

## **Opinion No. 66-146**

December 28, 1966

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

**TO:** Mr. Eloy Blea, Superintendent of Schools, Ojo Caliente Independent School District, P. O. Box 5, El Rito, New Mexico

### **QUESTION**

#### **FACTS**

The Ojo Caliente Independent School District is seeking to acquire land upon which to construct school buildings. The only land available which meets size requirements and is suitable for the intended use is property held by the U.S. Forest Service. The Forest Service will not sell the involved property directly but will pass title only in connection with a land exchange.

The School District desires to construct a school building on federal lands which it would hold under a Special Use Permit from the Forest Service. It would be intended, and the Special Use Permit does so provide, that the Permit is issued with the understanding that the School District desires to acquire title to the property involved.

Title to the property would be acquired through the use of a third party land exchange. Under such arrangement the Forest Service would seek a piece of land which it would desire to acquire. It would arrange a transfer of that land to the Forest Service, at the cost of the School District in exchange for it passing title to the school property to the School District. Title passage could occur sometime after signing of the Special Use Permit or might not occur if no suitable exchange could be made.

#### **QUESTION**

Would it be proper for the School District to expend bond money to construct schools on the federal lands during the time the land is held under the Special Use Permit and prior to acquisition of title?

#### **CONCLUSION**

No.

### **OPINION**

{\*189} ANALYSIS

Realizing that this opinion may create a hardship, we are nevertheless constrained to conclude that a school district cannot construct a school on Forest Service lands which it holds pursuant to a Special Use Permit.

A problem similar to this was discussed in Attorney General Opinion No. 58-231. In that opinion the question raised was whether the State Armory Board could lawfully construct an armory on land held by the Board under a lease. There it was stated:

". . . . The principal legal question would be whether the State, in expending State funds in the construction of the armory, would thereby be effecting a donation to the lessor, if the improvements constructed retain value at the termination of the lease and become the property of the lessor. . . ."

The question is presented by Art. IX, Sec. 14, of the Constitution of New Mexico, which provides as follows:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

Applying the provision cited above to the instant fact situation, the problem inherent in the proposed transaction becomes apparent. There is no set or established term of use set forth in the Special Use Permit. Furthermore, that document specifically provides as follows:

"15. This permit may be terminated upon breach of any of the conditions herein **or at the discretion of the regional forester or the Chief, Forest Service.**" (Emphasis added.)

As a result of the above underscored language, even if a term were specified in the Special Use Permit, it could effectively be made meaningless by the exercise of discretion of one of the named persons. Termination of the use of the land prior to the end of the life of the buildings would then effectively constitute a donation contrary to Art. IX, Sec. 14 of the New Mexico Constitution.

It is, therefore, our opinion that the School District could not expend money to construct schools during the period the school holds the land {*\*190*} under a Special Use Permit and prior to acquisition of title to the land.