

## **Opinion No. 66-105**

August 26, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

**TO:** The Honorable Jack M. Campbell, Governor of New Mexico, State Capitol Building, Santa Fe, New Mexico

### **QUESTION**

#### **FACTS**

Forest Service Highway 6141 is a hard-surfaced gravel road which begins at the end of State Road 435 approximately 5.5 miles south of Reserve, New Mexico, and ends 28 miles to the southeast at a point where it joins State Road 78. It is used as an access road for logging operations and as access to the Willow Creek Recreational Area in the Gila Wilderness but it lies wholly within the Gila National Forest and outside of the Wilderness area. Officials of Forest Service in the Gila National Forest maintain that the road is a multiple use road which is open to the public.

This road was constructed sometime in the mid-1950's. At that time the Forest Service approached the Catron County Commission setting forth the proposal to construct the highway. The county cooperated by obtaining the rights of way from various private holders along the route which were subsequently deeded to the Federal Government.

The highway was constructed at a cost of \$ 1,152,791.34. The road was built under a requirement of a timber purchase contract. The contract required that the purchaser construct the road. However, an allowance or adjustment was made in the appraisal value of the timber sold to compensate the timber purchaser for costs incurred in the construction and it was contemplated the purchaser recover all costs over the term of the contract.

It should be noted that a portion of the total costs of construction was directly paid from funds non-appropriated by Congress for road construction purposes.

The timber purchase contract also provides that purchaser is required to maintain the road insofar as it is affected by his operations. Cost of this operation is handled in the same manner as costs of the original construction under the contract.

There has been some comment that county funds were used in the construction of this road. Under Title 16 U.S.C.A., Section 500, the county in which timber is located and cut, is entitled to twenty five percent of the receipts received from such sales. It is our understanding that the total receipts are figured after costs such as road construction

have been deducted. Therefore, we understand no county funds were expended in this project.

## QUESTIONS

1. Is Forest Service Highway 6141 a public or a private road?
2. Are State Motor Vehicle, State Highway and other State laws applicable to operations conducted over Forest Service Highway 6141?

## CONCLUSIONS

1. See analysis.
2. Yes.

## OPINION

### {\*142} ANALYSIS

On the basis of the above facts, it is our opinion that the road under consideration is clearly a public highway. The costs of construction were borne in the final analysis by the public. The road is dedicated for multiple use including use by the public. It has been used in the past and is presently being used by the public.

Further support for the contention that this is a public road is found in the pertinent Federal regulations 36 C.F.R. Section 251.5 (f) and (g) provide as follows:

"(f) No toll shall be charged for the use of roads or trails over national forest lands, and they shall be open to free public use unless otherwise authorized by the Chief of the Forest Service. Roads built at private expense may be temporarily closed to public use by order of the regional forester, if their unrestricted use endangers public safety and property or interferes with the primary purpose for which they were built.

(g) Roads across national forest lands which are not parts of State or county highway systems and which are constructed and maintained wholly at the expense of the Federal Government and its private cooperators may be designated by the regional forester as "special service" roads, and public use of such roads may be prohibited or regulated by the regional forester when necessary to the public interest."

The involved road has not nor never has been designated as a "special service" road and the public has never been denied the use thereof. Therefore under Section (f) the public has the use of the road as a matter of right.

The above facts coincide with the definition of "Street or Highway" as defined by our statutes. Under the Motor Vehicle Laws street or highway is defined as follows: Sec. 64-1-20, N.M.S.A., 1953 Comp.

"The entire width between boundary lines of every way open to the use of the public as a matter of right for purposes of vehicular travel."

It is clear that the road under consideration falls within this definition.

The second question is whether the state laws would be applicable to operations over the road. It is our opinion that the answer to this question is found in Federal law. 16 U.S.C.A., Section 480 provides as follows:

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. June 4, 1897, c.2, Section 1, 30 Stat. 36; Mar. 1, 1911, c. 186, Section 12, 36 Stat. 963."

This section was discussed in **Wilson v. Cook**, 372 U.S. 474, 66 S. Ct. 663 where the Court held:

{\*143} "By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants 'be absolved from their duties as citizens of the State'."

Under the above cited section, it is clear that the State has civil and criminal jurisdiction over the road. Where, of course, state laws conflict with Federal laws, the latter would prevail.