond - 07/28/24 00:09

Printed on July 28, 2024

I state to the Court that I have posted a bond in the sum of \$500.00 for Gary Dean Ogden (Defendant) named in a Warrant of Arrest. I hereby give authority to the Court to distribute the bond as follows

- ☐ Apply the bond first to the fines and costs due from Gary Dean Ogden (Defendant) in this matter and refund any balance to .
- ☐ After Gary Dean Ogden (Defendant) has duly appeared as provided, the entire bond should be returned to me.
- ☒ I Gary Ogden am giving \$500.00 to Gary Dean Ogden for his or her personal use or bond.

Signed

  
Surety  
Gary Ogden  
420 E 28th St, South Sioux City, NE 68776  
712-259-6218

Date

7-28-24

**FILED**

JUL 29 2024

  
UNION COUNTY CLERK for Court  
FIRST JUDICIAL Circuit Court

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM

63CRI24-000363

UNION COUNTY CLERK OF COURTS  
PO BOX 757  
ELK POINT, SD 57025  
(605)356-2132

**FILED**

JUL 29 2024

*Melissa Jensen*  
UNION COUNTY CLERK OF COURTS  
1ST JUDICIAL CIRCUIT COURT OF SD

DEFENDANT: Garup Ogden

DATE	DESCRIPTION/DOCKET NO.	PYMT. TYPE	AMOUNT
<u>7/29/24</u>	<u>Bond</u>	<u>Cash</u>	<u>\$ 500<sup>00</sup></u>

BALANCE DUE \$ 0

CM BH  
CLERK'S INITIAL

STATE OF SOUTH DAKOTA )	IN CIRCUIT COURT
COUNTY OF UNION )	FIRST JUDICIAL COURT
STATE OF SOUTH DAKOTA, PLAINTIFF,	63CR124-000363
V.	INFORMATION
GARY D. OGDEN, JR., 565 W. 1st Street, South Sioux City, NE 68775, DOB: 04/08/1975, DEFENDANT.	Ct. 1A: Boating Under Influence, SDCL 42-8-45(1) Ct. 1B: Boating Under Influence, SDCL 42-8-45(2) Ct. 2: Boat Lights Required, SDCL 32-3A-1(1) Ct. 3: Obstructing Law Enforcement, SDCL 22-11-6 Ct. 4: Resisting Arrest, SDCL 22-11-4(2)

Kimora R. Cross, as prosecuting attorney, in the name of and by the authority of the State of South Dakota, makes and files this Information and charges:

**Count 1A**

That on or about the 27th day of July, 2024, in the County of Union, State of South Dakota, Gary D. Ogden, Jr., did commit the public offense of Boating Under Influence contrary to SDCL 42-8-45(1) in that he did operate any boat while underway on the public waters of this state while there is 0.08 percent or more by weight of alcohol in his blood as shown by chemical analysis of breath, blood, or other bodily substance, in violation of SDCL 42-8-45(1), a class 1 misdemeanor, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

**OR IN THE ALTERNATIVE**

**Count 1B**

That on or about the 27th day of July, 2024, in the County of Union, State of South Dakota, Gary D. Ogden, Jr., did commit the public offense of Boating Under Influence contrary to SDCL 42-8-45(2) in that he did operate any boat while underway on the public waters of this state while under the influence of an alcoholic beverage, marijuana, or any controlled drug or substance not obtained pursuant to a valid prescription, or any combination of an alcoholic beverage, marijuana, or such controlled drug or substance, in violation of SDCL 42-8-45(2), a class 1 misdemeanor, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

**Count II**

That on or about the 27th day of July, 2024, in the County of Union, State of South Dakota, Gary D. Ogden, Jr., did commit the public offense of Boat Lights Required contrary to SDCL 32-3A-1(1) in that he did occupy or use a boat in a body of water while the boat failed to exhibit the



proper lights as required by South Dakota State Administrative Rule 41:04:05:18, in violation of SDCL 32-3A-1(1), a class 2 misdemeanor, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

**Count III**

That on or about the 27th day of July, 2024, in the County of Union, State of South Dakota, Gary D. Ogden, Jr., did commit the public offense of Obstructing Law Enforcement contrary to SDCL 22-11-6 in that he did by using or threatening to use violence, force, physical interference or obstacle, intentionally obstruct, impair, or hinder the enforcement of the criminal laws or the preservation of the peace by a law enforcement officer or jailer acting under the color of his official authority, (or did intentionally obstruct emergency management personnel acting under the color of authority), to-wit: Gary D. Ogden Jr. did by using or threatening to use violence, force, physical interference or obstacle, intentionally obstruct, impair, or hinder the enforcement of the criminal laws or the preservation of the peace by Officer(s) Josh Vanden Bosch acting under the color of authority, (or did intentionally obstruct emergency management personnel acting under the color of authority), in violation of SDCL 22-11-6, a class 1 misdemeanor, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

**Count IV**

That on or about the 27th day of July, 2024, in the County of Union, State of South Dakota, Gary D. Ogden, Jr., did commit the public offense of Resisting Arrest contrary to SDCL 22-11-4(2) in that he did intentionally prevent or attempt to prevent a law enforcement officer, acting under color of authority, from effecting an arrest of the actor or another, by using any means other than physical force or violence, which creates a substantial risk of causing physical injury to the law enforcement officer or any other person, to-wit: Gary D. Ogden Jr. did intentionally prevent or attempt to prevent Officer(s) Josh Vanden Bosch, acting under color of authority, from effecting his arrest, by using any means other than physical force or violence, which created a substantial risk of causing physical injury to Officer(s) Josh Vanden Bosch, in violation of SDCL 22-11-4(2), a class 1 misdemeanor, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

This Information is based upon the affidavit/report of Game Warden Josh Vanden Bosch, Game, Fish, and Parks.

Witnesses known to the prosecution at the time of the filing of this Information are:

Chemist Cody Geffre - STATE LAB

WCO Taylor Kirchner – Game, Fish, and Parks

Heidi Oligmueller - Witness

Bruce Samuelson - Witness

Nurse Angela Swartos - UCSA

Game Warden Josh Vanden Bosch - GFP

Dated this 23rd day of August, 2024, at Elk Point, South Dakota.

Kimora Cross

KIMORA R. CROSS

Union County Deputy State's Attorney

209 E. Main St. ~ Suite 140

Elk Point, SD 57025

Telephone: (605) 356-2666

Kimora.Cross@UnionCountySD.org

STATE OF SOUTH DAKOTA )

99.

COUNTY OF UNION

Kimora R. Cross, being duly sworn as a prosecuting attorney for the above matter has read the foregoing Information, and the same is true to the prosecuting attorney's own best knowledge, information, and belief.

Kimora Cross

KIMORA R. CROSS

UNION COUNTY DEPUTY STATE'S

ATTORNEY

Subscribed and sworn to before me this 3<sup>rd</sup> day of August, 2024.

ALESHA VOELTZ  
 NOTARY PUBLIC  
 SOUTH DAKOTA  
 (SEAL)

Alesha Voeltz  
Notary Public\*South Dakota  
My Commission Expires: 09/15/2027

STATE OF SOUTH DAKOTA

95

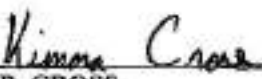
COUNTY OF UNION

## NOTICE OF DEMAND

**FOR ALIBI DEFENSE**

Gary D. Ogden, Jr. ~63CR124-000363  
Information

I, Kimora R. Cross, Deputy State's Attorney in the above matter hereby State that the alleged offense(s) was/were committed on the 27th of July, 2024, in Union County, South Dakota. I hereby request that Defendant and the Defendant's attorney serve upon me a written notice of the Defendant's intention to offer a defense of alibi within ten days as provided in SDCL 23A-9-1. Failure to provide such notice of an alibi defense may result in exclusion of any testimony pertaining to an alibi defense.

  
KIMORA R. CROSS  
UNION COUNTY DEPUTY STATE'S  
ATTORNEY

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF UNION	)	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA	)	63CRI24-363
Plaintiff,	)	
	)	
vs.	)	MOTION TO DISMISS FOR LACK
	)	OF JURISDICTION
GARY DEAN OGDEN,	)	
Defendant.	)	

COMES NOW the Defendant, Gary Dean Ogden, Jr., by and through his attorneys, and pursuant to South Dakota Rule of Criminal Procedure Rule 23A-8-2 hereby moves the Court to dismiss the charges against him due to a lack of jurisdiction based on the following facts and law:

#### STATEMENT OF FACTS

1. On or about July 27, 2024, Defendant was operating a boat on the Missouri River, traveling downstream near the western shoreline.
2. On or about July 27, 2024, South Dakota Wildlife Conservation Officer Josh Vanden Bosch stopped the Defendant's boat for operating the boat after sunset without proper navigation lights, an alleged violation of SDCL § 32-3A-1(1) (requiring the use of navigation lights).
3. Based on Officer Vanden Bosch's observations on Defendant's boat, the Officer placed the Defendant under arrest, placed the Defendant on the Officer's boat, and transported the Defendant to Union County, South Dakota.
4. Defendant was charged by complaint with South Dakota Codified Laws §§ SDCL 42-8-45(1) or (2) (in the alternative); 42-8-45-(2); 22-11-6; 22-11-4(2); and 32-3A-1(1).

#### LEGAL ARGUMENT AND ANALYSIS

5. “[E]ach State is sovereign within its own domain, governing its citizens and providing for their general welfare.” *FERC v. Mississippi*, 102 S.Ct. 2126, 2147, 456 U.S. 742, 777 (U.S.Miss., 1982).

6. Defendants have a right under the Sixth Amendment to the United States Constitution, and under the South Dakota Constitution, to a trial in the state, county and district wherein the crime was alleged to have been committed, U.S. Const. amend. VI; S.D. Const. art. VI, §7.

7. South Dakota does not have jurisdiction in this matter because all of the pertinent events occurred in Nebraska, and South Dakota law is inapplicable.

8. It is self-evident that the laws of one sovereign state do not apply in another. “[S]tate sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted).” *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2578, 567 U.S. 519, 536 (U.S., 2012).

9. Under SDCL § 1-1-1, the jurisdiction of South Dakota extends to all territory “within its established boundaries except as to such places wherein jurisdiction is expressly ceded to the United States by the State Constitution[.]” (emphasis added).

10. The Nebraska-South Dakota Boundary Compact (the “Compact”) is an interstate compact which was enacted by both states and consented to by Congress to establish an identifiable compromise boundary between the states; specifically, between Dakota County, Nebraska and

Union County, South Dakota. Act of March 1, 1905, Chapter 1295, Vol. 33, Part 1, United States Statutes at Large, 820.

11. An interstate compact is “a federal statute enacted by Congress’ that preempts contrary state law.” *Texas v. New Mexico*, 144 U.S. 1756, 1762 (2024). Therefore, the Compact is the governing law if any of Nebraska’s or South Dakota’s state statutes are in conflict.

12. Further, interstate compacts are construed as contracts under the principles of contract law. *Tarrant Regl. Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) (citing *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987)). This means, as with any contract, the best indication as to the intent of the parties can be determined by examining the express terms of the compact. *Tarrant Regl. Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013).

13. The South Dakota Legislature ratified the Compact in the year 1989, and it is codified at SDCL § 1-2-8.

14. The Compact fixes the compromise boundary between Dakota County, Nebraska and Union County, South Dakota at the “centerline of the designed channel of the Missouri River (the westerly channel adjacent to Section 5, Township 29 North, Range 7 East of the 6th P.M. shall be considered the main channel).” SDCL § 1-2-8, Article II(a).

15. The Compact was created, in part, to “avoid multiple exercise of sovereignty and jurisdiction including matters of . . . judicial and police powers and exercise of administrative authority[.]” *Id.* at Article I(b).

16. Because the Compact establishes the boundary between Dakota County, Nebraska and Union County, South Dakota as the centerline of the Missouri River, under the plain language of SDCL § 1-1-1, South Dakota has no jurisdiction west of the compromise boundary.

17. Officer Vanden Bosch's own video of the interaction with the Defendant's boat clearly establishes that the Defendant was traveling downstream, near the western shoreline of the Missouri River – obviously well beyond the centerline of the Missouri River main channel.

18. Officer Vanden Bosch's attempt to enforce South Dakota Codified Law beyond the established boundary of the State is contrary to the express purpose of the Compact to avoid the multiple exercise of sovereignty and jurisdiction of police powers.

19. While South Dakota Codified Law § 42-8-67 (which was adopted in 1981, eight (8) years prior to the Compact being ratified by the South Dakota Legislature) may confer concurrent jurisdiction over boundary waters between Nebraska which are *not* part of the Compact, SDCL § 42-8-67 is preempted as between Dakota County, Nebraska and Union County, South Dakota by Federal law under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl. 2.

20. Thus, Officer Vanden Bosch lacked the authority to stop the Defendant's boat for the alleged violation of SDCL § 32-3A-1(1), as SDCL § 32-3A-1(1) has no application within Nebraska's sovereign borders.

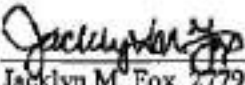
21. Further, even though a Supplemental Report submitted by South Dakota Wildlife Conservation Officer Taylor Kirchner, stated that the Defendant was arrested while the Wildlife Conservation Officers were participating in a joint state watercraft operation, there were no Nebraska officials on the patrol vessel further solidifying the lack of jurisdiction for any of the charges.

22. Therefore, because South Dakota has no jurisdiction outside of its established boundaries, and because the South Dakota Wildlife Conservation officers clearly observed and stopped the Defendant within Nebraska's sovereign boundary, the South Dakota Wildlife

Conservation officers lacked authority for the initial stop, and the South Dakota Courts have no jurisdiction over the Defendant regarding any charges resulting from the stop.

**WHEREFORE**, Defendant moves the Court to dismiss this case for lack of jurisdiction and for such other and further relief as the Court deems just and equitable. The above-titled action falls within the jurisdiction of Nebraska and therefore this South Dakota court does not have jurisdiction to allow this matter to proceed in this forum.

Dated this 23rd day of September, 2024.

CRARY HUFF, P.C.  
BY   
Jacklyn M. Fox, 27792  
329 Pierce Street, Ste. 200  
PO Box 27  
Sioux City, Iowa 51102  
Telephone: (712) 277-4561  
Fax: (712) 277-4605  
[jfox@craryhuff.com](mailto:jfox@craryhuff.com)  
ATTORNEYS FOR DEFENDANT

#### PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served via Odyssey File and Serve upon the following on September 23, 2024:

Kimora Cross  
Deputy State's Attorney  
209 East Main Street, Suite 140  
Elk Point, SD 57025  
[Kimora.Cross@UnionCountySD.org](mailto:Kimora.Cross@UnionCountySD.org)

/s/ Jacklyn M. Fox  
Jacklyn M. Fox



STATE OF SOUTH DAKOTA ) : SS COUNTY OF UNION )	IN CIRCUIT COURT  FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,  <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> GARY DEAN OGDEN,  <div style="text-align: right;">Defendant.             </div>	63CR124-363  <b>BRIEF IN RESPONSE TO DEFENSE'S MOTION TO DISMISS</b>

COMES NOW the State of South Dakota, by and through the undersigned Special Assistant Attorney General, and respectfully submits this brief responding to Defense's Motion to Dismiss for Lack of Jurisdiction. The hearing on this matter is scheduled for October 18<sup>th</sup>, 2024, at 9:00am. The State of South Dakota respectfully requests the Court to deny Defense's motion because a trial court cannot inquire into the legality or sufficiency of the evidence upon which an information is based when considering a dismissal under SDCL § 23A-8-2. Alternatively, both federal law and state law grant South Dakota concurrent jurisdiction over the waters of the Missouri River. Because the legality or sufficiency of the evidence is not relevant to the merits of the motion, the State asserts that a non-evidentiary hearing is appropriate in this matter.

#### LEGAL ARGUMENT

##### I. A TRIAL COURT CANNOT INQUIRE INTO THE LEGALITY OR SUFFICIENCY OF THE EVIDENCE WHEN CONSIDERING DISMISSAL.

The Defense relies upon SDCL § 23A-8-2 in its motion to dismiss. That statute delineates specific, limited instances wherein a court may dismiss an indictment or information. One instance is "[w]hen the grand jury which filed the indictment had no legal authority to inquire into the offense charged because it was not within the jurisdiction of the grand jury or because the court was without jurisdiction of the offense charged." SDCL § 23A-8-2(7). The South Dakota Supreme

Court has consistently held that "the trial court cannot inquire into the legality or sufficiency of the evidence upon which an indictment is based when considering a dismissal under SDCL § 23A-8-2." *State v. Springer-Ertl*, 1997 S.D. 128, ¶ 8, 570 N.W.2d 39, 41; *State v. Dorhout*, 513 N.W.2d 390, 392 (S.D. 1994); *State v. Schlachweiler*, 436 N.W.2d 851, 854 (S.D. 1989); *State v. Hoekstra*, 286 N.W.2d 127, 128 (S.D. 1979); *see also Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956). Rather, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *State v. Cameron*, 1999 S.D. 70, 596 N.W.2d 49, 52. This is particularly true when it comes to establishing venue. "The question of venue is for the trier of fact. The state need only prove venue by a preponderance of the evidence." *State v. Sullivan*, 2002 S.D. 125, ¶ 7, 652 N.W.2d 786, 788;

The Information in the present case charges that the Defendant "on or about the 27<sup>th</sup> day of July, 2024, in the County of Union, State of South Dakota..., did commit the public offense of Boating Under Influence." Because the charges listed in the same Information are brought in Union County, the Information is valid on its face. Consequently, the legality or sufficiency of the evidence concerning jurisdiction cannot be considered at this stage in the proceedings.

II. BOTH FEDERAL AND STATE LAW GRANT SOUTH DAKOTA CONCURRENT JURISDICTION OVER THE WATERS OF THE MISSOURI RIVER.

Alternatively, the law is clear that South Dakota has concurrent jurisdiction over the entirety of the waters of the Missouri River. This is reaffirmed in several different places. SDCL § 41-15-2 states that,

"For the purpose of enforcing any of the laws under this title and the rules promulgated pursuant to this title, the courts of this state, and the conservation officers of this state, have jurisdiction over the entire boundary waters of the state, to the furthestmost shore line. Concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota,

Montana, Wyoming, Iowa, and Nebraska over all boundary waters between such states and this state, and the whole of such boundary waters, is hereby recognized."

Similarly, SDCL § 42-8-67 states that,

"For the purposes of this chapter, the courts and the conservation officers of this state have jurisdiction over the entire boundary waters of this state to the furthestmost shorelines. The concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa and Nebraska over all boundary waters between those states and this state, is hereby recognized."

Additionally, federal law also recognizes concurrent jurisdiction over the boundary waters:

"The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917."

33 U.S.C.A. § 11.

The Defense states that the Nebraska-South Dakota Boundary Compact (Compact), as codified in SDCL § 1-2-8, "fixes the compromise boundary between Dakota County, Nebraska and Union County, South Dakota at the 'centerline of the designed channel of the Missouri River.'" *Motion to Dismiss*, ¶ 14. Moreover, the Defense contends that "an interstate compact is a federal statute enacted by Congress that preempts contrary state law. Therefore, the Compact is the governing law if any of Nebraska's or South Dakota's state statutes are in conflict." *Id.* at ¶ 11.

Consequently, the Defense believes that South Dakota law recognizing jurisdiction over the entire boundary waters of the state is preempted by the Compact. *Id.* at ¶ 19.

The Defense's argument fails for two reasons. Firstly, it fails to take into account the federal law stated above (33 U.S.C.A. § 11) which recognizes concurrent jurisdiction over the boundary waters of the state. Secondly, it hinges on the mistaken belief that the Compact and the laws recognizing jurisdiction over the entire boundary waters of the state are, in fact, contrary to one another. Consequently, it fails to consider the so-called Harmonious Reading Canon. According to that canon of construction,

"When analyzing two statutes touching upon the same subject matter, there is a presumption that the Legislature intended the two to coexist and that it did not intend an absurd or unreasonable result. Even where statutes appear to conflict, it is [the Court's] responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable."

*State v. Betteloun*, 2022 S.D. 14, ¶ 29, 972 N.W.2d 124, 133 (internal citations omitted); *see also Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502, 138 S. Ct. 1612, 1619, 200 L. Ed. 2d 889 (2018). In the present case, the language in the Compact clearly concerns the land beneath the waters of the river and not the waters themselves. In fact, Article III states that,

"On the effective date of this compact, the state of South Dakota hereby relinquishes to the state of Nebraska all sovereignty over lands lying on the Nebraska side of said compromise boundary and the state of Nebraska hereby relinquishes to the state of South Dakota all sovereignty over lands lying on the South Dakota side of the compromise boundary."

SDCL 1-2-8 (emphasis mine). The language here can be read in harmony with the aforementioned statutes concerning the actual boundary waters overlying the land. Consequently, there is no

conflict requiring preemption of the Compact over related statutes governing jurisdiction of the boundary waters.

#### CONCLUSION

Based upon the foregoing law and argument, the State respectfully requests that the court deny Defendant's Motion to Dismiss for Lack of Jurisdiction. The trial court cannot inquire into the legality or sufficiency of the evidence upon which the Information is based when considering a dismissal under SDCL § 23A-8-2. Alternatively, both federal and state law grant South Dakota concurrent jurisdiction over the waters of the Missouri River.

Dated this 10<sup>th</sup> day of October, 2024.

/s/ Nick Michels  
Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks

**PROOF OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon the following individuals on October 10, 2024:

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/s/ Nick Michels  
Nick Michels  
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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF UNION	)	FIRST JUDICIAL CIRCUIT
<hr/>		
STATE OF SOUTH DAKOTA	)	63CRI24-363
Plaintiff,	)	
	)	
vs.	)	REPLY TO STATE'S BRIEF IN
	)	RESPONSE TO DEFENDANT'S
GARY DEAN OGDEN,	)	MOTION TO DISMISS
Defendant.	)	
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COMES NOW the Defendant, Gary Dean Ogden, Jr., by and through his attorneys, and submits this Reply to the State's Brief in Response to Defendant's Motion to Dismiss.

**I. SDCL § 23A-8-3 Allows for Dismissal of this Case**

The State argues that this Court cannot dismiss this case, because it would be required to inquire into the legal sufficiency of the evidence upon which the indictment is based. However, SDCL § 23A-8-3 requires the Defendant to raise defenses and objections prior to trial based on: (1) defects in the institution of the prosecution; (2) defects in the indictment or information; and (3) motions to suppress evidence. Furthermore, jurisdiction may be challenged at any time during the pendency of the proceedings. SDCL § 23A-8-3(3); *State v. Neitge*, 607 N.W.2d 258, 260 (S.D. 2000).

The substance of the Defendant's Motion to Dismiss clearly establishes that the Defendant's argument is both that the officer lacked authority and jurisdiction to stop and arrest the defendant and that the Court lacks jurisdiction over this matter. These matters may be raised at any time, and the fact that the Defendant's motion, titled "Motion to Dismiss for Lack of Jurisdiction" referenced SDCL § 23A-8-2 does not deprive the Court of the ability to dismiss this matter under any applicable rule of law.



**II. The State Misconstrues Federal and State Law Regarding Concurrent Jurisdiction and the effect of the Nebraska-South Dakota Boundary Compact**

The State correctly notes that State and Federal law generally provide that South Dakota and Nebraska have concurrent jurisdiction over the boundary waters from shoreline to shoreline. However, the State cites to but misunderstands 33 U.S.C.A. § 11 in its brief, which states: "The consent of Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, **by such agreement or compact as they may deem desirable or necessary . . . to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any said States upon any of the waters forming the boundary lines between any two or more of said States . . . .**" (emphasis added).

South Dakota and Nebraska have agreed, by virtue of the Nebraska-South Dakota Boundary Compact (the "Compact"), that the boundary between Union County, South Dakota, and Dakota County, Nebraska, is the centerline of the channel of the Missouri River. A harmonious reading of the Compact with the provisions of South Dakota Law providing for concurrent jurisdiction over boundary waters is simple: The Dakota County-Union County border comprises of approximately 13 of the 98 miles of the Missouri River runs between the states of South Dakota and Nebraska. For the 85 miles of the Missouri River that are not covered by the Compact – the two states have concurrent jurisdiction from shoreline to shoreline. But not here.

Furthermore, the State's argument that the Compact concerns only the lands beneath the waters of the Missouri River is absurd and disregards much of the plain language of the Compact: "WHEREAS, it is to the best interest of the states of Nebraska and South Dakota, their

political and governmental subdivisions and their citizens, to determine a new and compromise boundary between said counties of the states, to **avoid litigation and multiple exercises of sovereignty and jurisdiction**, to encourage the optimum beneficial use of the river, its facilities and its waters, and to remove **all causes of controversy between said states with respect to the boundary between said counties of the states**," (SDCL 1-2-8); "The state of Nebraska and the state of South Dakota find that there have been actual and potential **disputes, controversies, criminal proceedings and litigation arising or which may arise out of the location of the boundary line** between Dakota County, Nebraska, and Union County, South Dakota," (SDCL 1-2-8, Article I(a)); "It is the principal purpose of the states in executing this compact to **establish an identifiable compromise boundary between said counties of the states** for the entire distance thereof as of the effective date of this compact without interfering with or otherwise affecting private rights or titles to property, and the states declare that further **compelling purposes of this compact are**: (1) to create a friendly and harmonious interstate relationship; (2) to **avoid multiple exercise of sovereignty and jurisdiction including matters of taxation, judicial and police powers and exercise of administrative authority**; (3) to **encourage settlement and disposition of pending litigation and criminal proceedings and avoid or minimize future disputes and litigations**; (4) to promote economic and political stability; (5) to encourage the optimum mutual beneficial use of the Missouri River, its waters and its facilities; (6) to **establish a forum for settlement of future disputes**; (7) to place the boundary in a new or reestablished location which can be identified or located; and (8) to express the intent and policy of the states that the common boundary between said counties be established within the confines of the Missouri River and both states shall continue to have access to and use of the waters of the river." (SDCL 1-2-8, Article I(b)) (all emphasis added).

This case is the exact scenario the Compact sought to avoid. The Court can, and must, determine whether it has jurisdiction over this matter, and under the plain language of the Compact, the Court lacks jurisdiction if the events giving rise to this case occurred in Nebraska. To the extent that the Court requires evidence to make that determination, the Defendant requests the Court to set an evidentiary hearing for the purpose of determining jurisdiction.

Dated this 1<sup>st</sup> day of November, 2024.

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#### PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served via Odyssey File and Serve upon the following on November 1, 2024:

/s/ Jacklyn M. Fox  
Jacklyn M. Fox

1       STATE OF SOUTH DAKOTA       )       IN CIRCUIT COURT  
2       COUNTY OF UNION       )       FIRST JUDICIAL CIRCUIT  
3       \*\*\*\*\*  
4       STATE OF SOUTH DAKOTA,       )  
5               Plaintiff,       )       63CRI24-363  
6       v.       )       Motion to Dismiss  
7       GARY OGDEN, Jr.,       )       Hearing  
8               Defendant.       )  
9       \*\*\*\*\*  
10               BEFORE THE HONORABLE KASEY SORENSEN,  
11               MAGISTRATE COURT JUDGE,  
12       In Elk Point, South Dakota, November 15, 2024, FTR  
13       \*\*\*\*\*  
14       APPEARANCES:  
15       FOR PLAINTIFF:       Nicholaus Michels  
16               Special Assistant Attorney General  
17               Sioux Falls, SD 57106  
18  
19       FOR DEFENDANT:       Jacklyn Fox  
20               Attorney at Law  
21               Sioux City, IA 51101  
22  
23               John Hines  
24               Attorney at Law  
25               Sioux City, IA 51101

1

1 present any evidence. I am going to  
2 notify the parties at this time I am not  
3 going to issue a ruling today in Court.  
4 I am going to take the matter under  
5 advisement.

6 What is argued in the Defendant's  
7 motion is that the Defendant was arrested  
8 on the Nebraska side of the Missouri  
9 River. Is that correct, Ms. Fox?

10 MS. FOX: Yes.

11 THE COURT: And Mr. Michels, does the the  
12 State agree with that assertion?

13 MR. MICHELS: The State agrees that that  
14 is the defense's argument, Your Honor.  
15 However, we would contend that there is  
16 no Nebraska side of the river.

17 MS. FOX: Your Honor, if we do, for  
18 whatever reason, need to have an  
19 evidentiary hearing on that particular  
20 issue, it appears that the conservation  
21 officer is present in the courtroom, as  
22 well.

23 THE COURT: In order to proceed forward,  
24 I think it's necessary for the Court to  
25 hear evidence or receive evidence by

1 stipulation as to the arrest location.

2 Is there -- Mr. Michels, did you  
3 intend to offer any additional evidence?

4 MR. MICHELS: I didn't, Your Honor. And  
5 the reason is because our primary  
6 argument here is that this motion to  
7 dismiss really can't proceed at this  
8 stage of proceedings. It requires that  
9 the Court look into the inquiring to the  
10 sufficiency of the evidence. Which is  
11 really a question for the trier of fact.  
12 And the statute's that at issue here  
13 preclude that from happening. It's in  
14 the alternative if we are going to  
15 discuss jurisdiction, then certainly I  
16 have an argument prepared for that, but  
17 we primarily rest on the fact that this  
18 is not something that can be contested at  
19 that point in the proceedings.

20 THE COURT: You have any legal authority  
21 that would say that jurisdiction is a  
22 question for the fact finder and not --  
23 or for the jury and not for the Court?

24 MR. MICHELS: I would, Your Honor. I  
25 rest on -- or I rely primarily on the

1 arguments in my brief here. 23A-8-2,  
2 that's the statute that delineates only  
3 specific limited instances where a Court  
4 can dismiss an indictment or an  
5 information as the defense is asking for  
6 here. And it's -- when it comes to  
7 jurisdiction, it's only when the grand  
8 jury, which filed the indictment or, in  
9 this case, an information, has the legal  
10 authority to inquire into the offense  
11 changed when it the now within the  
12 jurisdiction of the grand jury or because  
13 the Court is without jurisdiction.

14 I cite to several case law in my  
15 brief as well, where our Supreme Court  
16 has consistently held that the trial  
17 court cannot inquire into the legality or  
18 sufficiency of the evidence upon which an  
19 indictment is based when it's considering  
20 dismissal. Now, the defense points to  
21 23A-8-3, and uh -- presents argument in  
22 their rebuttal brief stating that  
23 jurisdiction can be challenged any time,  
24 but I fail to see how that contradicts  
25 the statutory authority and the case law



1       that the State cites. Certainly it can  
2       be challenged if on its face the  
3       indictment or the information illustrates  
4       that the Court has no jurisdiction. But,  
5       because in this case, the information on  
6       its face does not demonstrate that the  
7       Court has jurisdiction it requires a --  
8       it requires inquiring into the legality  
9       or sufficiency of the evidence, which,  
10      again, requires that we go trial first.  
11      THE COURT: So then, just following the  
12      State's argument, the State would then  
13      present its case-in-chief, and then, the  
14      Court would consider the jurisdictional  
15      issue at the close of the State's  
16      case-in-chief?  
17      MR. MICHELS: I believe so. Yes, Your  
18      Honor. And then if -- if -- and it's the  
19      standard here is by preponderance of the  
20      evidence and assuming that State made its  
21      case-in-chief, then the Court weighing  
22      that evidence giving the benefit to the  
23      State, it goes to the jury, it goes to  
24      the trier of fact to determine whether  
25      jurisdiction -- if -- if this still

1 falls within the jurisdiction of the  
2 State.

3 THE COURT: So when you say the  
4 preponderance of the evidence standard  
5 applies, you're referring to venue,  
6 correct?

7 MR. MICHELS: I'm referring to --  
8 referring to venue, yes.

9 THE COURT: Which is separate and apart  
10 from jurisdiction, correct?

11 MR. MICHELS: It is my understanding  
12 though, and -- and I'll be honest, I  
13 don't have any case law as that the same  
14 standard applies when we're talking about  
15 jurisdiction as preponderance of the  
16 evidence.

17 THE COURT: Any further argument that you  
18 wish to make, Mr. Michels, at this time?

19 MR. MICHELS: I do argue in the  
20 alternative, Your Honor, that if the  
21 Court does believe that this can be  
22 established prior to trial, that the --  
23 that the State does in fact have  
24 concurrent jurisdiction over the boundary  
25 waters. I, again, stand on arguments in

7

1 Compact, is the mid-line, then if the  
2 initial interaction with Mr. Ogden  
3 occurred on the Nebraska side of that  
4 mid-line, than this Court has no  
5 jurisdiction.  
6 THE COURT: Is the arresting officer in  
7 the courtroom?  
8 MR. MICHELS: He is, Your Honor.  
9 THE COURT: Taking into account the  
10 arguments of both sides, I think it would  
11 prudent to receive evidence at this time.  
12 And then, if it's subsequently irrelevant  
13 by the Court, the Court can disregard,  
14 but since we are all here, I think it's  
15 appropriate to receive that.  
16 Mr. Hines, you may call the  
17 witness.  
18 MR. HINES: I'll turn it back over to Ms.  
19 Fox, Your Honor.  
20 MS. FOX: We would call South Dakota Wild  
21 Life Conservation Officer, Josh  
22 Vandembosch.  
23 THE COURT: {Swears in Witness.}  
24 THE WITNESS: Yes.  
25 THE COURT: Please be seated.

1           You may inquire.

2       MS. FOX: Thank you. Mr. --

3       Mr. Vandembosch, did I pronounce that

4       correctly?

5       THE WITNESS: Yeah.

6       Q. (BY MS. FOX:) Where do you work?

7       A. For the State of South Dakota as a

8       conservation officer.

9       Q. How long have you been doing that?

10      A. Eleven years.

11      Q. And is part of your job duties to

12      patrol the river?

13      A. Yeah --

14      Q. -- that's here in Dakota Count -- Or

15      I'm sorry. Here in Union County?

16      A. Yes, it is.

17      Q. And when you do that, do you

18      normally do that accompanied by a

19      Nebraska Conservation Officer as well?

20      A. At times, but not even close to

21      every time.

22      Q. Okay. When you say not close to

23      every time, how many times would you say

24      that you have a Nebraska Conservation

25      Officer on your boat?

18

1       A.   Uh -- totality in our district, I  
2       would say maybe 20 percent of the time we  
3       are accompanied with Nebraska. The rest  
4       is with another South Dakota warden.  
5       Q.   And why do you include a Nebraska  
6       Conservation Officer on the boat?  
7       A.   We just work together as a team. So  
8       we do details where a Nebraska and South  
9       Dakota officer are in the boat, but  
10      there's no specific reason we just work  
11      hand-in-hand with that state.  
12      Q.   So would you agree there are times  
13      where Nebraska takes the lead on certain  
14      stops --  
15      A.   No --  
16      Q.   -- in the river?  
17      A.   -- There's no -- There's no set  
18      ordinance on who takes what stop. It's  
19      just a team effort.  
20      Q.   Okay. But does the Nebraska  
21      Conservation Officer at any time conduct  
22      a stop in the river with you on board?  
23      A.   I guess -- what do you mean by  
24      conduct the stop -- or lead the stop or  
25      write the ticket or what are you

1       referencing?

2       Q.   Well, you're not always the one who  
3       does the investigation, per se; is that  
4       correct?

5       A.   Sure.

6       Q.   Okay. Uh -- you allow the Nebraska  
7       Conservation Officer to head that up at  
8       times?

9       A.   Yeah. Sometimes it's every other,  
10      sometimes it's just there is no -- there  
11      is no set rule that we have between each  
12      other on who takes charge over the stop.

13      Q.   On July 27th, 2024, did you have a  
14      Nebraska Conservation Officer on the  
15      boat at that time?

16      A.   No. I did not.

17      Q.   And do you recall making a safety  
18      check of my client, Gary Ogden?

19      A.   Uh -- we stopped him for no  
20      navigation lights, yes.

21      Q.   Okay. And where exactly was the  
22      boat located when you stopped my client?

23      A.   I was on the Missouri River.

24      Q.   Where exactly on the Missouri River?

25      A.   Are you saying like latitude or

1 longitude at all or what are you  
2 referencing?

3 Q. Well, can you give us a description  
4 in which you were located at that time?

5 A. We were in between -- if I remember  
6 correctly, we were near Miners Bend,  
7 which would be just upstream from Miners  
8 Bend, which is a bend or an old natural  
9 bay of the the Missouri River on the  
10 South Dakota side.

11 Q. So it's your testimony here today  
12 that you were on the South Dakota side  
13 of the river?

14 MR. MICHELS: Objection. That question  
15 calls for a legal conclusion.

16 THE COURT: Sustained.

17 MS. FOX: Your Honor, may I approach the  
18 witness?

19 THE COURT: Yes, and you have continuing  
20 permission as well.

21 (SIDEBAR CONVERSATION.)

22 THE COURT: Will be marked as Defendant's  
23 Exhibit A.

24 Q. (BY MS. FOX:) Okay. I'm showing you  
25 what's been premarked as Exhibit A. Do



1       you recognize that?

2       A.    I do, yes.

3       Q.    Okay.  What is that?

4       A.    Uh --  this would be just a probe to  
5       put it plainly.  The general area of our  
6       typical patrol area what we call the  
7       lower Missouri stretch.  Um, this would  
8       be Dakota Dunes out of Sioux City down  
9       here, and I believe I see Miners Bend  
10      right here on the South Dakota side.

11      Q.    Okay.  And that would be located in  
12      Union County, South Dakota?

13      A.    The Miners Bend ?

14      Q.    Correct.

15      A.    Yes.

16      Q.    And is that a fair and accurate  
17      representation of the area on the river?

18      A.    Of the -- of this specific area?  
19      Yes.

20      Q.    And in this specific area, you claim  
21      to have stopped my client; is that  
22      right?

23      A.    It was in this -- in this map area,  
24      yes.

25      Q.    Okay.  Um --

1       A.    -- Or close to it would be -- it was  
2       getting very close to the upper end of  
3       that.  But yes, I believe it was in this  
4       photo.

5       Q.    Okay.  But you would agree that it  
6       exceeded Union County (INAUDIBLE); is  
7       that right?

8       THE COURT:  Restate your question.  I'm  
9       not sure I heard it correctly.

10      MS. FOX:  Would you agree that the stop  
11      that you made of my client did go up into  
12      the Dixon County part of the river?  It  
13      maintained in the Union County-Dakota  
14      County area?

15      MR. MICHELS:  Objection, Your Honor.  
16      Again calls for a legal conclusion.

17      THE COURT:  Overruled.  You may answer.

18      THE WITNESS:  You're going to correct me  
19      if I'm wrong, is Dixon west of -- For a  
20      Nebraska map, what is directly south of  
21      Union County?

22      THE COURT:  Well, she can't answer the  
23      question.  So you just have to answer to  
24      the best of your ability, and if you  
25      don't know, then that's the answer.

1 THE WITNESS: If we are saying it's  
2 between the county that's directly south  
3 of Union County, yes. It never went to  
4 the county of that county. I don't know  
5 my Nebraska counties like I should, I  
6 guess. I wasn't prepared for that.

7 Q. (BY MS. FOX:) So based on this map,  
8 Exhibit A, are you able to identify  
9 where you stopped Gary Ogden's boat?

10 A. I would say it would be somewhere  
11 within a mile upstream of Miners Bend  
12 because I remember during the actual  
13 resistance and all that we were floating  
14 past Miners Bend. So we were just  
15 upstream of Miners Bend at the time of  
16 the stop.

17 Q. Okay. So when you made the stop,  
18 would you agree that you were going  
19 downstream?

20 A. The boat was operating --

21 Q. Okay. You were -- sorry --

22 A. -- And in a -- in a downstream  
23 fashion when we conducted the stop, yes.

24 Q. Okay. And you would -- would you  
25 agree that the downstream fashion would

1 be on the Nebraska?

2 A. You can --

3 Q. -- of the river?

4 A. -- You can go downstream at any  
5 point from shoreline to shoreline.

6 Q. Okay. Can you identify uh -- which  
7 side of the river is South Dakota and  
8 which side is Nebraska verses, lower  
9 verses upper, on this map?

10 MR. MICHELS: Objection --

11 MS. FOX: So the lower side --

12 MR. MICHELS: -- calls for a legal  
13 conclusion.

14 MS. FOX: -- of the river would be South  
15 Dakota or Nebraska?

16 MR. MICHELS: Objection. Calls for a  
17 legal conclusion.

18 THE COURT: Sustained. You'll have to  
19 rephrase your question.

20 MS. FOX: Sure.

21 On this map, what is on the south  
22 side of the river? What's that thing?

23 THE WITNESS: Well, it would depend if  
24 you're talking right here or right here,  
25 because it goes east and west here, and

1       here, it goes south and north. So I  
2       guess it would depend which part you're  
3       talking.  
4       MS. FOX: Okay. Let me -- are you able  
5       to mark on the map where exactly you --  
6       THE CLERK: -- I couldn't pick that up.  
7       You're not close enough to a mic.  
8       Q. (BY MS. FOX:) Are you able to mark  
9       on the map where exactly the boat was  
10      located?  
11      A. Exactly? I don't have an exact  
12      location. I have a rough estimate  
13      location, but I do not have a latitudinal  
14      and longitudinal exact location of the  
15      boat.  
16      Q. Okay. Can I --  
17      A. -- would you like a rough estimate?  
18      Q. I would, yes.  
19      A. Okay. I would say the rough  
20      estimate would be somewhere in this  
21      general area.  
22      Q. And why do you believe that?  
23      A. That's just, again, when the  
24      resistance and the use of force occurred  
25      with Mr. Ogden. I remember saying in the

1 video that we are floating past Miners  
2 Bend. So, based on my training and  
3 experience how long it takes to float, I  
4 would put it within a mile upstream of  
5 Miners Bend.

6 Q. Okay. Based on your recollection --  
7 Have you had a chance to review your  
8 video?

9 A. I have.

10 Q. Okay. Based on your recollection  
11 and what's seen in the video, is it true  
12 that you um -- told Mr. Ogden to bring  
13 the boat more towards the middle of the  
14 river?

15 A. To bring him away from the rocks,  
16 yes.

17 Q. Okay. So your testimony here  
18 today is that he was close to some  
19 rocks; is that right?

20 A. He was in the -- on the -- I mean,  
21 yeah, he was near rocks, but again that  
22 is very common for us. If we are even  
23 too close to rocks at all, we ask them to  
24 go more towards or away from the rocks so  
25 that way we are not bumping over the

1 rocks when we are doing the check.

2 Q. Okay. And where were those rocks  
3 located? Were they on the South Dakota  
4 side or the Nebraska side?

5 MR. MICHELS: Again, objection. Calls  
6 for legal conclusion.

7 THE COURT: Sustained.

8 MS. FOX: Would those rocks have touched  
9 the Nebraska land border?

10 THE WITNESS: The rocks in question  
11 would be the Nebraska border, yes.

12 MS. FOX: Your Honor, may I take a brief  
13 moment to look at additional  
14 paragraphs --

15 THE COURT: -- yes.

16 MS. FOX: -- to determine further  
17 questioning?

18 During the initial stop of my  
19 client, how close was his boat to the --  
20 those rocks that we previous discussed?

21 THE WITNESS: Again, I don't have an  
22 exact, but rewatching my body cam, I  
23 would put it at 50 yards. Thirty to  
24 fifty yards, I think is what I initially  
25 said. Again, I don't have an exact,



1       exact location. We were in the actual --  
2       yeah, thirty to fifty yards.

3       Q. (BY MS. FOX:) Officer, you said that  
4       you reviewed your video in this case;  
5       is that correct?

6       A. I have.

7       Q. Okay. And is that a fair and  
8       accurate representation of exactly what  
9       occurred between you and my client, Gary  
10      Ogden?

11      A. Yeah. I mean, it shows everything.  
12      I mean, there might be some wind that cut  
13      out noise, but yes it shows everything  
14      that was from the best of the cameras  
15      ability, yes.

16      Q. Okay. So based on your review of  
17      that video, would you agree that that  
18      video showed  
19      Mr. Ogden's boat was pretty close to  
20      those rocks?

21      A. It would show it where the boat was  
22      at the time. So I guess it would you up  
23      for depiction on if it was too close or  
24      where it was.

25      MS. FOX: Your Honor, we would like to

1 enter evidence um -- this officer's body  
2 cam video. We don't have it here today.  
3 So is it possible that we could provide a  
4 copy to the Court um -- after this  
5 hearing?

6 THE COURT: Mr. Michels?

7 MR. MICHELS: I would like to review the  
8 copy that they submit first, but  
9 otherwise I would -- I would just stand  
10 up my objection, again, that this is not  
11 appropriate at this point of proceedings,  
12 but understanding the Court does want an  
13 evidentiary hearing. That being the  
14 case, I wouldn't object.

15 THE COURT: All right. Then the body cam  
16 video exhibit will be marked as  
17 Defendant's Exhibit B.

18 Ms. Fox, you're directed to -- I  
19 don't know -- is it in digital format  
20 that you can share that with Mr. Michels  
21 or are you going to mail it to Pierre and  
22 he'll mail it back?

23 MS. FOX: No, Your Honor. We have a  
24 system where we can put it up in the  
25 Cloud. Otherwise, I'm sure, since it's

1 the State's evidence -- it's the State's  
2 own evidence, they would be able to  
3 procure a copy from the Union County  
4 State's Attorney as well.

5 MR. MICHELS: Correct. It -- it's not  
6 that the State has -- does not have the  
7 body cam video. The State just wants to  
8 make sure that the video that is being  
9 submitted is in fact the body cam video  
10 is the same evidence that we have.

11 THE COURT: All right. So how are you we  
12 going to make sure that happens, is my  
13 question?

14 MR. MICHELS: If she uploads it to the  
15 Cloud, and I have a chance to review it,  
16 then maybe I can reserve my objection, if  
17 I even have one, to that point. I assume  
18 it is the same video, but in the event  
19 it's not, I'd like to be able to make  
20 that objection at a later time.

21 THE COURT: Okay. And so then, your only  
22 objection would be if it's not a true and  
23 accurate copy of the officer's body cam  
24 video?

25 MR. MICHELS: Correct, Your Honor.

1 THE COURT: And then, also your standing  
2 objection to the Court considering this  
3 at all based upon your argument?

4 MR. MICHELS: That's correct. Yes, Your  
5 Honor.

6 THE COURT: All right. Then the Court  
7 will conditionally receive Defendant's  
8 Exhibit B. And I will just ask the  
9 parties to e-mail me once the exchange  
10 has occurred on the Cloud, Mr. Michels  
11 has a chance to look at that and state  
12 your final objection, and then, I will  
13 file that e-mail as part of the record.

14 You may continue, Ms. Fox.

15 MS. FOX: I have no further questions.

16 THE COURT: Mr. Michels.

17 MR. MICHELS: Thank you, Your Honor.

18 Officer, can you remind me, I  
19 don't recall if you answered this  
20 question, how long you've been a  
21 conservation officer.

22 THE WITNESS: I was a conservation  
23 officer for 11 years, and I just took the  
24 promotion to Conservation Officer  
25 Supervisor very recently. So it's a

1       tally of 11 years.

2       Q. (BY MR. MICHELS:) And in your time  
3       as an officer, how long have you worked  
4       here in Union County?

5       A. I was stationed in Lincoln County,  
6       which is part of the south district, in  
7       April of 2017. So I guess the summers of  
8       '17 through this past '24.

9       Q. So about seven years; is that  
10      accurate?

11     A. Correct.

12     Q. And in that time, how long have you  
13     patrolled the Missouri River?

14     A. Too many to count on the Missouri  
15     River, especially this lower stretch of  
16     the Missouri River.

17     Q. Apart of the number instances,  
18     during the seven years, were you  
19     patrolling the River over the course of  
20     all seven years at different  
21     (INAUDIBLE)?

22     A. Yes. Multiple times, every summer.

23     Q. Okay. And you -- can you give us an  
24     estimate of how often you're patrolling  
25     the river?

1       A.    I would say at least two to three  
2       times a week during the summer months.  
3       And that would be from mid-May to  
4       mid-September.

5       Q.    Can you give us an estimate on an  
6       average patrol how often you initiated  
7       stops on the river?

8       A.    How many times I contact a boat, is  
9       that what you're asking?

10      Q.    Yes.

11      A.    Oh.  That would depend on --  
12      sometimes the first boat results in an  
13      arrest and we are out of the river.  
14      Sometimes it's up to 20 boats per patrol.  
15      So it kind of greatly depends on the  
16      busyness of the river and the time of day  
17      it is.  So on average, I would say we are  
18      making 10 to 15 boat contacts per patrol  
19      on the river.

20      Q.    And you stated in your testimony  
21      prior that you have regular contact with  
22      Nebraska officers.  Not necessarily on  
23      every patrol, but certainly throughout  
24      your course of your -- throughout the  
25      course of your career?

1 A. Correct.

2 Q. Have those officers every challenged  
3 your jurisdiction on the river?

4 A. No.

5 Q. Have you ever been contacted by any  
6 Nebraska lawyers challenging your  
7 jurisdiction?

8 MS. FOX: Objection. Relevance.

9 THE COURT: Overruled. You may answer.

10 THE WITNESS: No.

11 MR. MICHELS: Thank you. I have nothing  
12 further.

13 THE COURT: Officer Vandembosch, to your  
14 knowledge, the entire boundary between  
15 South Dakota and Nebraska, with regard to  
16 Union County and the county directly  
17 south of Union County, is the entirety of  
18 that water, is it the Missouri River or  
19 is there any land boundary?

20 If you know.

21 THE WITNESS: The only thing I would  
22 question would be the islands within the  
23 Missouri River. Sometimes those islands  
24 deeded to Nebraska and sometimes deeded  
25 private, South Dakota or Nebraska,



1 sometimes they are public, but there is  
2 no land within the Missouri River itself.  
3 We just go off the South Dakota  
4 shoreline, and the Nebraska shoreline,  
5 and that would be the entirety of the  
6 Missouri River. There are some islands  
7 within that entirety of the Missouri  
8 River. I don't know if that's what  
9 you're -- that's what you were  
10 referencing or not, Your Honor.

11 THE COURT: So I think you answered my  
12 questioned. It was just whether the  
13 Missouri River followings Union County in  
14 its entirety.

15 THE WITNESS: Yeah. Based on geography,  
16 the entire south side of Union County is  
17 Missouri river.

18 THE COURT: Did that generate any  
19 questions, Ms. Fox?

20 MS. FOX: Officer, can you just describe  
21 the area um -- around where the -- where  
22 you initially encountered Mr. Ogden? So  
23 were there -- were there tons of trees,  
24 there were clearly rocks, those types of  
25 things present?

1 THE WITNESS: I mean, besides the water  
2 itself, there was the rocks what we call  
3 Riprap. Um -- and then, other than that,  
4 that this section of the river where we  
5 are talking, the actual flowing channel  
6 of water is very narrow. There's other  
7 parts of the river where it's shallow and  
8 unnavigable. At some times of the year  
9 with shallow and sandbars, the actual  
10 flowing water of Missouri River is a  
11 very narrow stretch.

12 And when I say channel, I don't  
13 mean water to water. I mean underneath  
14 water, where it gets deeper, is what we  
15 call the channel. That's where you have  
16 to run the boat. Other than that, there  
17 was no -- there was no trees or exposed  
18 sand or anything in the stop area to the  
19 best of my recollection.

20 Q. (BY MS. FOX:) But up against the  
21 land was a forested area?

22 A. If I remember correctly, no. It was  
23 not forested. I mean there was -- are  
24 you saying directly against the water or  
25 beyond?

1 Q. I'm saying where the water met the  
2 land closest to where my client was  
3 located.

4 A. Uh -- I believe a rocky area with  
5 some -- some trees and grass. I'd have  
6 to rewatch the body cam to see exactly  
7 what it was. But that entire stretch  
8 most of it is either rocky shoreline or  
9 timber shoreline or residential area.  
10 It's -- it's -- that's the entirety of  
11 that whole stretch so.

12 Q. Okay. So that would be on your  
13 video if there was a forested area  
14 surround -- like toward -- on the  
15 shoreline where -- around where Mr.  
16 Ogden's boat was stopped?

17 A. Sure. The video, it's dark. It was  
18 after dark when the stop conducted so it  
19 would -- it might be difficult to see,  
20 but.

21 Q. So is it your testimony here today  
22 that it was completely dark so you're  
23 completely unable to see?

24 A. I wouldn't say it's completely dark.  
25 It was after the sunset hours when

1 navigation lights were required, so it's  
2 going to be right at that dusk timeframe,  
3 I guess. It's not completely dark. By  
4 the end of the stop, yes.

5 MS. FOX: I have nothing further. Thank  
6 you.

7 THE WITNESS: Thank you.

8 THE COURT: Mr. Michels?

9 MR. MICHELS: Nothing further,  
10 Your Honor.

11 THE COURT: All right, sir. Thank you.  
12 You may step down.

13 THE WITNESS: Okay.

14 THE COURT: Ms. Fox, do you have any  
15 additional evidence you wish to offer in  
16 support of your motion?

17 MS. FOX: Um -- No, Your Honor. And just  
18 to confirm, I did not enter into evidence  
19 Exhibit A. I only entered Exhibit B,  
20 which is the video.

21 THE COURT: And that was intentional?

22 MS. FOX: Yes.

23 THE COURT: Anything further from the  
24 defense with regard to the motion?

25 MS. FOX: Nothing further, other than we



Circuit Administrator  
Kim Allison  
Chief Court Services Officer  
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Ryan Modder  
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# First Judicial Circuit Court

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*Melissa Sorenson*  
UNION COUNTY CLERK OF COURTS  
FIRST JUDICIAL CIRCUIT COURT OF S.D.

December 6, 2024

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RE: State v. Gary Ogden, Jr. 63CRI24-363

Dear Counsel,

A hearing was held on November 15, 2024, on Defendant's Motion to Dismiss For Lack of Jurisdiction. The Court received the testimony of Officer Josh Vandembosch and Defendant's Exhibit B.

The Defendant's motion asserts the Court does not have subject matter jurisdiction to hear this case because the events leading up to, and including the arrest, occurred in Nebraska. Defendant's Motion to Dismiss, Paragraph 7. The State argues the motion cannot be granted because it does not meet the statutory bases for dismissal in SDCL 23A-8-2 and asserts that the Court may not inquire into the sufficiency of the evidence. The State further argues South Dakota has concurrent jurisdiction over the entirety of the Missouri River.

The Court will address the following issues: first, whether the Court may hear a motion to dismiss prior to the State's case-in-chief at trial and resolve factual disputes limited to the motion, and if so, whether the Court has subject matter jurisdiction in this case.

"To properly hear a case, a circuit court must have personal jurisdiction over the defendant appearing before them and subject matter jurisdiction over the charges filed by the State." *State v. Pentecost*, 2016 S.D. 84, ¶12, 887 N.W.2d 877, 881. "Jurisdictional issues can be raised at any

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time and determination of jurisdiction is appropriate." *State v. Medicine Eagle*, 2013 S.D. 60, ¶38, 835 N.W.2d 886, 900 (quoting *State v. Anders*, 2009 S.D. 15, ¶5, 763 N.W.2d 547, 549-50). "Further, subject-matter jurisdiction cannot be acquired by agreement, consent, waiver, or estoppel." *Id.* (internal citations omitted).

"Subject matter jurisdiction is a court's competence to hear and determine cases of the general class to which proceedings in question belong and the power to deal with the general subject involved in the action. *Pentecost* at ¶13 (quoting *March v. Thursby*, 2011 S.D. 73, ¶15, 806 N.W.2d 239, 243)(internal quotations omitted). South Dakota has broadly defined "jurisdiction" and it includes the "legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to the particular matter, ... the power to inquire into the facts and apply the law, and ... the right to adjudicate concerning the subject-matter in the given case." *Medicine Eagle*, ¶40, 900 (internal citation and quotations omitted).

"Motions to dismiss for lack of subject matter jurisdiction fall into one of two categories: (1) facial attacks on allegations of subject matter jurisdiction within the complaint; or (2) disputes regarding the facts upon which subject matter jurisdiction rests." *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶11, 931 N.W.2d 707, 710-11 (internal citations and quotations omitted). "Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide." *Id.* "To resolve the question, the court may hold hearings, consider live testimony, or review affidavits and documents." *Id.* at ¶12. "[Courts] are empowered to hear only those cases constitutionally and statutorily authorized." *Id.* at ¶13. The Defendant's motion attacks the facts on which jurisdiction rests: the location of the arrest, so it is a factual attack.

"Judicial economy demands that the issue be decided at the outset rather than deferring it until trial..." *Osborn v. United States*, 917 F.2d 724, 729 (8th Cir. 1990). "If the defendant thinks the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue." *Id.* at 730. The defendant may submit affidavits or other documents and the court can hold a hearing. *Id.* "As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, any rational mode of inquiry will do." *Id.* (internal quotations omitted). The court must then conclusively determine the jurisdictional issue unless the jurisdictional issue is so tied to the merits that a full trial is necessary to determine the jurisdiction issue. *Id.* The plaintiff must prove jurisdiction exists. *Id.*

Based on the foregoing authority, it is clear the Court should consider the motion to dismiss for lack of jurisdiction prior to trial and may appropriately consider evidence received at the hearing and resolve factual questions related to the jurisdictional challenge. The Court will next address whether it has jurisdiction in this case.

Based on the evidence received at the hearing, the Court finds that Officer Josh Vandebosch has been employed as a wildlife conservation officer for 11 years and is now a supervising officer. Officer Vandebosch patrols the Union County area of the Missouri River from the South Dakota shoreline to the Nebraska shoreline between two to three times per week with 10-15 boat contacts each patrol from mid-May to mid-September.

Officer Vandebosch was employed in that capacity on July 27, 2024, when he initiated a stop of the Defendant's boat on the Missouri River. Officer Vandebosch observed the Defendant driving his boat near the rocks, or shoreline, of Nebraska and according to Officer Vandebosch, the stop occurred within 30-50 yards of the rocks/shoreline. Officer Vandebosch's initial observations of the Defendant and the initial encounter were captured by a body camera and received as Defendant's Exhibit B. Exhibit B corroborates Officer Vandebosch's testimony but establishes that the stop and driving occurred much closer to the Nebraska shoreline than 30 to 50 yards. The Court finds the Defendant operated his boat and was stopped near the Nebraska shoreline.



Article I § 2 of the South Dakota Constitution defines the boundaries of the State. SDCL § 1-1-1 provides that South Dakota has jurisdiction within the established boundaries of South Dakota. Congress has the power to admit new states and establish state boundaries. U.S. Const., Art. IV, § 3; *Texas v. Louisiana*, 410 U.S. 702, 707, 93 S.Ct. 1215, 1218, 35 L.Ed.2d 646 (1973). States may enter into their own border agreements with the consent of Congress. U.S. Const., Art. I, § 10, Cl.3; see also *New Jersey v. New York*, 523 U.S. 767, 811, 118 S.Ct. 1726, 1750, 140 L.Ed.2d 993 (1998); *Commonwealth of Virginia v. State of Tennessee*, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893); *State of Florida v. State of Georgia*, 58 U.S. 478, 15 L.Ed. 181 (1854). “While contractual in nature, an interstate compact is not just a contract but also a federal statute enacted by Congress that preempts contrary state law.” *Texas v. New Mexico*, 602 U.S. 943, 949-50, 144 S.Ct. 1756, 1762, 219 L.Ed. 539 (2024)(internal citations and quotations omitted). “Once Congress gives its stamp of approval, an interstate compact becomes the law of the land, much like any other federal statute.” *Id.*

Indeed, congressional consent “transforms an interstate compact within [the Compact] Clause into a law of the United States,” *Cuyler v. Adams*, 449 U.S. 433, 438, 101 S.Ct. 703, 706, 66 L.Ed.2d 641 (1981); accord, *Texas v. New Mexico*, 462 U.S. 554, 564, 103 S.Ct. 2558, 2565, 77 L.Ed.2d 1 (1983). Just as if a court were addressing a federal statute, then, the “first and last order of business” of a court addressing an approved interstate compact “is interpreting the compact.” *Id.*, at 567-568, 103 S.Ct., at 2566-2567. “[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms,” *Id.*, at 564, 103 S.Ct., at 2565, no matter what the equities of the circumstances might otherwise invite. See *Arizona v. California*, 373 U.S. 546, 565-566, 83 S.Ct. 1468, 1480-1481, 10 L.Ed.2d 542 (1963)(“[C]ourts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress”); *Washington v. Oregon*, 211 U.S. 127, 135, 29 S.Ct. 47, 49, 53 L.Ed. 118 (1908) (noting that Congress had established the boundary between Washington and Oregon in the middle of the north channel, and that “[t]he courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel,” even though changes in the waterway over the course of time seemed to indicate the equity of altering the boundary line); cf. *New Jersey v. Delaware*, 291 U.S. 361, 385, 54 S.Ct. 407, 415-416, 78 L.Ed. 847 (1934); *Maryland v. West Virginia*, 217 U.S., at 46, 30 S.Ct., at 279-280.

*New Jersey v. New York*, 523 U.S. 767, 811, 118 S.Ct. 1726, 1750, 140 L.Ed.2d 993 (1998).

South Dakota and Nebraska entered into a boundary compact (“Compact”) and it was approved by Congress on November 28, 1989. 101 P.L. 183; 103 Stat. 1328. The Compact is also codified at SDCL § 1-2-8. The Compact provides that “the permanent compromise boundary line between said counties of the states shall be fixed at the centerline of the designed channel of the Missouri River (the westerly channel adjacent to Section 5, Township 29 North, Range 7 East of the 6th P.M. shall be considered the main channel).” SDCL § 1-2-8 (Article II(a)).

The State argues South Dakota has jurisdiction over the entire Missouri River based on 33 U.S.C.A. § 11 and SDCL §§ 41-15-2, 42-8-67. 33 U.S.C.A. § 11 provides:

The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters



forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917.

This law does not create a compact between South Dakota and Nebraska. Rather, it grants consent by Congress for two or more states to enter into a compact to establish concurrent jurisdiction. There is no evidence showing that South Dakota and Nebraska entered into a compact for concurrent jurisdiction over the Missouri River. Further, although SDCL §§ 41-15-2 and 42-8-67 show a willingness by the South Dakota Legislature to enter into such compact with our surrounding states, there appears to be no reciprocal Nebraska legislation evincing an intent to form a compact. One party alone cannot form a contract. Interestingly, and by way of comparison, 33 U.S.C.A. § 11 does create a compact between South Dakota and Minnesota.

Further, although SDCL §§ 41-15-2 and 42-8-67 provide for concurrent jurisdiction, they are preempted by the Compact, since it is federal law. *See Texas, supra*, 602 U.S. 943. Since the South Dakota statutes are preempted by federal law, the Court will not utilize the canons of statutory construction. Moreover, the identified purposes of the Compact include:

"(2) to avoid multiple exercise of sovereignty and jurisdiction including matters of taxation, judicial and police powers and exercise of administrative authority; (3) to encourage settlement and disposition of pending litigation and criminal proceedings and avoid or minimize future disputes and litigations; and ... that the common boundary between said counties be established within the confines of the Missouri River and both states shall continue to have access to and use of the waters of the river."

SDCL § 1-2-8 (Article I(b)) (emphasis added).

The State further argued that South Dakota has jurisdiction over the entirety of the Missouri River based on *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935) and *Commonwealth of Massachusetts v. State of New York*, 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838 (1926). These cases both recognize that,

[T]he dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership.

*Oregon* at 14; *Massachusetts* at 88. The issue presented in both cases was whether the title to the soil underneath the waters was transferred to the state when it was admitted to the Union and this question turned on whether the waters were navigable or non-navigable. These cases and their analysis are irrelevant to these proceedings because the question before the Court does not depend on whether title passed from the federal government to South Dakota when it was admitted to the Union. As previously stated, South Dakota and Nebraska agreed that the state boundary is "the centerline of the designed channel of the Missouri River." SDCL § 1-2-8 (Article II(a)).

The Court recognizes that law enforcement may well have difficulty in enforcing regulations on the Missouri River based on the comprise boundary. However equitable it may seem, the Court does not have the authority to extend the boundary further than what both states have agreed upon. *See New Jersey, supra*, 523 U.S. at 811. Congress has granted approval for the states to enter in compacts to address jurisdictional issues with river boundaries. 33 U.S.C.A. § 11. However, this must be accomplished by the legislative and executive branches of our government.

The Defendant put forth evidence establishing that the arrest and observation of boating occurred very close to the Nebraska shore. The Court conclusively finds that this necessarily occurred to the south of the centerline of the designed channel of the Missouri River. The State did not submit any evidence establishing that the relevant events occurred to the north of the centerline of the designed channel of the Missouri River. The Court further notes the State has the burden to establish jurisdiction. *See Osborn*, 917 F.2d at 730. Since the events occurred inside the border of Nebraska, that establishes that Union County, South Dakota does not have subject matter jurisdiction in this case. "When the court discovered it lacked subject matter jurisdiction, it correctly concluded that it must end its inquiry and dismiss the case based on the motion to dismiss made pursuant to SDCL § 15-6-12(b)(1)." *Alone* at ¶ 20. Based on the foregoing analysis the Defendant's Motion to Dismiss is granted. The Defendant is directed to submit written findings of fact and conclusions of law in accordance with this ruling within 10 business days and also submit an Order Dismissing the Information. This memorandum opinion shall be incorporated into the findings of fact and conclusions of law.

Sincerely,

A handwritten signature in black ink, appearing to be 'KS' or similar, written in a cursive style.

Judge Sorensen



4. The State objects to proposed Finding #4. The Finding is irrelevant for the determination as to whether the Information should be dismissed pursuant to 23A-8-2.
5. The State objects to proposed Finding #5. The Finding is irrelevant for the determination as to whether the Information should be dismissed pursuant to 23A-8-2. Moreover, there is no evidence to support where the actual stop took place.
6. The State objects to proposed Finding #6. The Finding is irrelevant for the determination as to whether the Information should be dismissed pursuant to 23A-8-2. Moreover, there is no evidence to support where the actual stop took place.
7. The State objects to proposed Finding #7. The Finding is irrelevant for the determination as to whether the Information should be dismissed pursuant to 23A-8-2. Moreover, there is no evidence to support where the actual stop took place, and there does not exist a South Dakota side of the channel of the Missouri River.
8. The State objects to proposed Finding #8. The Finding is irrelevant for the determination as to whether the Information should be dismissed pursuant to 23A-8-2. Moreover, there is no evidence to support where the actual stop took place, and there does not exist a Nebraska side of the channel of the Missouri River.

#### CONCLUSIONS OF LAW

1. The State objects to proposed Conclusion #1. The State objects to the Court's *Memorandum Opinion*.
2. No objection.
3. The State objects to proposed Conclusion #3. "Whether a court has subject matter jurisdiction is determined by the indictment." *State v. Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d 105, 107 (S.D. 2016). "Jurisdiction over the subject-matter of the offense

charged depends upon the allegations of said indictment or affidavit and information and not upon the actual facts." *Id.* (citing *State v. Osborn*, 155 Ind. 385, 58 N.E. 491, 493 (1900)). An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. *State v. Cameron*, 1999 S.D. 70, 596 N.W.2d 49, 52. Whether the charges actually occurred where the indictment or affidavit and information alleges that they occurred is a factual assertion for a jury to determine. *State v. Sanders* at ¶ 6, 108. The Information in the present case charges that the Defendant "on or about the 27<sup>th</sup> day of July, 2024, in the County of Union, State of South Dakota ..., did commit the public offense of Boating Under Influence." Because the charges listed in the same Information are brought in Union County, the Information is valid on its face. Consequently, the legality or sufficiency of the evidence concerning jurisdiction cannot be considered at this stage in the proceedings.

4. The State objects to Conclusion #4. Based upon the allegations contained in the Information, this court has subject matter jurisdiction over the Defendant. *State v. Sanders*, 2016 S.D. 32 at ¶5.
5. The State objects to Conclusion #5. Defendant proposes using civil rules in dismissing a criminal case. The issue that the Supreme Court addressed in *Alone v. Brunsch, Inc.* concerned a civil, tort claim. The question of subject matter jurisdiction rested upon the rules of civil procedure. Indeed, the statute upon which the Defendants relied in their Motion to Dismiss, and upon which the South Dakota Supreme Court issued its decision, was S.D. Codified Laws § 15-6-12(b)(1) which governs the rules for civil procedure in circuit courts. *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶24, 931 N.W.2d 707, 714.

Conversely, the Defense's Motion to Dismiss in the present case was made pursuant to the rules of criminal procedure. S.D. Codified Laws §23A-8-2. Thus, the rules of criminal procedure must apply when concerning questions of jurisdiction. And, as stated above, the trial court is not authorized to consider evidence when determining jurisdiction.

Whether the charges actually occurred where the indictment or affidavit and information alleges that they occurred is a factual assertion for a jury to determine. *State v. Sanders* at ¶ 6, 108.

6. The State objects to proposed Conclusion #6. "Federal preemption of state law may be either express or implied." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). In either case, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Id.* at 108, 2388. In the South Dakota-Nebraska Boundary Compact ("Compact"), each state specifically relinquishes "all sovereignty over lands lying on the [other state's] side of the compromise boundary." S.D. Codified Laws § 1-2-8 (emphasis mine). Conversely, S. D. Codified Laws §§ 41-15-2 and 42-8-67 concern the State of South Dakota's concurrent jurisdiction over the waters adjoining Nebraska. Neither of these South Dakota laws is contrary to the Compact since they concern a different subject matter: namely, the boundary waters and not land.
7. The State objects to proposed Conclusion #7. In the South Dakota-Nebraska Boundary Compact, each state specifically relinquishes "all sovereignty over lands lying on the [other state's] side of the compromise boundary." S.D. Codified Laws § 1-2-8. Thus, to the extent that the states of South Dakota and Nebraska hope "to avoid multiple exercises

of sovereignty and jurisdiction...”, it is with respect to exercises of sovereignty and jurisdiction over the lands on either side of the boundary line and not the waters.

8. The State objects to proposed Conclusion #8 and #9. S. D. Codified Laws §§ 41-15-2 and 42-8-67 make explicit the state of South Dakota's concurrent jurisdiction over the boundary waters of the state, which includes the Missouri River. Officer Vandebosch's initial observation and stop of the Defendant's boat did not occur on the Nebraska side of the Compact; it occurred on the waters of the Missouri River. Thus, the Compact is not implicated, the state of South Dakota maintains subject matter jurisdiction, and the Defense's Motion to Dismiss should be denied.

/s/ Nick Michels

Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks

**PROOF OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon the following individuals on January 3, 2025:

Jacklyn M. Fox  
329 Pierce Street, Ste. 200  
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[jfox@eraryhuff.com](mailto:jfox@eraryhuff.com)

/s/ Nick Michels  
Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks



STATE OF SOUTH DAKOTA )		IN CIRCUIT COURT
: SS		
COUNTY OF UNION )		FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,		63CRI24-363
	Plaintiff,	STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.		
GARY DEAN OGDEN,		
	Defendant.	

The above-entitled case came before the Court on the 15<sup>th</sup> day of November, 2024, before the Honorable Kasey Sorensen. The State was represented by Special Assistant Attorney General, Nick Michels. Defendant was represented by his attorneys, Jacklyn Fox and John Hines. The State respectfully submits the following proposed Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

The State proposes the following Findings of Fact:

1. Any finding of fact more properly designated as a conclusion of law shall be treated as such.
2. On July 27, 2024, South Dakota Conservation Officer Josh Vandenbosch initiated a stop of the Defendant's boat on the Missouri River.
3. The Defendant was arrested for the public offense of operating a boat under the influence in violation of SDCL 42-8-45.
4. The Defendant was charged by an Information on or about August 23, 2024, with the following: two counts of Boating Under Influence in violation of SDCL 42-8-45(1)(2), one count of Boat Lights Required in violation of SDCL 32-3A-1(1), one count of Obstructing Law Enforcement in violation of SDCL 22-11-6, and one count of Resisting Arrest in violation of SDCL 22-11-4(2). The information on file in this matter is incorporated herein by this reference.
5. The Information alleged that the listed charges occurred in Union County.

6. The Information was filed in Union County.
7. The Information was valid on its face.
8. The Information was found, endorsed, and presented or filed as prescribed by Title 23A.
9. The names of the witnesses were inserted at the foot of the Information.
10. The Information substantially conformed to the requirements of Title 23A.
11. No more than one offense was charged in a single count of the Information.
12. All charged offenses in the Information were public offenses.
13. Nothing in the Information constituted a legal justification or excuse to the offenses charged, or contained matters which constituted any other bar to prosecution.
14. No preliminary hearing was necessary in this matter.

#### CONCLUSIONS OF LAW

The State proposes the following Conclusions of Law:

1. Any conclusion of law more properly designated as a finding of fact shall be treated as such.
2. S.D. Codified Laws § 23A-8-2 provides the specific grounds upon which a trial court may dismiss an indictment or information.
3. "Whether a court has subject matter jurisdiction is determined by the indictment." *State v. Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d 105, 107.
4. "The trial court cannot inquire into the legality or sufficiency of the evidence upon which an indictment is based when considering a dismissal under SDCL § 23A-8-2." *State v. Springer-Ertl*, 1997 S.D. 128, ¶ 8, 570 N.W.2d 39, 41.
5. Rather, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *State v. Cameron*, 1999 S.D. 70, 596 N.W.2d 49, 52.
6. Because the Information is valid on its face, the legality or sufficiency of the evidence concerning jurisdiction cannot be considered at this stage in the proceedings.
7. S.D. Codified Laws § 1-2-8 establishes the South Dakota-Nebraska Boundary Compact.
8. S.D. Codified Laws § 1-2-8 states in relevant part that "On the effective date of this compact, the state of South Dakota hereby relinquishes to the state of Nebraska all sovereignty over lands lying on the Nebraska side of said compromise boundary and the

state of Nebraska hereby relinquishes to the state of South Dakota all sovereignty over lands lying on the South Dakota side of the compromise boundary.”

9. No mention is made in S.D. Codified Laws § 1-2-8 of the waters overlying the lands on either side of the compromise boundary.
10. “While contractual in nature, an interstate compact is not just a contract, but also a federal statute enacted by Congress that preempts contrary state law.” *Texas v. New Mexico*, 602 U.S. 943, 949–50, 144 S. Ct. 1756, 1762, 219 L. Ed. 2d 539 (2024) (citations omitted).
11. However, when a compact does not address a particular issue, courts must consider background principles of law that would have informed the parties’ understanding when they entered the compact. *New York v. New Jersey*, 598 U.S. 218, 224, 143 S. Ct. 918, 924, 215 L. Ed. 2d 208 (2023).
12. One relevant, background principle of law applicable in the present case is the principle that “Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing...transfer of sovereignty itself.” *United States v. State of Oregon*, 295 U.S. 1, 14, 55 S. Ct. 610, 615, 79 L. Ed. 1267 (1935).
13. The South Dakota-Nebraska Boundary Compact does not relinquish either state’s jurisdiction over the waters overlying the lands on either side of the compromise boundary.
14. Additionally, 33 U.S.C.A. § 11 states in relevant part that, “The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends.”

15. The plain language of 33 U.S.C.A. § 11 makes clear that even one state of those listed can determine and settle jurisdiction over offenses arising upon the waters forming its boundary lines.
16. South Dakota determined and settled jurisdiction over the waters forming the boundary lines of the state in S.D. Codified Laws § 41-15-2, which states that, "For the purpose of enforcing any of the laws under this title and the rules promulgated pursuant to this title, the courts of this state, and the conservation officers of this state, have jurisdiction over the entire boundary waters of the state, to the furthestmost shore line. Concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa, and Nebraska over all boundary waters between such states and this state, and the whole of such boundary waters, is hereby recognized."
17. South Dakota determined and settled jurisdiction over the waters forming the boundary lines of the state in S.D. Codified Laws § 42-8-67, which states that, "For the purposes of this chapter, the courts and the conservation officers of this state have jurisdiction over the entire boundary waters of this state to the furthestmost shorelines. The concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa and Nebraska over all boundary waters between those states and this state, is hereby recognized."
18. Neither S.D. Codified Laws §§ 41-15-2 nor § 42-8-67 are contrary to the South Dakota-Nebraska Boundary Compact.
19. S.D. Codified Laws § 23A-16-10 establishes venue in Union County for the criminal offenses. "When an offense is committed in this state on a boundary water between this state and another state, the venue is in any county which bounds on the body of water. Upon a showing of good cause, the court in which such prosecution is commenced may order the case transferred to any other county bounding on the body of water as is more appropriate under the general venue provisions of § 23A-16-5."

/s/ Nick Michela

Nick Michela  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks

**PROOF OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon the following individuals on January 3, 2025:

Jacklyn M. Fox  
329 Pierce Street, Ste. 200  
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[jfox@cravhuff.com](mailto:jfox@cravhuff.com)

/s/ Nick Michels  
Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks

STATE OF SOUTH DAKOTA	)		IN CIRCUIT COURT
	:SS		
COUNTY OF UNION	)		FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA	)		
Plaintiff,	)	63CRI24-363	
	)		
	)		
v.	)		<b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>
	)		
GARY DEAN OGDEN, JR.	)		
Defendant.	)		

---

This matter came before the Court on November 15, 2024 for hearing on Defendant's *Motion to Dismiss for Lack of Jurisdiction*. Plaintiff appeared by legal counsel Special Assistant Attorney General Nick Michels, and Defendant appeared by legal counsel Jacklyn Fox and John Hines. Evidence and legal argument were presented at the hearing. Following presentation of the evidence, the Court enters the following *Findings of Fact and Conclusions of Law*:

**FINDINGS OF FACT**

1. This Court's *Memorandum Opinion*, dated December 6, 2024, is incorporated herein by this reference.
2. Any finding of fact more properly designated as a conclusion of law shall be treated as such.
3. South Dakota and Nebraska entered into an interstate boundary compact ("Compact"), approved by the United States Congress on November 28, 1989.
4. The Compact describes a compromise boundary line between Union County, South Dakota and Dakota County, Nebraska, fixed at the centerline of the designed channel of the Missouri River.
5. On July 27, 2024, South Dakota wildlife conservation Officer Josh Vandembosch initiated

a stop of the Defendant's boat near the Nebraska shoreline of Dakota County, Nebraska.

6. Defendant presented evidence corroborating that the initial observation and stop of Defendant's boat occurred near the Nebraska shoreline.
7. Plaintiff presented no evidence that the initial observation and stop of the Defendant's boat occurred on the South Dakota side of the centerline of the designed channel of the Missouri River.
8. Officer Vandembosch's initial observation and stop of the Defendant's boat occurred on the Nebraska side of the centerline of the designed channel of the Missouri River.

#### CONCLUSIONS OF LAW

1. This Court's *Memorandum Opinion*, dated December 6, 2024, is incorporated herein by this reference.
2. Any conclusion of law more properly designated as a finding of fact shall be treated as such.
3. Defendant's *Motion to Dismiss for Lack of Jurisdiction* may be considered by the Court prior to the State's case-in-chief. *See State v. Medicine Eagle*, 2013 S.D. 60, ¶38, 835 N.W.2d 886, 900 ("Jurisdictional issues can be raised at any time and determination of jurisdiction is appropriate.")
4. Plaintiff has the burden to establish that the Court has jurisdiction. *See Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990).
5. To determine whether the Court has jurisdiction, the Court is authorized to consider evidence. *See Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶12, 931 N.W.2d 707, 711 ("To resolve the question [of jurisdiction], the court may hold hearings, consider live testimony, or review affidavits and documents.")



6. The Compact adopted by South Dakota and Nebraska, and approved by Congress, is a federal statute that preempts contrary state law. *Texas v. New Mexico*, 602 U.S. 943, 949–50, 144 S.Ct. 1756, 1762, 219 L.Ed. 539 (2024)(internal citations and quotations omitted).
7. The compromise boundary described in the Compact establishes the legal boundary between Union County, South Dakota, and Dakota County, Nebraska, in part “to avoid multiple exercise of sovereignty and jurisdiction including matters of taxation, judicial and police powers . . . [and] to encourage settlement and disposition of pending litigation and criminal proceedings and avoid or minimize future disputes and litigations[.]” SDCL § 1-2-8 (Article I(b)).
8. Because Officer Vandembosch’s initial observation and stop of the Defendant’s boat occurred on the Nebraska side of the Compact compromise boundary, Union County, South Dakota does not have subject matter jurisdiction in this case.
9. Because this Court lacks subject matter jurisdiction, the case must be dismissed.

1/13/2025 12:25:51 PM

BY THE COURT:



Hon. Kasey Sorensen,

Attest:  
Buum, Laurie  
Clerk/Deputy



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF UNION	)	FIRST JUDICIAL CIRCUIT
<hr/>		
STATE OF SOUTH DAKOTA	)	
Plaintiff,	)	63CRI24-363
	)	
	)	<b>ORDER GRANTING</b>
v.	)	<b>MOTION TO DISMISS</b>
	)	
GARY DEAN OGDEN, JR.	)	
Defendant.	)	
<hr/>		

NOW, on this 13th day of January, 2025, the Court having before it the Defendant's Motion to Dismiss, having entered Findings of Fact and Conclusions of Law, and being fully advised in the matters previously stated, it is hereby

ORDERED, that the Information filed on August 23, 2024, is dismissed.

1/13/2025 12:28:10 PM  
BY THE COURT:



Hon. Kasey Sorensen, Magistrate Judge

Attest:  
Bum, Laurie  
Clerk/Deputy



STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF UNION )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA  
Plaintiff,

vs.

GARY D. OGDEN, JR.,  
Defendant.

63CRI24-000363

## NOTICE OF APPEAL

To: GARY D. OGDEN, JR., Defendant; and  
Jacklyn Fox, Attorney for Defendant.

Please take notice that the State of South Dakota, the Department of Game, Fish and Parks, appeals to the Supreme Court of South Dakota from the Court's FFCL and Order Granting Motion to Dismiss, in whole, filed on January 14, 2025.

Dated this 22<sup>nd</sup> day of January, 2025.

/s/ Nick Michels

Nick Michels, General Counsel  
South Dakota Department of  
Game, Fish and Parks  
4500 S. Oxbow Ave.  
Sioux Falls, SD 57106  
605 773-2750  
nick.michels@state.sd.us

**CERTIFICATE OF SERVICE**

---

Nick Michels, counsel for the State of South Dakota, Department of Game, Fish and Parks, hereby certifies that on January 22<sup>nd</sup>, 2025, a true and correct copy of the foregoing Notice of Appeal was served upon the following electronically via Odyssey File and Serve:

Jacklyn M. Fox  
329 Pierce Street, Ste. 200  
PO Box 27  
Sioux City, Iowa 51102  
[jfox@craryhuff.com](mailto:jfox@craryhuff.com)

Office of the Attorney General  
1302 E. Hwy 14  
Suite 1  
Pierre, SD 57501  
[atgservice@state.sd.us](mailto:atgservice@state.sd.us)

/s/ Nick Michels  
Nick Michels, General Counsel  
South Dakota Department of  
Game, Fish and Parks  
4500 S. Oxbow Ave.  
Sioux Falls, SD 57106  
605 773-2750  
[nick.michels@state.sd.us](mailto:nick.michels@state.sd.us)

**FILED**

MAR 06 2025

*Michael Jensen*  
UNION COUNTY CLERK OF COURTS  
FIRST JUDICIAL CIRCUIT COURT OF SD

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

FEB 10 2025

*Shirley A. Jensen-Land*  
Clerk

\* \* \* \*

STATE OF SOUTH DAKOTA, )  
Plaintiff and Appellant, )  
vs. )  
GARY DEAN OGDEN, JR., )  
Defendant and Appellee. )

ORDER DISMISSING APPEAL

#30984

It appearing to the Court that the appeal taken in the above-entitled matter is from an order of the magistrate court granting a motion to dismiss, and under SDCL 23A-32-5 there is no right of direct appeal from a magistrate order, now, therefore, it is ORDERED that the appeal is hereby dismissed.

DATED at Pierre, South Dakota, this 10th day of February, 2025.

BY THE COURT:

ATTEST:

*[Signature]*  
Clerk of the Supreme Court  
(SEAL)

*[Signature]*  
Steven R. Jensen, Chief Justice

STATE OF SOUTH DAKOTA  
In the Supreme Court  
I, Shirley A. Jensen-Land, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this

*Shirley A. Jensen-Land* 25th day of March, 2025

*[Signature]*  
Clerk of Supreme Court  
Deputy

STATE OF SOUTH DAKOTA )		IN CIRCUIT COURT
COUNTY OF UNION )		FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,		63CRI24-00363
Plaintiff,		
vs.		NOTICE OF ENTRY OF ORDER
GARY DEAN OGDEN,		
Defendant.		

TO: The above-named defendant, Gary Dean Ogden, and Jacklyn M. Fox, his attorney.

PLEASE TAKE NOTICE that the Order granting your Motion to Dismiss in the above-entitled action was entered by the Court and filed with the Clerk on January 14<sup>th</sup>, 2025.

Dated this 18<sup>th</sup> day of February, 2025.

/s/ Nick Michels

Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks  
523 East Capitol Ave.  
Pierre, SD 57501  
[Nick.Michels@state.sd.us](mailto:Nick.Michels@state.sd.us)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon the following individual on February 18<sup>th</sup>, 2025:

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/s/ Nick Michels  
Nick Michels  
Special Assistant Attorney General  
South Dakota Gam, Fish and Parks  
523 East Capitol Ave.  
Pierre, SD 57501  
[Nick.Michels@state.sd.us](mailto:Nick.Michels@state.sd.us)



STATE OF SOUTH DAKOTA  
In the Supreme Court  
I, Shirley A. Johnson-Hagel, Clerk of the Supreme Court of  
South Dakota, hereby certify that the within instrument is a true  
and correct copy of the original thereof as the same appears  
on record in my office. In witness whereof, I have hereunto set  
my hand and affixed the seal of said court at Pierre, S.D., this  
4 day of April, 2025.

*Shirley A. Johnson-Hagel*  
Clerk

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA  
\* \* \* \*

63CR124-343  
SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED  
APR 04 2025  
*Shirley A. Johnson-Hagel*  
Clerk

STATE OF SOUTH DAKOTA,	)	ORDER GRANTING PETITION FOR
Plaintiff and Petitioner,	)	DISCRETIONARY APPEAL
	)	
VS.	)	#31010
	)	
GARY DEAN OGDEN, JR.,	)	
Defendant and Respondent.	)	

Petitioner having served and filed a petition for allowance of appeal from an order of the Magistrate Court of the First Judicial Circuit within and for the County of Union, South Dakota, filed January 13, 2025. Respondent served and filed a response thereto. The Court having considered the petition and response and being fully advised in the premises, it is now

ORDERED that the petition for allowance of appeal from said intermediate order is granted.

IT IS FURTHER ORDERED that the order for transcript, if any, be made upon receipt of this order and the schedule for briefing follow the schedule set forth in SDCL 15-26A-75. If no order for transcript is made, the forty-five-day period for service and filing of the appellant's brief shall commence to run as of the date of this order.

DATED at Pierre, South Dakota this 4th day of April, 2025.

ATTEST: *[Signature]*  
BY THE COURT: *[Signature]*  
Steven R. Jensen, Chief Justice

Clerk of the Supreme Court  
(SEAL)  
(Chief Justice Steven R. Jensen recused.)  
(Justice Scott P. Myren dissents.)

PARTICIPATING: Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney, and Scott P. Myren.

**33 USC 11: Authority for compact between Middle Northwest States as to jurisdiction of offenses committed on boundary waters**

Text contains those laws in effect on May 12, 2025

**From Title 33-NAVIGATION AND NAVIGABLE WATERS****CHAPTER 1-NAVIGABLE WATERS GENERALLY****SUBCHAPTER I-GENERAL PROVISIONS****Jump To:**[Source Credit](#)[Miscellaneous](#)[Codification](#)**§11. Authority for compact between Middle Northwest States as to jurisdiction of offenses committed on boundary waters**

The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917.

(Mar. 4, 1921, ch. 176, 41 Stat. 1447 .)

**EDITORIAL NOTES****CODIFICATION**

This section is from a resolution entitled a "Joint Resolution giving consent of the Congress of the United States to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of said States, to agree upon the jurisdiction to be exercised by said States over boundary waters between any two or more of said States".

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA	)	
	)	Appeal No. 31010
Appellant,	)	
	)	
v.	)	
	)	
GARY DEAN OGDEN, JR.	)	
	)	
Appellee.	)	

---

Appeal from the Magistrate Court, First Judicial Circuit, Union County, South Dakota.

The Hon. Kasey Sorensen, Magistrate Judge presiding.

**Appellee's Brief**

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Petition for Permission to Take Discretionary Appeal filed on February 27, 2025

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## **JURISDICTIONAL STATEMENT**

The Magistrate Court entered an order granting Ogden's Motion to Dismiss on January 13, 2025. (App. 1). On January 22, 2025, the State filed a timely, but unauthorized, Notice of Appeal. (App. 10). The South Dakota Supreme Court dismissed the unauthorized appeal on February 10, 2025. (App. 12). The State then filed a "Notice of Entry of Order" on February 18, 2025. (App. 13). The State petitioned for discretionary appeal on February 27, 2025, forty-five (45) days after receiving notice of entry of the Magistrate Judge's Order. (App. 15). This Court granted the petition for discretionary appeal on April 4, 2025, with one Justice dissenting. (App. 29). This Court lacks jurisdiction due to the State's untimely petition for discretionary appeal.

## **LEGAL ISSUES**

### **I. THIS COURT LACKS JURISDICTION TO HEAR THE STATE'S APPEAL BECAUSE IT WAS NOT TIMELY FILED**

This Court lacks jurisdiction to hear this appeal because the State's petition for discretionary appeal was more than ten (10) days after it received written notice of the entry of judgment.

#### **Most relevant authority:**

SDCL § 15-6-5(b)(2)

SDCL § 15-26A-3(6)

SDCL § 23A-32-5

SDCL § 23A-32-6

*State v. Anders*, 2009 S.D. 15, ¶ 5, 763 N.W. 2d 547, 549

*State v. Sharpfish*, 2018 S.D. 63, ¶¶ 12–13, 917 N.W.2d 21, 23



## **II. THE MAGISTRATE COURT DID NOT ABUSE ITS DISCRETION IN CONSIDERING OGDEN'S JURISDICTIONAL CHALLENGE AND CORRECTLY DISMISSED THE INFORMATION**

The Magistrate Court did not abuse its discretion because jurisdiction may be challenged at any time during the pendency of the proceedings.

### **Most relevant authority:**

SDCL § 23A-8-3(3)

*State v. Neitge*, 607 N.W.2d 258, 260 (S.D. 2000)

*State v. Medicine Eagle*, 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900

## **III. THE MAGISTRATE COURT CORRECTLY RULED THAT SOUTH DAKOTA LACKS JURISDICTION OVER AN ALLEGED OFFENSE OCCURRING IN NEBRASKA**

The Magistrate Court correctly concluded that South Dakota does not have jurisdiction over the boundary waters of the State of Nebraska without an agreement, compact, or legislative action of Nebraska granting concurrent jurisdiction.

### **Most relevant authority:**

33 U.S.C.A. § 11

SDCL § 1-1-1

SDCL § 1-2-8

*Texas v. New Mexico*, 144 U.S. 1756, 1762 (2024)

*Tarrant Regl. Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013)

## **STATEMENT OF THE CASE AND FACTS**

Ogden generally agrees with the statement of the case and facts contained in the State's Brief, except as stated herein. The State's recitation of facts in its brief omits the

location of Ogden's boat at the time of Officer Josh Vanden Bosch's stop. Officer Vanden Bosch testified he directed Ogden to "bring [his boat] away from the rocks[.]" (T.T. p. 27, ll. 15, App. 32). The Officer agreed that the rocks in question were located on the Nebraska land border. (T.T. p. 28, ll. 8–11, App. 33). Officer Vanden Bosch testified he believed Ogden's boat was "thirty to fifty yards" away from the rocks at the time of the stop. (T.T. p. 28, ll. 23–24, App. 33). The Magistrate Court reviewed Officer Vanden Bosch's body camera video, and determined the video "establishes that the stop and driving occurred much closer to the Nebraska shoreline than 30 to 50 yards." (Memorandum Decision, p. 2, App. 6). No evidence was presented by the State showing that the stop occurred on the South Dakota side of the main channel of the Missouri River.

## **ARGUMENT**

### **I. Standard of Review**

"Whether this Court has jurisdiction is a legal issue which is reviewed de novo." *State v. Anders*, 2009 S.D. 15, ¶ 5, 763 N.W.2d 547, 549 (citation omitted). Similarly, an appeal regarding whether the circuit court has jurisdiction is also reviewed de novo. *State v. Gullickson*, 2003 S.D. 32, ¶ 7, 659 N.W.2d 388, 390.

### **II. This Court lacks jurisdiction to hear the appeal because it was not filed within the required timeframe.**

#### **A. Analysis**

An appeal under SDCL § 23A-32-5 must be taken within ten (10) days after written notice of entry of the judgment or order being appealed. SDCL § 23A-32-6. Appeals under SDCL § 23A-32-5 are "not a matter of right but of sound judicial

discretion” and must also “be taken in the same manner as intermediate appeals in subdivision § 15-26A-3(6).” The Magistrate Court filed the “Order Granting Motion to Dismiss” and “Findings of Fact and Conclusions of Law” on January 13, 2025. (App. 1–4). “Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey system or served electronically through the Odyssey system are presumed served upon all attorneys of record at the time of submission.” SDCL § 15-6-5(b)(2).

The State filed a petition for discretionary appeal on February 27, 2025, forty-five (45) days after the order was entered and served on all attorneys of record (App. 15). As attorney of record in the underlying case, the State is presumed by law to have received the Magistrate Judge’s Order on January 13, 2025. Additionally, the State undoubtedly received written notice of the entry of the Magistrate Judge’s Order when it filed its timely, but unauthorized, Notice of Appeal on January 22, 2025. (App. 10). Ogden also raised in his Response to Petition for Permission to take Discretionary Appeal, the fact that Magistrate Sorensen emailed the State’s attorney, Nick Michels, on January 21, 2025, reiterating that an order dismissing the charges had been entered (App. 42).

The facts establishing untimeliness of the appeal in this case are nearly identical to those in *State v. Sharpfish*, 2018 S.D. 63, ¶¶ 12–13, 917 N.W.2d 21, 23. In that case, the State admitted that an email from the lower court constituted notice of entry of the order for purposes of the deadline to apply for discretionary review. *Id.* Because the state’s application for discretionary review was outside the ten (10) day limit imposed by statute, the Court ruled the appeal “must be dismissed.” *Id.* at ¶14.

There is no basis here for the State to deny it had written notice of the entry of the Magistrate Court's order. The State presumptively, by law, was served the January 13 Order. The State cannot credibly claim it did not receive written notice of entry of the judgment on that date, considering it filed its unauthorized Notice of Appeal on January 22, 2025. The State's petition for discretionary appeal was filed well outside the ten (10) day requirement for discretionary appeal.

As was the case in *State v. Sharpfish*, this appeal "must be dismissed" due to the State's untimely petition for discretionary appeal. Ogden respectfully requests this Court to dismiss the appeal for lack of jurisdiction. Because this Court lacks jurisdiction to hear the appeal, Ogden respectfully requests the Court not consider the merits of the appeal.

**III. The Magistrate Court did not abuse its discretion in considering Ogden's jurisdictional challenge.**

**A. Analysis**

Should this Court allow the appeal to be heard on the merits, the Court should nonetheless conclude the Magistrate Court properly dismissed the underlying case. Because jurisdiction may be challenged at any time, the Magistrate Court did not abuse its discretion in dismissing the case. Jurisdiction may be challenged at any time during the pendency of the proceedings. SDCL § 23A-8-3(3); *State v. Neitge*, 607 N.W.2d 258, 260 (S.D. 2000). "In South Dakota, beyond the concepts of personal and subject-matter jurisdiction, we have defined the term 'jurisdiction' more broadly to include 'the legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to the particular matter, . . . [the] power to inquire into the facts and apply the law, and . . . the right to adjudicate concerning the subject-matter in the given case[.]'" *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900 (citing

*State ex rel. Byrne v. Ewert*, 36 S.D. 622, 156 N.W. 90, 95 (1916)). “We have also declared it to mean ‘whether there was power to enter upon the inquiry and not whether the determination by the court of a question of law or fact involved is correct.’” *Medicine Eagle*, 2013 S.D. 60, ¶ 40 (quoting *Janssen v. Tusha*, 68 S.D. 639, 643, 5 N.W.2d 684, 685 (1942)).

Unlike in cases cited in the State’s brief, here the Magistrate Court did not inquire into the legality or sufficiency of the evidence upon which the indictment was based. The Magistrate Court did not consider whether the facts constituted the crime charged, or whether the facts were legally insufficient to constitute the crime. Instead, the Magistrate Court interpreted the law regarding South Dakota’s jurisdiction in boundary waters and correctly concluded that the Court lacked jurisdiction. None of the cases cited by the State involved this type of jurisdictional challenge.

Under this Court’s broad definition of “jurisdiction”, it is clear the Defendant’s Motion to Dismiss was a challenge of the legal power, right, or authority of the Magistrate Court to hear and determine the case, not whether the facts were legally sufficient or constituted the crime charged. The State’s argument with respect to the statutory grounds authorizing the dismissal of an indictment or information is irrelevant to this case. Because jurisdictional challenges may be considered at any time of the pendency of proceedings, the Magistrate Court did not abuse its discretion in dismissing the charges.

#### **IV. The Magistrate Court correctly ruled South Dakota lacks jurisdiction.**

##### **A. Analysis**

South Dakota does not have jurisdiction in this matter because all the pertinent events occurred in Nebraska, and no concurrent jurisdiction has been granted to South Dakota by the State of Nebraska over its boundary waters. “[E]ach State is sovereign within its own domain, governing its citizens and providing for their general welfare.” *FERC v. Mississippi*, 102 S.Ct. 2126, 2147, 456 U.S. 742, 777 (U.S.Miss., 1982). Defendants have a right under the Sixth Amendment to the United States Constitution, and under the South Dakota Constitution, to a trial in the state, county and district wherein the crime was alleged to have been committed. U.S. Const. amend. VI; S.D. Const. art. VI, §7. It is self-evident that the laws of one sovereign state do not apply in another. “State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted).”

Under SDCL § 1-1-1, the jurisdiction of South Dakota extends to all territory “*within its established boundaries* except as to such places wherein jurisdiction is expressly ceded to the United States by the State Constitution[.]” (emphasis added). Federal law authorizes the states of Nebraska and South Dakota to enter into any “agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States . . . to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States[.]” 33 U.S.C.A. § 11.

An interstate compact is “a federal statute enacted by Congress’ that preempts contrary state law.” *Texas v. New Mexico*, 144 U.S. 1756, 1762 (2024). Therefore, an interstate compact is the governing law if any of Nebraska’s or South Dakota’s state statutes are in conflict. Further, interstate compacts are construed as contracts under the principles of contract law. *Tarrant Regl. Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) (citation omitted). This means, as with any contract, the best indication as to the intent of the parties can be determined by examining the express terms of the compact. *Id.*

The Nebraska-South Dakota Boundary Compact (the “Compact”) is an interstate compact which was enacted by both states and consented to by Congress to establish an identifiable compromise boundary between the states; specifically, between Dakota County, Nebraska and Union County, South Dakota. The South Dakota Legislature ratified the Compact in the year 1989, and it is codified at SDCL § 1-2-8. The Compact fixes the compromise boundary between Dakota County, Nebraska and Union County, South Dakota at the “centerline of the designed channel of the Missouri River (the westerly channel adjacent to Section 5, Township 29 North, Range 7 East of the 6th P.M. shall be considered the main channel).” SDCL § 1-2-8, Article II(a).

The Compact was created, in part, to “avoid multiple exercise of sovereignty and jurisdiction including matters of . . . judicial and police powers and exercise of administrative authority[.]” *Id.* at Article I(b). Because the Compact establishes the boundary between Dakota County, Nebraska and Union County, South Dakota as the centerline of the Missouri River, under the plain language of SDCL § 1-1-1, South Dakota has no jurisdiction to the west (or north, depending on the river orientation) of the



compromise boundary, unless it has been granted concurrent jurisdiction from Nebraska by agreement, compact, or as evidenced by legislative acts.

While South Dakota Codified Law § 42-8-67 (which was adopted in 1981, eight (8) years prior to the Compact being ratified by the South Dakota Legislature) purports to grant South Dakota concurrent jurisdiction of the courts and administrative officers over the boundary waters between Nebraska, Nebraska has no parallel law. (*Compare* CA Penal § 853.2 and AZ St § 37-620.11, showing the states of California and Arizona, respectively, granting each other concurrent jurisdiction for criminal cases upon the common water boundary of the Colorado River.) The Compact establishing the compromise boundary between South Dakota and Nebraska also does not grant concurrent jurisdiction between the states, even though it could have under 33 U.S.C.A. § 11, if that was the intent of the parties. South Dakota cannot unilaterally grant itself concurrent jurisdiction over Nebraska's boundary waters. See *Miller v. McLaughlin*, 224 N.W. 18, 20 (Neb. 1929) ("One state cannot require another to unite in treaties, laws, contracts or compacts. . . . [e]ach state, as to river waters within her own boundaries, has rights and powers not committed to the adjoining state.")

As determined by the Magistrate Court, Officer Vanden Bosch's own video of his interaction with Ogden's boat clearly establishes that Ogden was traveling downstream, near the Nebraska shoreline of the Missouri River – obviously well beyond the centerline of the Missouri River main channel. Officer Vanden Bosch's attempt to enforce South Dakota Codified Law beyond the established boundary of the State, without a grant of concurrent jurisdiction by the State of Nebraska, is contrary to the express purpose of the

Compact to avoid the multiple exercise of sovereignty and jurisdiction of police powers, and is contrary to SDCL § 1-1-1.

Officer Vanden Bosch lacked the authority to stop the Defendant's boat for the alleged violation of South Dakota boating regulations, because South Dakota law has no application within Nebraska's borders. Under SDCL § 1-1-1, South Dakota has no jurisdiction outside of its lawfully established boundaries, and no concurrent jurisdiction over boundary waters has been granted from Nebraska. Because the South Dakota Wildlife Conservation officers clearly observed and stopped Ogden within Nebraska's boundary, the South Dakota Wildlife Conservation officers lacked authority for the initial stop, and the South Dakota Courts have no jurisdiction over Ogden regarding any charges resulting from the stop.

### CONCLUSION

Ogden respectfully requests the Court dismiss this appeal for lack of jurisdiction due to the State's untimely appeal. Alternatively, Ogden respectfully requests this Court affirm the Magistrate Court's decision that it lacked jurisdiction because all relevant events occurred in the boundary waters of the State of Nebraska, and no concurrent jurisdiction has been granted by Nebraska to the State of South Dakota.

Respectfully submitted,

CRARY HUFF, P.C.

BY /s/John M. Hines  
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ATTORNEYS FOR APPELLEE

### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court. This brief was prepared and printed in a proportionally spaced typeface in Times New Roman font, size 12. This brief contains 2,241 words including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel.

Dated this 2nd day of July, 2025

/s/ John M. Hines

John M. Hines

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of July, 2025, I electronically filed the foregoing with the Clerk of the Court using the Odyssey File & Serve system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system as follows:

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John M. Hines

## APPENDIX

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STATE OF SOUTH DAKOTA )  
 )  
COUNTY OF UNION )

IN CIRCUIT COURT  
  
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA )  
 )  
Plaintiff, )  
 )  
 )  
v. )  
 )  
GARY DEAN OGDEN, JR. )  
 )  
Defendant. )

63CRI24-363

**ORDER GRANTING  
MOTION TO DISMISS**

NOW, on this 13th day of January, 2025, the Court having before it the Defendant's Motion to Dismiss, having entered Findings of Fact and Conclusions of Law, and being fully advised in the matters previously stated, **it is hereby**

**ORDERED**, that the Information filed on August 23, 2024, is dismissed.

1/13/2025 12:28:10 PM

BY THE COURT:



Hon. Kasey Sorensen, Magistrate Judge

Attest:  
Bum, Laurie  
Clerk/Deputy





STATE OF SOUTH DAKOTA	)		IN CIRCUIT COURT
	.SS		
COUNTY OF UNION	)		FIRST JUDICIAL CIRCUIT

---

STATE OF SOUTH DAKOTA	)		
Plaintiff,	)		63CRI24-363
	)		
	)		<b>FINDINGS OF FACT AND</b>
v.	)		<b>CONCLUSIONS OF LAW</b>
	)		
GARY DEAN OGDEN, JR.	)		
Defendant.	)		

---

This matter came before the Court on November 15, 2024 for hearing on Defendant's *Motion to Dismiss for Lack of Jurisdiction*. Plaintiff appeared by legal counsel Special Assistant Attorney General Nick Michels, and Defendant appeared by legal counsel Jacklyn Fox and John Hines. Evidence and legal argument were presented at the hearing. Following presentation of the evidence, the Court enters the following *Findings of Fact and Conclusions of Law*:

**FINDINGS OF FACT**

1. This Court's *Memorandum Opinion*, dated December 6, 2024, is incorporated herein by this reference.
2. Any finding of fact more properly designated as a conclusion of law shall be treated as such.
3. South Dakota and Nebraska entered into an interstate boundary compact ("Compact"), approved by the United States Congress on November 28, 1989.
4. The Compact describes a compromise boundary line between Union County, South Dakota and Dakota County, Nebraska, fixed at the centerline of the designed channel of the Missouri River.
5. On July 27, 2024, South Dakota wildlife conservation Officer Josh Vandembosch initiated

- a stop of the Defendant's boat near the Nebraska shoreline of Dakota County, Nebraska.
6. Defendant presented evidence corroborating that the initial observation and stop of Defendant's boat occurred near the Nebraska shoreline.
  7. Plaintiff presented no evidence that the initial observation and stop of the Defendant's boat occurred on the South Dakota side of the centerline of the designed channel of the Missouri River.
  8. Officer Vandebosch's initial observation and stop of the Defendant's boat occurred on the Nebraska side of the centerline of the designed channel of the Missouri River.

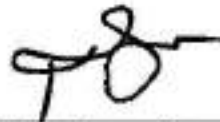
### **CONCLUSIONS OF LAW**

1. This Court's *Memorandum Opinion*, dated December 6, 2024, is incorporated herein by this reference.
2. Any conclusion of law more properly designated as a finding of fact shall be treated as such.
3. Defendant's *Motion to Dismiss for Lack of Jurisdiction* may be considered by the Court prior to the State's case-in-chief. *See State v. Medicine Eagle*, 2013 S.D. 60, ¶38, 835 N.W.2d 886, 900 ("Jurisdictional issues can be raised at any time and determination of jurisdiction is appropriate.")
4. Plaintiff has the burden to establish that the Court has jurisdiction. *See Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990).
5. To determine whether the Court has jurisdiction, the Court is authorized to consider evidence. *See Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶12, 931 N.W.2d 707, 711 ("To resolve the question [of jurisdiction], the court may hold hearings, consider live testimony, or review affidavits and documents.")

6. The Compact adopted by South Dakota and Nebraska, and approved by Congress, is a federal statute that preempts contrary state law. *Texas v. New Mexico*, 602 U.S. 943, 949–50, 144 S.Ct. 1756, 1762, 219 L.Ed. 539 (2024)(internal citations and quotations omitted).
7. The compromise boundary described in the Compact establishes the legal boundary between Union County, South Dakota, and Dakota County, Nebraska, in part “to avoid multiple exercise of sovereignty and jurisdiction including matters of taxation, judicial and police powers . . . [and] to encourage settlement and disposition of pending litigation and criminal proceedings and avoid or minimize future disputes and litigations[.]” SDCL § 1-2-8 (Article I(b)).
8. Because Officer Vandembosch’s initial observation and stop of the Defendant’s boat occurred on the Nebraska side of the Compact compromise boundary, Union County, South Dakota does not have subject matter jurisdiction in this case.
9. Because this Court lacks subject matter jurisdiction, the case must be dismissed.

1/13/2025 12:25:51 PM

BY THE COURT:



Hon. Kasey Sorensen,

Attest:  
Buum, Laurie  
Clerk/Deputy





# First Judicial Circuit Court

410 Walnut, Suite 201  
Yankton, SD 57078

Kasey Sorensen  
Magistrate Judge

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Cheryle Gering  
Circuit Judges  
Bruce Anderson  
Tami Bern  
Chris Giles  
David Knoff  
Patrick Smith  
Magistrate Judges  
Donna Bucher  
Kasey Sorensen

Circuit Administrator  
Kim Allison  
Chief Court Services Officer  
Ron Freeman  
Deputy Chief CSO  
Ryan Mockler  
Circuit Assistant  
Joan Novak

# FILED

DEC 06 2024

*Melissa Larson*  
UNION COUNTY CLERK OF COURTS  
FIRST JUDICIAL CIRCUIT COURT OF S.D.

December 6, 2024

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Ms. Jacklyn Fox  
Attorney for Defendant  
[jfox@cravhuff.com](mailto:jfox@cravhuff.com)

RE: State v. Gary Ogden, Jr. 63CRI24-363

Dear Counsel,

A hearing was held on November 15, 2024, on Defendant's Motion to Dismiss For Lack of Jurisdiction. The Court received the testimony of Officer Josh Vandenbosch and Defendant's Exhibit B.

The Defendant's motion asserts the Court does not have subject matter jurisdiction to hear this case because the events leading up to, and including the arrest, occurred in Nebraska. Defendant's Motion to Dismiss, Paragraph 7. The State argues the motion cannot be granted because it does not meet the statutory bases for dismissal in SDCL 23A-8-2 and asserts that the Court may not inquire into the sufficiency of the evidence. The State further argues South Dakota has concurrent jurisdiction over the entirety of the Missouri River.

The Court will address the following issues: first, whether the Court may hear a motion to dismiss prior to the State's case-in-chief at trial and resolve factual disputes limited to the motion, and if so, whether the Court has subject matter jurisdiction in this case.

"To properly hear a case, a circuit court must have personal jurisdiction over the defendant appearing before them and subject matter jurisdiction over the charges filed by the State." *State v. Pentecost*, 2016 S.D. 84, ¶12, 887 N.W.2d 877, 881. "Jurisdictional issues can be raised at any

time and determination of jurisdiction is appropriate.” *State v. Medicine Eagle*, 2013 S.D. 60, ¶38, 835 N.W.2d 886, 900 (quoting *State v. Anders*, 2009 S.D. 15, ¶5, 763 N.W.2d 547, 549-50). “Further, subject-matter jurisdiction cannot be acquired by agreement, consent, waiver, or estoppel.” *Id.* (internal citations omitted).

“Subject matter jurisdiction is a court’s competence to hear and determine cases of the general class to which proceedings in question belong and the power to deal with the general subject involved in the action. *Pentecost* at ¶13 (quoting *March v. Thursby*, 2011 S.D. 73, ¶15, 806 N.W.2d 239, 243)(internal quotations omitted). South Dakota has broadly defined “jurisdiction” and it includes the “legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to the particular matter, ... the power to inquire into the facts and apply the law, and ... the right to adjudicate concerning the subject-matter in the given case.” *Medicine Eagle*, ¶40, 900 (internal citation and quotations omitted).

“Motions to dismiss for lack of subject matter jurisdiction fall into one of two categories: (1) facial attacks on allegations of subject matter jurisdiction within the complaint; or (2) disputes regarding the facts upon which subject matter jurisdiction rests.” *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶11, 931 N.W.2d 707, 710-11 (internal citations and quotations omitted). “Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide.” *Id.* “To resolve the question, the court may hold hearings, consider live testimony, or review affidavits and documents.” *Id.* at ¶12. “[Courts] are empowered to hear only those cases constitutionally and statutorily authorized.” *Id.* at ¶13. The Defendant’s motion attacks the facts on which jurisdiction rests: the location of the arrest, so it is a factual attack.

“Judicial economy demands that the issue be decided at the outset rather than deferring it until trial....” *Osborn v. United States*, 917 F.2d 724, 729 (8th Cir. 1990). “If the defendant thinks the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue.” *Id.* at 730. The defendant may submit affidavits or other documents and the court can hold a hearing. *Id.* “As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, any rational mode of inquiry will do.” *Id.* (internal quotations omitted). The court must then conclusively determine the jurisdictional issue unless the jurisdictional issue is so tied to the merits that a full trial is necessary to determine the jurisdiction issue. *Id.* The plaintiff must prove jurisdiction exists. *Id.*

Based on the foregoing authority, it is clear the Court should consider the motion to dismiss for lack of jurisdiction prior to trial and may appropriately consider evidence received at the hearing and resolve factual questions related to the jurisdictional challenge. The Court will next address whether it has jurisdiction in this case.

Based on the evidence received at the hearing, the Court finds that Officer Josh Vandebosch has been employed as a wildlife conservation officer for 11 years and is now a supervising officer. Officer Vandebosch patrols the Union County area of the Missouri River from the South Dakota shoreline to the Nebraska shoreline between two to three times per week with 10-15 boat contacts each patrol from mid-May to mid-September.

Officer Vandebosch was employed in that capacity on July 27, 2024, when he initiated a stop of the Defendant’s boat on the Missouri River. Officer Vandebosch observed the Defendant driving his boat near the rocks, or shoreline, of Nebraska and according to Officer Vandebosch, the stop occurred within 30-50 yards of the rocks/shoreline. Officer Vandebosch’s initial observations of the Defendant and the initial encounter were captured by a body camera and received as Defendant’s Exhibit B. Exhibit B corroborates Officer Vandebosch’s testimony but establishes that the stop and driving occurred much closer to the Nebraska shoreline than 30 to 50 yards. The Court finds the Defendant operated his boat and was stopped near the Nebraska shoreline.



Article I § 2 of the South Dakota Constitution defines the boundaries of the State. SDCL § 1-1-1 provides that South Dakota has jurisdiction within the established boundaries of South Dakota. Congress has the power to admit new states and establish state boundaries. U.S. Const., Art. IV, § 3; *Texas v. Louisiana*, 410 U.S. 702, 707, 93 S.Ct. 1215, 1218, 35 L.Ed.2d 646 (1973). States may enter into their own border agreements with the consent of Congress. U.S. Const., Art. I, § 10, Cl.3; see also *New Jersey v. New York*, 523 U.S. 767, 811, 118 S.Ct. 1726, 1750, 140 L.Ed.2d 993 (1998); *Commonwealth of Virginia v. State of Tennessee*, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893); *State of Florida v. State of Georgia*, 58 U.S. 478, 15 L.Ed. 181 (1854). “While contractual in nature, an interstate compact is not just a contract but also a federal statute enacted by Congress that preempts contrary state law.” *Texas v. New Mexico*, 602 U.S. 943, 949-50, 144 S.Ct. 1756, 1762, 219 L.Ed. 539 (2024)(internal citations and quotations omitted). “Once Congress gives its stamp of approval, an interstate compact becomes the law of the land, much like any other federal statute.” *Id.*

Indeed, congressional consent “transforms an interstate compact within [the Compact] Clause into a law of the United States,” *Cuyler v. Adams*, 449 U.S. 433, 438, 101 S.Ct. 703, 706, 66 L.Ed.2d 641 (1981); accord, *Texas v. New Mexico*, 462 U.S. 554, 564, 103 S.Ct. 2558, 2565, 77 L.Ed.2d 1 (1983). Just as if a court were addressing a federal statute, then, the “first and last order of business” of a court addressing an approved interstate compact “is interpreting the compact.” *Id.*, at 567–568, 103 S.Ct., at 2566–2567. “[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms,” *Id.*, at 564, 103 S.Ct., at 2565, no matter what the equities of the circumstances might otherwise invite. See *Arizona v. California*, 373 U.S. 546, 565–566, 83 S.Ct. 1468, 1480–1481, 10 L.Ed.2d 542 (1963)(“[C]ourts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress”); *Washington v. Oregon*, 211 U.S. 127, 135, 29 S.Ct. 47, 49, 53 L.Ed. 118 (1908) (noting that Congress had established the boundary between Washington and Oregon in the middle of the north channel, and that “[t]he courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel,” even though changes in the waterway over the course of time seemed to indicate the equity of altering the boundary line); cf. *New Jersey v. Delaware*, 291 U.S. 361, 385, 54 S.Ct. 407, 415–416, 78 L.Ed. 847 (1934); *Maryland v. West Virginia*, 217 U.S., at 46, 30 S.Ct., at 279–280.

*New Jersey v. New York*, 523 U.S. 767, 811, 118 S.Ct. 1726, 1750, 140 L.Ed.2d 993 (1998).

South Dakota and Nebraska entered into a boundary compact (“Compact”) and it was approved by Congress on November 28, 1989. 101 P.L. 183; 103 Stat. 1328. The Compact is also codified at SDCL § 1-2-8. The Compact provides that “the permanent compromise boundary line between said counties of the states shall be fixed at the centerline of the designed channel of the Missouri River (the westerly channel adjacent to Section 5, Township 29 North, Range 7 East of the 6th P.M. shall be considered the main channel).” SDCL § 1-2-8 (Article II(a)).

The State argues South Dakota has jurisdiction over the entire Missouri River based on 33 U.S.C.A. § 11 and SDCL §§ 41-15-2, 42-8-67. 33 U.S.C.A. § 11 provides:

The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters

forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917.

This law does not create a compact between South Dakota and Nebraska. Rather, it grants consent by Congress for two or more states to enter into a compact to establish concurrent jurisdiction. There is no evidence showing that South Dakota and Nebraska entered into a compact for concurrent jurisdiction over the Missouri River. Further, although SDCL §§ 41-15-2 and 42-8-67 show a willingness by the South Dakota Legislature to enter into such compact with our surrounding states, there appears to be no reciprocal Nebraska legislation evincing an intent to form a compact. One party alone cannot form a contract. Interestingly, and by way of comparison, 33 U.S.C.A. § 11 does create a compact between South Dakota and Minnesota.

Further, although SDCL §§ 41-15-2 and 42-8-67 provide for concurrent jurisdiction, they are preempted by the Compact, since it is federal law. *See Texas, supra*, 602 U.S. 943. Since the South Dakota statutes are preempted by federal law, the Court will not utilize the canons of statutory construction. Moreover, the identified purposes of the Compact include:

*“(2) to avoid multiple exercise of sovereignty and jurisdiction including matters of taxation, judicial and police powers and exercise of administrative authority; (3) to encourage settlement and disposition of pending litigation and criminal proceedings and avoid or minimize future disputes and litigations; and ... that the common boundary between said counties be established within the confines of the Missouri River and both states shall continue to have access to and use of the waters of the river.”*

SDCL § 1-2-8 (Article I(b)) (emphasis added).

The State further argued that South Dakota has jurisdiction over the entirety of the Missouri River based on *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935) and *Commonwealth of Massachusetts v. State of New York*, 271 U.S. 65, 46 S.Ct. 357, 70 L.Ed. 838 (1926). These cases both recognize that,

*[T]he dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership.*

*Oregon* at 14; *Massachusetts* at 88. The issue presented in both cases was whether the title to the soil underneath the waters was transferred to the state when it was admitted to the Union and this question turned on whether the waters were navigable or non-navigable. These cases and their analysis are irrelevant to these proceedings because the question before the Court does not depend on whether title passed from the federal government to South Dakota when it was admitted to the Union. As previously stated, South Dakota and Nebraska agreed that the state boundary is “the centerline of the designed channel of the Missouri River.” SDCL § 1-2-8 (Article II(a)).

The Court recognizes that law enforcement may well have difficulty in enforcing regulations on the Missouri River based on the comprise boundary. However equitable it may seem, the Court does not have the authority to extend the boundary further than what both states have agreed upon. *See New Jersey, supra*, 523 U.S. at 811. Congress has granted approval for the states to enter in compacts to address jurisdictional issues with river boundaries. 33 U.S.C.A. § 11. However, this must be accomplished by the legislative and executive branches of our government.

The Defendant put forth evidence establishing that the arrest and observation of boating occurred very close to the Nebraska shore. The Court conclusively finds that this necessarily occurred to the south of the centerline of the designed channel of the Missouri River. The State did not submit any evidence establishing that the relevant events occurred to the north of the centerline of the designed channel of the Missouri River. The Court further notes the State has the burden to establish jurisdiction. *See Osborn*, 917 F.2d at 730. Since the events occurred inside the border of Nebraska, that establishes that Union County, South Dakota does not have subject matter jurisdiction in this case. "When the court discovered it lacked subject matter jurisdiction, it correctly concluded that it must end its inquiry and dismiss the case based on the motion to dismiss made pursuant to SDCL § 15-6-12(b)(1)." *Alone* at ¶ 20. Based on the foregoing analysis the Defendant's Motion to Dismiss is granted. The Defendant is directed to submit written findings of fact and conclusions of law in accordance with this ruling within 10 business days and also submit an Order Dismissing the Information. This memorandum opinion shall be incorporated into the findings of fact and conclusions of law.

Sincerely,

A handwritten signature in black ink, appearing to be 'KS' or similar, written in a cursive style.

Judge Sorensen



STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF UNION )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA )  
Plaintiff, )  
 )  
vs. )  
 )  
GARY D. OGDEN, JR., )  
Defendant. )

63CRI24-000363

**NOTICE OF APPEAL**

To: GARY D. OGDEN, JR., Defendant; and  
Jacklyn Fox, Attorney for Defendant.

Please take notice that the State of South Dakota, the Department of Game, Fish and Parks, appeals to the Supreme Court of South Dakota from the Court's FFCL and Order Granting Motion to Dismiss, in whole, filed on January 14, 2025.

Dated this 22<sup>nd</sup> day of January, 2025.

/s/ Nick Michels

Nick Michels, General Counsel  
South Dakota Department of  
Game, Fish and Parks  
4500 S. Oxbow Ave.  
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605 773-2750  
[nick.michels@state.sd.us](mailto:nick.michels@state.sd.us)

## CERTIFICATE OF SERVICE

---

Nick Michels, counsel for the State of South Dakota, Department of Game, Fish and Parks, hereby certifies that on January 22<sup>nd</sup>, 2025, a true and correct copy of the foregoing Notice of Appeal was served upon the following electronically via Odyssey File and Serve:

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/s/ Nick Michels

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

FEB 10 2025

*Shirley A. Jensen*  
Clerk

\* \* \* \*

STATE OF SOUTH DAKOTA,  
Plaintiff and Appellant,

vs.

GARY DEAN OGDEN, JR.,  
Defendant and Appellee.

ORDER DISMISSING APPEAL

#30984

It appearing to the Court that the appeal taken in the above-entitled matter is from an order of the magistrate court granting a motion to dismiss, and under SDCL 23A-32-5 there is no right of direct appeal from a magistrate order, now, therefore, it is

ORDERED that the appeal is hereby dismissed.

DATED at Pierre, South Dakota, this 10th day of February, 2025.

BY THE COURT:

ATTEST:

*[Signature]*  
Clerk of the Supreme Court  
(SEAL)

*[Signature]*  
Steven R. Jensen, Chief Justice

STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF UNION )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  
Plaintiff,  
vs.  
GARY DEAN OGDEN,  
Defendant.

63CR124-00363

NOTICE OF ENTRY OF ORDER

TO: The above-named defendant, Gary Dean Ogden, and Jacklyn M. Fox, his attorney.

PLEASE TAKE NOTICE that the Order granting your Motion to Dismiss in the above-entitled action was entered by the Court and filed with the Clerk on January 14<sup>th</sup>, 2025.

Dated this 18<sup>th</sup> day of February, 2025.

*/s/ Nick Michels*

Nick Michels  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon the following individual on February 18<sup>th</sup>, 2025:

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/s/ Nick Michels  
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SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

FEB 27 2025

*Shirley A. Johnson-Lee*  
Clerk

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,  
  
Plaintiff and Appellant,  
  
vs.  
  
GARY DEAN OGDEN,  
  
Defendant and Appellee.

Case No.

APPEAL FROM THE MAGISTRATE COURT  
FIRST JUDICIAL CIRCUIT  
UNION COUNTY, SOUTH DAKOTA

THE HONORABLE KASEY SORENSEN  
Presiding Magistrate Court Judge

**PETITION FOR PERMISSION TO TAKE DISCRETIONARY APPEAL**

ATTORNEYS FOR APPELLANT

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ATTORNEY FOR APPELLEE

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Plaintiff, the State of South Dakota, by and through the undersigned and pursuant to SDCL § 23A-32-5, hereby petitions the Court for permission to take a discretionary appeal of the Magistrate court's Order Granting Defendant's Motion to Dismiss.

#### STATEMENT OF FACTS

On July 27, 2024, South Dakota Conservation Officer Josh Vandebosch initiated a stop of the Defendant's boat on the Missouri River. Officer Vandebosch subsequently conducted an investigation and the Defendant was arrested for the public offense of operating a boat under the influence in violation of SDCL § 42-8-45. The Defendant was charged by an Information on August 23, 2024, with the following: Boating Under Influence in violation of SDCL § 42-8-45(1) or (2); Boat Lights Required in violation of SDCL § 32-3A-1(1); Obstructing Law Enforcement in violation of SDCL § 22-11-6; and Resisting Arrest in violation of SDCL § 22-11-4(2). The Information was filed in Union County and alleged that the listed charges occurred in Union County. The Information was valid on its face.

On September 23, 2024, the Defendant filed a Motion to Dismiss For Lack Of Jurisdiction pursuant to SDCL § 23A-8-2. The Defendant alleged that Officer Vandebosch's initial stop took place on the Nebraska side of the Missouri River. The State filed a brief in response, arguing that the motion should be denied because the Information was valid on its face and noted that the magistrate court may not inquire into the sufficiency of the evidence. The State further argued South Dakota has concurrent jurisdiction over the Missouri River. The Defendant filed a reply brief.

A hearing on the Defendant's Motion was held on November 15, 2024. On January 13, 2025, the court granted the Defendant's Motion to Dismiss and subsequently entered Findings of

Fact and Conclusions of Law. The State timely objected to the proposed Findings and Conclusions. Notice of Entry was served on February 18<sup>th</sup>, 2025.

#### STATEMENT OF THE QUESTIONS

1. Does SDCL § 23A-8-2 allow the trial court to inquire into the legality or sufficiency of the evidence upon which an information is based when considering a Motion to Dismiss?
2. Does the South Dakota-Nebraska Boundary Compact, codified in SDCL § 1-2-8 federally preempt SDCL §§ 41-15-2 and 42-8-67 establishing the State of South Dakota's concurrent jurisdiction over the boundary waters of the state with the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa, and Nebraska?

#### RELIEF SOUGHT

1. The State asks this Court to grant the State's petition and reverse the magistrate court's order of dismissal.

#### STATEMENT OF THE LAW IN SUPPORT OF THE REQUEST

With respect to the first question, SDCL § 23A-8-2 provides the specific, limited grounds upon which a trial court may dismiss an information. One such ground, and the one pertinent to this petition, is in subsection (7) which states "[w]hen the grand jury which filed the indictment had no legal authority to inquire into the offense charged because it was not within the jurisdiction of the grand jury or because the court was without jurisdiction of the offense charged." This Court has stated that "[w]hether a court has subject matter jurisdiction is determined by the indictment." *State v. Sanders*, 2016 S.D. 32, ¶ 5, 878 N.W.2d 105, 107. However, "[t]he trial court cannot inquire into the legality or sufficiency of the evidence upon which an indictment is based when considering a dismissal under SDCL § 23A-8-2." *State v. Springer-Ertl*, 1997 S.D. 128, ¶ 8, 570 N.W.2d 39, 41. Rather, "[a]n indictment returned by a



legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” *State v. Cameron*, 1999 S.D. 70, 596 N.W.2d 49, 52.

With respect to the second question, the South Dakota-Nebraska Boundary Compact, codified in SDCL § 1-2-8, states in relevant part that

“On the effective date of this compact, the state of South Dakota hereby relinquishes to the state of Nebraska all sovereignty over lands lying on the Nebraska side of said compromise boundary and the state of Nebraska hereby relinquishes to the state of South Dakota all sovereignty over lands lying on the South Dakota side of the compromise boundary.”

However, no mention is made of the waters overlying the lands on either side of the compromise boundary.

“While contractual in nature, an interstate compact is not just a contract, but also a federal statute enacted by Congress that preempts contrary state law.” *Texas v. New Mexico*, 602 U.S. 943, 949–50, 144 S. Ct. 1756, 1762, 219 L. Ed. 2d 539 (2024) (citations omitted). However, when a compact does not address a particular issue, courts must consider background principles of law that would have informed the parties’ understanding when they entered the compact. *New York v. New Jersey*, 598 U.S. 218, 224, 143 S. Ct. 918, 924, 215 L. Ed. 2d 208 (2023). One relevant, background principle of law applicable in the present case is the principle that “Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing...transfer of sovereignty itself.” *United States v. State of Oregon*, 295 U.S. 1, 14, 55 S. Ct. 610, 615, 79 L. Ed. 1267 (1935). The South Dakota-Nebraska Boundary Compact does not relinquish either state’s jurisdiction over the waters overlying the lands on either side of the compromise boundary.

Additionally, 33 U.S.C.A. § 11 states in relevant part that,

"The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends."

The plain language of 33 U.S.C.A. § 11 makes clear that even one state of those listed can determine and settle jurisdiction over offenses arising upon the waters forming its boundary lines.

South Dakota determined and settled jurisdiction over the waters forming the boundary lines of the state in SDCL § 41-15-2, which states that,

"For the purpose of enforcing any of the laws under this title and the rules promulgated pursuant to this title, the courts of this state, and the conservation officers of this state, have jurisdiction over the entire boundary waters of the state, to the furthestmost shore line. Concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa, and Nebraska over all boundary waters between such states and this state, and the whole of such boundary waters, is hereby recognized."

South Dakota also determined and settled jurisdiction over the waters forming the boundary lines of the state in SDCL § 42-8-67, which states that,

"For the purposes of this chapter, the courts and the conservation officers of this state have jurisdiction over the entire boundary waters of this state to the furthestmost shorelines. The concurrent jurisdiction of the courts and administrative officers of the adjoining states of Minnesota, North Dakota, Montana, Wyoming, Iowa and Nebraska over all boundary waters between those states and this state, is hereby recognized."

Finally, SDCL § 23A-16-10 establishes venue in Union County for the criminal offenses:

"When an offense is committed in this state on a boundary water between this state and another state, the venue is in any county which bounds on the body of water. Upon a showing of good cause, the court in which such prosecution is commenced may order the case transferred to any other county bounding on the

body of water as is more appropriate under the general venue provisions of § 23A-16-5."

This Court has consistently stated that "[w]here statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable." *State v. Bettelyoun*, 2022 S.D. 14, ¶ 29, 972 N.W.2d 124, 133.

#### REASONS WHY THE APPEAL SHOULD BE ALLOWED

The magistrate court's dismissal of the Information, based upon SDCL § 23A-8-2, merits review by this Court. The ruling, if allowed to stand, would require evidentiary hearings on the factual sufficiency of any information where the location of the offense is challenged.

Additionally, if the magistrate court's ruling were allowed to stand it would make enforcement of South Dakota's relevant laws under both Title 41 and Title 42 nearly impossible for the state's Conservation Officers on the boundary waters. The boundary has changed over the years as the river has changed its course, making it difficult for law enforcement to determine the exact boundary line. The Magistrate Court's ruling, in essence, repeals SDCL §§ 41-15-2 and 42-8-67.

For these foregoing reasons, the State requests the Court to grant its Petition.

Dated this 27<sup>th</sup> day of February, 2025.

/s/Nick Michels

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic transmission upon the following individual on February 27<sup>th</sup>, 2025:

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/s/Nick Michels

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**Attachments**

Copy of Order sought to be reviewed .....	009
Findings of Fact and Conclusions of Law .....	010
Notice of Entry of Order .....	013

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF UNION	)	FIRST JUDICIAL CIRCUIT
<hr/>		
STATE OF SOUTH DAKOTA	)	
Plaintiff,	)	63CRI24-363
	)	
	)	<b>ORDER GRANTING</b>
v.	)	<b>MOTION TO DISMISS</b>
	)	
GARY DEAN OGDEN, JR.	)	
Defendant.	)	

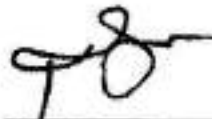
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NOW, on this 13th day of January, 2025, the Court having before it the Defendant's Motion to Dismiss, having entered Findings of Fact and Conclusions of Law, and being fully advised in the matters previously stated, **it is hereby**

**ORDERED**, that the Information filed on August 23, 2024, is dismissed.

1/13/2025 12:28:10 PM

BY THE COURT:



Hon. Kasey Sorensen, Magistrate Judge

Attest:  
Bum, Laurie  
Clerk/Deputy



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF UNION	)	FIRST JUDICIAL CIRCUIT

---

STATE OF SOUTH DAKOTA	)	
Plaintiff,	)	63CRI24-363
	)	
	)	<b>FINDINGS OF FACT AND</b>
v.	)	<b>CONCLUSIONS OF LAW</b>
	)	
GARY DEAN OGDEN, JR.	)	
Defendant.	)	

---

This matter came before the Court on November 15, 2024 for hearing on Defendant's *Motion to Dismiss for Lack of Jurisdiction*. Plaintiff appeared by legal counsel Special Assistant Attorney General Nick Michels, and Defendant appeared by legal counsel Jacklyn Fox and John Hines. Evidence and legal argument were presented at the hearing. Following presentation of the evidence, the Court enters the following *Findings of Fact and Conclusions of Law*:

#### **FINDINGS OF FACT**

1. This Court's *Memorandum Opinion*, dated December 6, 2024, is incorporated herein by this reference.
2. Any finding of fact more properly designated as a conclusion of law shall be treated as such.
3. South Dakota and Nebraska entered into an interstate boundary compact ("Compact"), approved by the United States Congress on November 28, 1989.
4. The Compact describes a compromise boundary line between Union County, South Dakota and Dakota County, Nebraska, fixed at the centerline of the designed channel of the Missouri River.
5. On July 27, 2024, South Dakota wildlife conservation Officer Josh Vandembosch initiated

a stop of the Defendant's boat near the Nebraska shoreline of Dakota County, Nebraska.

6. Defendant presented evidence corroborating that the initial observation and stop of Defendant's boat occurred near the Nebraska shoreline.
7. Plaintiff presented no evidence that the initial observation and stop of the Defendant's boat occurred on the South Dakota side of the centerline of the designed channel of the Missouri River.
8. Officer Vandebosch's initial observation and stop of the Defendant's boat occurred on the Nebraska side of the centerline of the designed channel of the Missouri River.

### CONCLUSIONS OF LAW


1. This Court's *Memorandum Opinion*, dated December 6, 2024, is incorporated herein by this reference.
2. Any conclusion of law more properly designated as a finding of fact shall be treated as such.
3. Defendant's *Motion to Dismiss for Lack of Jurisdiction* may be considered by the Court prior to the State's case-in-chief. See *State v. Medicine Eagle*, 2013 S.D. 60, ¶38, 835 N.W.2d 886, 900 ("Jurisdictional issues can be raised at any time and determination of jurisdiction is appropriate.")
4. Plaintiff has the burden to establish that the Court has jurisdiction. See *Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990).
5. To determine whether the Court has jurisdiction, the Court is authorized to consider evidence. See *Alone v. Brunsch, Inc.*, 2019 S.D. 41, ¶12, 931 N.W.2d 707, 711 ("To resolve the question [of jurisdiction], the court may hold hearings, consider live testimony, or review affidavits and documents.")



6. The Compact adopted by South Dakota and Nebraska, and approved by Congress, is a federal statute that preempts contrary state law. *Texas v. New Mexico*, 602 U.S. 943, 949–50, 144 S.Ct. 1756, 1762, 219 L.Ed. 539 (2024)(internal citations and quotations omitted).
7. The compromise boundary described in the Compact establishes the legal boundary between Union County, South Dakota, and Dakota County, Nebraska, in part “to avoid multiple exercise of sovereignty and jurisdiction including matters of taxation, judicial and police powers . . . [and] to encourage settlement and disposition of pending litigation and criminal proceedings and avoid or minimize future disputes and litigations[.]” SDCL § 1-2-8 (Article 1(b)).
8. Because Officer Vandebosch’s initial observation and stop of the Defendant’s boat occurred on the Nebraska side of the Compact compromise boundary, Union County, South Dakota does not have subject matter jurisdiction in this case.
9. Because this Court lacks subject matter jurisdiction, the case must be dismissed.

1/13/2025 12:25:51 PM

BY THE COURT:



Hon. Kasey Sorensen,

Attest:  
Baum, Laurie  
Clerk/Deputy



STATE OF SOUTH DAKOTA )	IN CIRCUIT COURT
: SS	
COUNTY OF UNION )	FIRST JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,  <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> GARY DEAN OGDEN,  <div style="text-align: right;">Defendant.</div>	63CRI24-00363  NOTICE OF ENTRY OF ORDER

TO: The above-named defendant, Gary Dean Ogden, and Jacklyn M. Fox, his attorney.

PLEASE TAKE NOTICE that the Order granting your Motion to Dismiss in the above-entitled action was entered by the Court and filed with the Clerk on January 14<sup>th</sup>, 2025.

Dated this 18<sup>th</sup> day of February, 2025.

/s/ Nick Michels

Nick Michels  
 Special Assistant Attorney General  
 South Dakota Game, Fish and Parks  
 523 East Capitol Ave.  
 Pierre, SD 57501  
[Nick.Michels@state.sd.us](mailto:Nick.Michels@state.sd.us)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon the following individual on February 18<sup>th</sup>, 2025:

Jacklyn M. Fox  
329 Pierce Street, Ste. 200  
P.O. Box 27  
Sioux City, Iowa 51102  
[jfox@craryhuff.com](mailto:jfox@craryhuff.com)

/s/ Nick Michels  
Nick Michels  
Special Assistant Attorney General  
South Dakota Game, Fish and Parks  
523 East Capitol Ave.  
Pierre, SD 57501  
[Nick.Michels@state.sd.us](mailto:Nick.Michels@state.sd.us)

STATE OF SOUTH DAKOTA

in the Supreme Court

I, Shirley A. Jameton-Feyer, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this

4 day of April, 2025

*Shirley A. Jameton-Feyer*  
Clerk of the Supreme Court  
Deputy

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

\* \* \* \*

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

APR 04 2025

*Shirley A. Jameton-Feyer*  
Clerk

STATE OF SOUTH DAKOTA,  
Plaintiff and Petitioner,

vs.

GARY DEAN OGDEN, JR.,  
Defendant and Respondent.

ORDER GRANTING PETITION FOR  
DISCRETIONARY APPEAL

#31010

Petitioner having served and filed a petition for allowance of appeal from an order of the Magistrate Court of the First Judicial Circuit within and for the County of Union, South Dakota, filed January 13, 2025. Respondent served and filed a response thereto. The Court having considered the petition and response and being fully advised in the premises, it is now

ORDERED that the petition for allowance of appeal from said intermediate order is granted.

IT IS FURTHER ORDERED that the order for transcript, if any, be made upon receipt of this order and the schedule for briefing follow the schedule set forth in SDCL 15-26A-75. If no order for transcript is made, the forty-five-day period for service and filing of the appellant's brief shall commence to run as of the date of this order.

DATED at Pierre, South Dakota this 4th day of April, 2025.

BY THE COURT:

ATTEST

*Shirley A. Jameton-Feyer*  
Clerk of the Supreme Court  
(SEAL)

(Chief Justice Steven R. Jensen recused.)  
(Justice Scott P. Myren dissents.)

*Steven R. Jensen*  
Steven R. Jensen, Chief Justice

PARTICIPATING: Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney, and Scott P. Myren.

APP 29

**Clerk of the Supreme Court**

500 EAST CAPITOL AVENUE  
PIERRE, SOUTH DAKOTA 57501-5070

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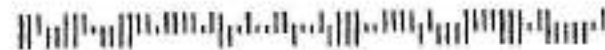
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1       STATE OF SOUTH DAKOTA       )               IN CIRCUIT COURT  
2       COUNTY OF UNION               )       FIRST JUDICIAL CIRCUIT  
3       \*\*\*\*\*  
4       STATE OF SOUTH DAKOTA,       )  
5               Plaintiff,               )               63CRI24-363  
6       v.                               )               Motion to Dismiss  
7       GARY OGDEN, Jr.,               )               Hearing  
8               Defendant.               )  
9       \*\*\*\*\*  
10               BEFORE THE HONORABLE KASEY SORENSEN,  
11               MAGISTRATE COURT JUDGE,  
12       In Elk Point, South Dakota, November 15, 2024, FTR  
13       \*\*\*\*\*  
14       APPEARANCES:  
15       FOR PLAINTIFF:               Nicholaus Michels  
16               Special Assistant Attorney General  
17                               Sioux Falls, SD 57106  
18  
19       FOR DEFENDANT:               Jacklyn Fox  
20                               Attorney at Law  
21                               Sioux City, IA 51101  
22  
23                               John Hines  
24                               Attorney at Law  
25                               Sioux City, IA 51101

1 video that we are floating past Miners  
2 Bend. So, based on my training and  
3 experience how long it takes to float, I  
4 would put it within a mile upstream of  
5 Miners Bend.

6 Q. Okay. Based on your recollection --  
7 Have you had a chance to review your  
8 video?

9 A. I have.

10 Q. Okay. Based on your recollection  
11 and what's seen in the video, is it true  
12 that you um -- told Mr. Ogden to bring  
13 the boat more towards the middle of the  
14 river?

15 A. To bring him away from the rocks,  
16 yes.

17 Q. Okay. So your testimony here  
18 today is that he was close to some  
19 rocks; is that right?

20 A. He was in the -- on the -- I mean,  
21 yeah, he was near rocks, but again that  
22 is very common for us. If we are even  
23 too close to rocks at all, we ask them to  
24 go more towards or away from the rocks so  
25 that way we are not bumping over the

1 rocks when we are doing the check.

2 Q. Okay. And where were those rocks  
3 located? Were they on the South Dakota  
4 side or the Nebraska side?

5 MR. MICHELS: Again, objection. Calls  
6 for legal conclusion.

7 THE COURT: Sustained.

8 MS. FOX: Would those rocks have touched  
9 the Nebraska land border?

10 THE WITNESS: The rocks in question  
11 would be the Nebraska border, yes.

12 MS. FOX: Your Honor, may I take a brief  
13 moment to look at additional  
14 paragraphs --

15 THE COURT: -- yes.

16 MS. FOX: -- to determine further  
17 questioning?

18 During the initial stop of my  
19 client, how close was his boat to the --  
20 those rocks that we previous discussed?

21 THE WITNESS: Again, I don't have an  
22 exact, but rewatching my body cam, I  
23 would put it at 50 yards. Thirty to  
24 fifty yards, I think is what I initially  
25 said. Again, I don't have an exact,





## PRELIMINARY STATEMENT

The Appellant's petition for discretionary appeal is untimely and must be dismissed. Furthermore, the petition was filed without reasonable grounds and should be considered vexatious, and this Court should impose terms as the court deems proper, including but not limited to payment of the Appellee's reasonable attorneys' fees incurred in responding to the vexatious petition.

## RELEVANT FACTS AND ARGUMENT

### **I. Appellant's Petition was filed later than ten (10) days after written notice of entry of the judgment or order of the Magistrate and is thus untimely.**

An appeal under SDCL § 23A-32-5 must be taken within ten (10) days after written notice of entry of the judgment or order being appealed. SDCL § 23A-32-6. Magistrate Judge Kasey Sorensen filed the "Order Granting Motion to Dismiss" and "Findings of Fact and Conclusions of Law" on January 13, 2025. (See, Attachments to Appellant's Petition, pp. 009-010). "Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey system or served electronically through the Odyssey system are presumed served upon all attorneys of record at the time of submission." SDCL § 15-6-5(b)(2) (See also, attached Notification of Events Filed, Appendix, p. 1). Furthermore, Magistrate Sorensen emailed attorneys Nick Michels and Jacklyn Fox on January 21, 2025, reiterating that an order dismissing the charges had been entered. (Email Communication, Appendix, p.2).

The Appellant filed the present petition on February 27, 2025. As attorney of record in the underlying case, the Appellant is *presumed by law* to have received the

Magistrate Judge's Order on January 13, 2025. Additionally, Appellant undoubtedly received the same email notification regarding the entry of the Order that Appellee's attorneys received on January 14, 2025. Even if those two events escaped the Appellant's attention, Magistrate Sorensen provided a third written notice via her January 21, 2025 email that the Order dismissing the case had been filed.

The facts establishing untimeliness of the appeal in this case are nearly identical to those in *State v. Sharpfish*, 2018 S.D. 63, ¶¶ 12–13, 917 N.W.2d 21, 23. In that case, the State admitted that an email from the circuit court constituted notice of entry of the order for purposes of the deadline to apply for discretionary review. *Id.* Because the state's application for discretionary review was outside the ten (10) day limit imposed by statute, the Court ruled the appeal "must be dismissed." *Id.* at ¶14.

Here, Appellant presumptively received the Order January 13, undoubtedly received an email notification on January 14, and unquestionably received an email notification from the Magistrate Judge on January 21. Even generously giving the Appellant the latest date of January 21, 2025, the deadline to petition for discretionary review would have been January 31, 2025. The Appellant's petition was filed 27 days late.

Apparently realizing its mistake, Appellant filed a document on February 18, 2025, titled "Notice of Entry of Order". This document does not, and cannot extend the statutory deadline for the prosecution to appeal—if the prosecution could simply extend the deadline to appeal in this manner, after all attorneys of record have received not one, or two, but three written notifications that the order has been entered, then the statutory time limit would be rendered meaningless.

Based on the foregoing, the Appellee respectfully requests that this Court dismiss the Appellant's petition for discretionary review.

## **II. Appellant's facially untimely Petition is vexatious.**

"In any case where the Supreme Court is satisfied that a petition for allowance of an appeal from an intermediate order has been filed without reasonable grounds, and that the filing of the same may be fairly considered vexatious, the court may impose upon the petitioner such terms as the court deems proper." SDCL § 15-26A-21.

The Appellant State of South Dakota, acting by and through Special Attorneys General, should be held to the highest standards and should be expected to know and follow the rules of appellate procedure. Here, the Appellant filed an obviously untimely petition for discretionary review and attempted to hide its untimeliness by filing an extraneous "Notice of Entry of Order." Under those facts and circumstances, Appellee respectfully requests this Court to deem the petition vexatious and to impose terms against the Appellant as the Court deems proper.

## **CONCLUSION**

Because the Appellant's Petition For Permission to Take Discretionary Appeal is untimely, the Court must dismiss the appeal. The Appellee respectfully requests the Court impose upon the Appellant such terms as the Court deems proper, including but not limited to the payment of Appellee's reasonable attorneys' fees incurred in responding to the Petition.

Respectfully submitted,

CRARY HUFF, P.C.

BY /s/John M. Hines  
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ATTORNEYS FOR APPELLANT

## **APPENDIX**

Email Notification of Events filed from NoReply_UJS@ujs.state.sd.us.....	1
Email from Magistrate Sorensen to Nick Michels and Jacklyn Fox.....	2

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of March, 2025, I electronically filed the foregoing with the Clerk of the Court using the Odyssey File & Serve system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system as follows:

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pbachand@pirlaw.com  
**Attorneys for Appellant**

/s/ John M. Hines  
John M. Hines

**John Hines**

---

**From:** NoReply\_UJS@ujs.state.sd.us  
**Sent:** Tuesday, January 14, 2025 11:17 AM  
**To:** John Hines  
**Cc:** Nancy Ford  
**Subject:** Notification of Events Filed



**63CRI24-000363**

STATE OF SOUTH DAKOTA vs. GARY DEAN OGDEN,  
JUNIOR  
Criminal Circuit  
Union  
Sorensen, Kasey

**UPDATE: ORDER**

GRANTING MOTION TO DISMISS  
10:46:14 AM

**UPDATE: ORDER TO WITHDRAW AS  
COUNSEL**

10:47:31 AM

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## John Hines

---

**From:** Jacklyn Fox  
**Sent:** Tuesday, January 21, 2025 11:19 AM  
**To:** John Hines; Mike Schmiedt  
**Cc:** Stephanie Heger  
**Subject:** FW: Gary Ogden CRI24-363

EXHIBIT

2

### Jacklyn Fox

Attorney

PHONE: 712.224.7588

EMAIL: [jfox@craryhuff.com](mailto:jfox@craryhuff.com)

ADDRESS: 329 Pierce Street, Suite 200  
Sioux City, IA 51101

CRARY HUFF

ATTORNEYS AT LAW



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**From:** Sorensen, Mag Judge Kasey <[Kasey.Sorensen@uj.s.state.sd.us](mailto:Kasey.Sorensen@uj.s.state.sd.us)>  
**Sent:** Tuesday, January 21, 2025 11:18 AM  
**To:** Michels, Nick <[Nick.Michels@state.sd.us](mailto:Nick.Michels@state.sd.us)>; Jacklyn Fox <[jfox@craryhuff.com](mailto:jfox@craryhuff.com)>  
**Cc:** Buum, Laurie <[Laurie.Buum@UJS.STATE.SD.US](mailto:Laurie.Buum@UJS.STATE.SD.US)>  
**Subject:** RE: Gary Ogden CRI24-363

Good morning, since I've entered an order dismissing all charges the file can be closed with no further court dates. The State may file their notice of appeal in accordance with the applicable statutes.

Kasey Sorensen  
Magistrate Judge, First Judicial Circuit  
410 Walnut St., Suite 201  
Yankton, SD 57078  
605-668-3614  
605-668-5499 (fax)

**From:** Michels, Nick <[Nick.Michels@state.sd.us](mailto:Nick.Michels@state.sd.us)>  
**Sent:** Tuesday, January 21, 2025 10:46 AM  
**To:** Sorensen, Mag Judge Kasey <[Kasey.Sorensen@uj.s.state.sd.us](mailto:Kasey.Sorensen@uj.s.state.sd.us)>; Jacklyn Fox <[jfox@craryhuff.com](mailto:jfox@craryhuff.com)>  
**Cc:** Buum, Laurie <[Laurie.Buum@UJS.STATE.SD.US](mailto:Laurie.Buum@UJS.STATE.SD.US)>  
**Subject:** Re: [EXT] Gary Ogden CRI24-363

Good morning Court and Counsel,

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

---

STATE OF SOUTH DAKOTA,	)	
	)	Appeal No. 31010
Appellant,	)	
	)	
vs.	)	
	)	
GARY DEAN OGDEN, JR.	)	
	)	
Appellee.	)	
	)	

---

Appeal from the Magistrate Court, First Judicial Circuit  
Union County, South Dakota  
The Honorable Kasey Sorensen  
Magistrate Judge

---

**APPELLANT'S REPLY BRIEF**

---

Petition for Permission to Take Discretionary Appeal Filed on February 27, 2025

---

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[jseveryn@pirlaw.com](mailto:jseveryn@pirlaw.com)

*Attorneys for Plaintiff and Appellant*

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## ARGUMENT

Appellant hereby incorporates all arguments set forth in the initial brief and further provides the following in support of its positions.

### A. JURISDICTION EXISTS FOR THIS APPEAL.

Ogden argues that the State's petition for discretionary appeal was not timely filed and as such this Court lacks jurisdiction to hear this appeal. In furtherance of that argument, Ogden states that "The facts establishing untimeliness of the appeal in this case are nearly identical to those in *State v. Sharpfish*, 2018 S.D. 63, ¶¶ 12-13, 917 N.W.2d 21, 23." See Appellee's Brief, Pg. 6. The facts here differ from those in *Sharpfish*. The State in *Sharpfish*, argued that SDCL § 23A-32-5 permitted an appeal from a circuit court's remand order. In addressing that issue, this Court in *Sharpfish* held: "Because we determine that no appeal can lie from the circuit court's remand order, we do not reach whether the encounter between Sharpfish and Officer Loen constituted a search and seizure." *Sharpfish*, ¶ 10, 917 N.W.2d at 22-23. This Court went on to state in *Sharpfish*:

"However, from our review of the record, an issue arises regarding the timeliness of the State's appeal. The State, in its July 5, 2017 petition for intermediate appeal, attached an email from the circuit court dated June 19, 2017. The State acknowledged the attachment as "constituting notice of entry of order."

*Sharpfish*, ¶ 12 at 23.

Based on those facts, this Court ultimately found the appeal in *Sharpfish* to be untimely, since the State appealed more than ten days after what the State apparently agreed to was the notice of entry of the order. *Sharpfish*, ¶¶ 12-13 at 23. Here, the State never stipulated or agreed that the magistrate court's Order Granting Motion to Dismiss

constituted the notice of entry of order required by SDCL § 23A-32-5. Instead, in its appeal to this Court, the State points to the Notice of Entry of Order filed by the State in order to comply with SDCL § 15-26A-15(3).

Ogden never filed a written notice of entry of order after the magistrate court's decision. Instead, Ogden relies upon SDCL § 15-26A-3(6) in support of his argument that a written notice of entry of order was served on the state. That argument is inconsistent with prior decisions of this Court. *See Porter v. Porter*, 1996 S.D. 6, ¶ 22, 542 N.W.2d 448, 452; *see also State v. Antuna*, 2024 S.D. 78, ¶ 15, 15 N.W.3d 439, 445 (wherein this Court determined there was insufficient evidence on the record to establish when the State was served with notice of entry, and the State's discretionary appeal was upheld). Moreover, this Court in *In the Matter of the Sales and Use Tax Refund Request of Media One, Inc.*, 1997 S.D. 17, 559 N.W.2d 875 addressed what constituted "written notice of entry" for purposes of SDCL § 15-26A-6. In that case, Media One argued that the time period for an appeal commenced upon the circuit court's "letter stating his reasons for reversal, accompanied by his judgment and findings of fact and conclusions of law." *Id.*, ¶ 6, at 876-77. Media One further argued that those documents constituted "written notice of entry" for purposes of SDCL § 15-26A-6. *Id.*, ¶ 6, at 876. The Court in that case held that "it is the duty of one party to serve the other with the written notice of entry of judgment. Judge Kean's mailings did not contain a written notice of entry of judgment, and he was not a party to this case." *Id.*, ¶ 7, at 877.

When that holding in *Media One* is applied here, Judge Sorensen's filing does not constitute written notice of entry of her order, and she was not a party to this case. As this Court is well aware, "A notice of entry of judgment gives to a party the power to set

running the time after which his adversary may not appeal and assures each party that the statutory period of time within which he may appeal does not commence to run until his adversary has given such notice.” *Kallstrom v. Marshall Beverages, Inc.*, 397 N.W.2d 647, 650 (S.D. 1986). Thus, when a written notice of entry is not filed the statutory period does not commence. *Kallstrom*, 397 N.W.2d at 650.

The language of SDCL § 23A-32-6 requiring a notice of entry of order is similar to that in SDCL § 15-26A-6. SDCL § 23A-32-6 provides that “[a]n appeal under §§ 23A-32-4 or 23A-32-5 must be taken within ten days after written notice of entry of the judgment or order[.]” SDCL § 15-26A-6 provides that “[a]n appeal from a judgment or order must be taken within thirty days after the judgment or order shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party.” Both statutes require a written notice of entry of order.

Likewise, in *Sudbeck v. Dale Electronics, Inc.*, 519 N.W.2d 63 (S.D.1994), this Court compared the notice required to commence the running of the time in which to appeal an administrative ruling pursuant to SDCL § 1-26-31 with that of SDCL § 15-26A-6. SDCL § 1-26-31 provides:

“An appeal shall be taken by serving a copy of a notice of appeal upon the adverse party, upon the agency, and upon the hearing examiner, if any, who rendered the decision, and by filing the original with proof of such service in the office of the clerk of courts of the county in which the venue of the appeal is set, within thirty days after the agency served notice of the final decision or, if a rehearing is authorized by law and is requested, within thirty days after notice has been served of the decision thereon. Failure to serve notice of the appeal upon the hearing examiner does not constitute a jurisdictional bar to the appeal.”

SDCL § 1-26-31. Sudbeck claimed that in order to start the time to appeal, a “Notice of Entry of Findings of Fact and Conclusions of Law and Order was necessary”. *Sudbeck*, at 66. The Court held that prescribed notice was not required by the language of SDCL §



1-26-31. *Id.*, at 66; *see also Havlik v. Havlik*, 2014 S.D. 84, ¶ 10, 857 N.W.2d 422, 425 (holding that knowledge of a court’s final judgment does not commence the time period in which to appeal absent the serving of a written notice of entry of order on the opposing party). The Court further noted in *Sudbeck* that “If the legislature wishes to revise SDCL § 1-26-31 to conform to civil practice and require notice of entry of judgment to commence the running of the time to perfect an administrative appeal, it may do so.” *Sudbeck*, at 67; SDCL § 15-26A-6.

Based upon the foregoing, the State’s appeal was timely, and this Court has jurisdiction to review and issue a ruling on the same.

**B. THE MAGISTRATE COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DISMISSED THE INFORMATION.**

Ogden claims that the magistrate court simply interpreted the law regarding South Dakota’s jurisdiction in boundary waters and did not inquire into the “legality or sufficiency of the evidence upon which the indictment<sup>1</sup> was based.” Appellee’s Brief, Pg. 8. Ogden also argues that the Magistrate Court did not consider whether the facts constituted the crime charged, or whether the facts were legally insufficient to constitute the crime.” *Id.* This argument ignores relevant portions of the underlying record, however.

More specifically, the magistrate court held an evidentiary hearing on November 15, 2024, over the State’s objection, at which time the court received the testimony of Officer Josh Vanden Bosch. SR 42-46, 56-78; T 3-7, ln. 23 (T 3) – ln. 2 (T-7) and T 17-39, ln. 20 (T 17) – ln. 4 (T 39); Appx. 25-53. The magistrate determined, based upon the

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<sup>1</sup> The underlying record reflects that the criminal charges were brought by complaint and a subsequent information.

testimony of Officer Vanden Bosch along with his body camera video received as an exhibit at the evidentiary hearing, that “the Defendant operated his boat and was stopped near the Nebraska shoreline.” SR 31; Appx. 55. The magistrate court then, in addressing Ogden’s underlying Motion to Dismiss, stated that “The Defendant’s motion asserts the Court does not have subject matter jurisdiction to hear this case because the events leading up to, and including the arrest, occurred in Nebraska.” SR 30; Appx. 54. Ogden’s assertion that the magistrate court did not inquire into the legality or insufficiency of the evidence upon which the indictment was based is clearly in error.

In furtherance of his argument, Ogden cites to *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900 (holding “[w]e have also determined [jurisdiction] to mean ‘whether there was power to enter upon the inquiry and not whether the determination by the court of a question of law or fact involved is correct.’”) (quoting *Janssen v. Tusha*, 68 S.D. 639, 643, 5 N.W.2d 684, 685 (1942)). In turning to *Janssen* for further context, however, this Court specifically held in *Janssen* that “[t]he test of jurisdiction is whether there was power to enter upon the inquiry and not whether the determination by the court of a question of law or fact involved is correct.” *Janssen*, 68 S.D. at 643, 5 N.W.2d at 685. In applying this test in *Janssen*, the court cited *Calhoun v. Bryant et. al.*, 28 S.D. 266, 133 N.W. 266, 269, to wit:

“So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a court had ‘jurisdiction’ to render only correct decisions, then, each time it made an erroneous ruling or decision, the court would be without jurisdiction, and the ruling itself void. Such is not the law, and it matters not what may be the particular question presented for adjudication, whether it relate to the jurisdiction of the court itself, or affects substantive rights of the parties litigating; it cannot be held that the ruling or decision itself is without jurisdiction, or is beyond the jurisdiction of the

court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction.”

*Calhoun v. Bryant et. al.*, 28 S.D. 266, 133 N.W. 266, 269. Based upon this application, this Court ultimately held in *Janssen* that the trial court had jurisdiction of the parties and of the subject matter. *Janssen*, 68 S.D. at 644, 5 N.W.2d at 686.

Ogden’s reliance on *Medicine Eagle, supra.*, without looking into the context of the additional cases cited therein, is therefore misplaced and instead appears to further support the State’s argument in the case at hand. Additionally, the issue in *Medicine Eagle* was whether Medicine Eagle waived his challenge to the part II proceedings. *Medicine Eagle*, ¶ 38, 835 N.W.2d at 900. The court determined “that the question of whether there was statutory authority for the trial court to impose the enhanced sentence (given the disputed legal status of the original/Amended Part II Information) is a jurisdictional question. As a result, this Court can review Medicine Eagle’s challenge to the part II proceedings regardless of when he made this challenge.” *Id.*, at ¶ 40.

This Court’s precedent is long-standing and well-established in holding that, “the trial court cannot inquire into the legality or sufficiency of the evidence upon which an indictment is based when considering a dismissal under SDCL § 23A-8-2.” *Springer-Ertl*, 570 N.W.2d at 40-41; *See also State v. Dorhout*, 513 N.W.2d 390, 392 (S.D. 1994); *State v. Schladweiler*, 436 N.W.2d 851, 854 (S.D. 1989); *State v. Hoekstra*, 286 N.W.2d 127, 128 (S.D. 1979); *see also Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956). “An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” *State v. Cameron*, 1999 S.D. 70, ¶ 11, 596 N.W.2d 49, 52.

SDCL § 23A-8-3(3) requires that defenses and objections based upon defects in the indictment or information be raised before trial (other than those that fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings). SDCL § 23A-8-3(3). Here, Ogden makes no assertion that the information is defective, but instead appears to rest upon the language in the parentheticals that the Information fails to show jurisdiction in the court. Notably, both the complaint and information show that the offenses occurred in Union County and the heading of the Information lists Union County. Applied here, both Ogden and the magistrate court confused the issue of jurisdiction with that of venue. When the magistrate court dismissed this case for lack of subject matter jurisdiction, based upon its examination of the underlying facts, it presented as clear error.

The magistrate court is therefore bound by SDCL § 23A-8-2 in determining whether the information is subject to dismissal. The reasons for dismissing an indictment or information under SDCL § 23A-8-2 are exclusive and exhaustive. None of the grounds for dismissal in SDCL § 23A-8-2 are applicable here, and thus, the magistrate court's dismissal was in error.

**C. THE MAGISTRATE COURT ERRED IN RULING THAT THE SOUTH DAKOTA-NEBRASKA BOUNDARY COMPACT, CODIFIED IN SDCL § 1-2-8, FEDERALLY PREEMPTS SDCL §§ 41-15-2 AND 42-8-67.**

Ogden claims that "South Dakota does not have jurisdiction in this matter because all the pertinent events occurred in Nebraska, and no concurrent jurisdiction has been granted to South Dakota by the State of Nebraska." Appellee's Brief, Pg. 9. The facts underlying where the events occurred would serve to determine venue. Venue, of course, is an element for the State to prove at trial, not pretrial. *State v. Iwan*, 2010 S.D. 92, ¶ 9,

791 N.W.2d 788, 789. Odgen's alleged criminal conduct occurred on the Missouri River, not on any lands located in South Dakota or Nebraska.

Ogden's argument on this issue also fails to address the explicit language of the South Dakota-Nebraska boundary compact, codified in SDCL § 1-2-8<sup>2</sup>. In recognition of the compromise boundary line between the two states, the compact states that,

"On the effective date of this compact, the state of South Dakota hereby relinquishes to the state of Nebraska all sovereignty over *lands* lying on the Nebraska side of said compromise boundary and the state of Nebraska hereby relinquishes to the state of South Dakota all sovereignty over *lands* lying on the South Dakota side of the compromise boundary."

SDCL § 1-2-8 (*emphasis added*). While the compact fixes an imaginary line at the "centerline of the designed channel of the Missouri River," it goes on to indicate in Article I (8) that one of the "Findings and Purposes" of the act is "to express the intent and policy of the states that the common boundary between said counties be established within the confines of the Missouri River and *both states shall continue to have access to and use of the waters of the river*. SDCL § 1-28-2. (*emphasis added*).

The plain language of compact only acts to separate the land on either side of the centerline; not the waters. SDCL § 42-8-67 is neither contrary to the compact agreement, as Ogden suggests, nor is it preempted by the same. Conservation officers in South Dakota by way of SDCL §§ 41-15-2 and 42-8-67, have jurisdiction over the entirety of the boundary waters of this state. Those statutes likewise recognize the concurrent jurisdiction of the courts and administrative officers of Nebraska, along with Minnesota, North Dakota, Montana, Wyoming, and Iowa as well.

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<sup>2</sup> A history of the 1905 compact, replaced by the adoption of SDCL § 1-2-8, appears in *Dailey v. Ryan*, 71 S.D. 58, 21 N.W.2d 61.

Applied here, Ogden states in his brief that South Dakota “cannot unilaterally grant itself concurrent jurisdiction over Nebraska’s boundary waters,” and such argument is wholly misplaced and contrary to well-settled law. Appellee’s Brief, Pg. 11. Specifically, in making such a statement, Ogden avoids the plain language and intent of SDCL §§ 1-2-8, 41-15-2, and 42-8-67. When the plain language of SDCL § 1-2-8 is read in harmony with SDCL §§ 41-15-2 and 42-8-67, it is clear that South Dakota has retained sovereignty over the entirety of its boundary waters and has only relinquished sovereignty of the land. Moreover, federal law also recognizes concurrent jurisdiction over the boundary waters:

“The consent of the Congress is given to the States of North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska, or any two or more of them, by such agreement or compact as they may deem desirable or necessary, or as may be evidenced by legislative acts enacted by any two or more of said States, not in conflict with the Constitution of the United States or any law thereof, to determine and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of any of said States upon any of the waters forming the boundary lines between any two or more of said States, or waters through which such boundary line extends, and that the consent of the Congress be, and the same is, given to the concurrent jurisdiction agreed to by the States of Minnesota and South Dakota, as evidenced by the act of the Legislature of the State of Minnesota approved April 20, 1917, and the act of the Legislature of the State of South Dakota approved February 13, 1917.”

33 U.S.C.A. § 11; Appx. 81. In furtherance of this, the Supreme Court of Nebraska has likewise opined:

“If [two states], 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 the 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.”

*Miller v. McLaughlin*, 224 N.W. 18, 118 Neb. 174, 177 (1929 Neb.). The primary purpose “in the grant of concurrent jurisdiction was to avoid any nice question as



to whether a criminal act...was committed on one side or the other...that boundary sometimes changing by reason of the shifting channel.” *Miller*, 224 N.W. 18, 118 Neb. 174 at 178 (quoting *Nielsen v. Oregon*, 212 U.S. 315, 29 S. Ct. 383, 53 L. Ed. 528). Moreover, “where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.” *Miller*, 224 N.W. 18, 118 Neb. 174 at 179.

The magistrate court erred in ruling that the South Dakota-Nebraska Boundary Compact federally preempts state law. In doing so, the magistrate court has implicitly repealed SDCL §§ 41-15-2 and 42-8-67, contrary to well-settled authority. More specifically, this Court held in *Goin v. Houdashelt*, 2020 S.D. 32, 945 N.W.2d 349, that “[j]udges should refrain from negating a legislative act unless it is demanded by manifest necessity,” and the act of “repeal by implication is strongly disfavored.” *Goin v. Houdashelt*, 2020 S.D. 32, ¶ 17, 945 N.W.2d 349, 354 (quoting *Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202).

## CONCLUSION

Based on the law and argument, the State respectfully requests that this Court reverse the magistrate court’s Memorandum Decision and Order Granting Motion to Dismiss. The magistrate court erred and abused its discretion when it dismissed the Information, and both federal and state law grant South Dakota concurrent jurisdiction over the waters of the Missouri River.

Dated this 31<sup>st</sup> day of July, 2025.

/s/Nick Michels

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### CERTIFICATE OF SERVICE

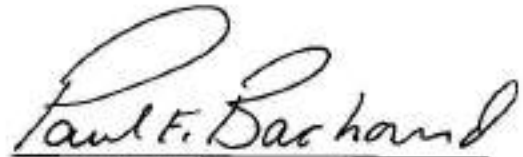
The undersigned, attorney for Appellant, State of South Dakota, the Department of Game, Fish, and Parks, hereby certifies that on the 31<sup>st</sup> day of July, 2025, a true and correct copy of Appellant's Reply Brief was served by Odyssey File and Serve upon:

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and the original was mailed (or hand delivered) to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at:  
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Dated this 31<sup>st</sup> day of July, 2025.



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### CERTIFICATE OF COMPLIANCE

Paul E. Bachand, the attorney for Appellant, hereby certifies that the foregoing Reply Brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

- a. The body of Appellant's Reply Brief does not exceed 16 pages;
- b. The body of Appellant's Reply Brief was typed in Times New Roman 12-point typeface; and
- c. The body of Appellant's Brief contains 3,298 words and 16,168 characters with no spaces and 19,552 characters with spaces, according to the word and character counting system in Microsoft Office 365 for Windows used by the undersigned.

Dated this 31<sup>st</sup> day of July, 2025.

A handwritten signature in black ink, reading "Paul E. Bachand". The signature is fluid and cursive, with the first name "Paul" and last name "Bachand" clearly legible.

Paul E. Bachand  
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