

Opinion No. 70-72

August 25, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: E.H. Williams, Jr. Third Judicial District Attorney County Courthouse Las Cruces,
New Mexico 88001

QUESTIONS

QUESTIONS

1. May people residing on White Sands Missile Range or Holloman Air Force Base, who are otherwise qualified to vote in the State of New Mexico, register and vote in the forthcoming general election and other elections thereafter?
2. May those people who have voted by absentee ballot in other states in preceding years, due to their residence at White Sands Missile Range or Holloman Air Force Base, but who are otherwise qualified to vote in New Mexico, except for their claims of residence elsewhere, register and vote in the forthcoming general election and succeeding elections?

CONCLUSIONS

1. See Analysis.
2. See Analysis.

OPINION

{*120} ANALYSIS

We note at the outset that White Sands Missile Range is held by the federal government in a proprietary capacity only and not under exclusive jurisdiction. A portion of Holloman Air Force Base was ceded to the federal government by New Mexico Laws 1953, Chapter 63, and at least that portion is therefore considered to be under exclusive federal jurisdiction within the meaning of paragraph 17 of Article I, Section 8 of the United States Constitution. **(Inventory Report on Jurisdictional Status of Federal Areas Within the States, G.S.A. June 30, 1962).**

{*121} Other than this information, we have no specific facts relating to the federal enclaves involved or the prospective voters who have or will present themselves for registration in New Mexico. Nevertheless, we are issuing a formal opinion in order to state our belief that the general law governing your first question, as interpreted by the New Mexico Supreme Court, has been altered by later decisions of the federal courts.

The New Mexico Supreme Court has twice held that persons residing on federal enclaves in the State of New Mexico were not entitled to register and vote in this state. **Arledge v. Mabry**, 52 N.M. 303, 197 P.2d 884 (1948); **Langdon v. Jaramillo**, 80 N.M. 255, 454 P.2d 269 (1969). See also **Chaney v. Chaney**, 53 N.M. 66, 201 P.2d 782 (1949). **Arledge** (and **Chaney**, a divorce case) involved persons residing within the area of the "Los Alamos Project" and **Langdon** involved persons residing within Sandia Base in Albuquerque. Although we recognize that factual distinctions may be made between the type of federal control over an area within the state and the individual prospective voters residing thereon, we believe that the broad doctrine announced in **Arledge** and **Langdon** was, in effect, overruled by the decision of the United States Supreme Court in **Evans v. Cornman**, 26 L. Ed. 2d 370 (U.S. 1970).

Evans v. Cornman, involved persons residing on the grounds of the National Institutes of Health, a federal enclave within the State of Maryland. The **Evans** case holds that there was no showing of a compelling state interest allowing Maryland to prevent the residents of the federal enclave from voting in the Maryland elections. Therefore, the denial of their right to vote was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Although not dealing directly with a New Mexico case, the court in **Evans** noted in a footnote: "In addition to [a prior] . . . decision of the Maryland Court of Appeals, there are a number of other state court rulings to the same effect. See, e.g., . . . [citing *inter alia*, **Arledge v. Mabry**,]." **Evans v. Cornman**, *supra*, 26 L. Ed. 2d at 375, n.3. See also **City of Phoenix v. Kolodziejki**, 26 L. Ed. 2d 523, 529-30, n.11 (U.S. 1970).

In view of the fact that the question involves one of federal constitutional law, we need not wait for the New Mexico Supreme Court to review this matter a third time before stating our opinion that **Arledge v. Mabry**, *supra*, and **Langdon v. Jaramillo**, *supra*, is no longer the law to be applied by the county clerks. In fact, a three-judge district court sitting in the United States District Court for the District of New Mexico has already determined that residents of Sandia Base, Albuquerque, New Mexico, are not prevented from voting in New Mexico solely on the basis of their residence at Sandia Base. **Langdon v. Jaramillo**, No. 8229, Civil (D.N.M. July 16, 1970). The complaint in the federal **Langdon** case had been filed in 1969 but all proceedings in the case were stayed pending the decision of the United States Supreme Court in **Evans v. Cornman**, *supra*. In order to assist you in analyzing the claims of prospective voters from White Sands Missile Range and Holloman Air Force Base, we are enclosing a complete set of the pleadings filed in the federal **Langdon** case.

We understand your second question essentially to be a question of whether or not a person who has voted by absentee ballot in another state is a resident of New Mexico as required by the voter qualification section of the New Mexico Constitution. Although your question does not state when a particular prospective voter voted by absentee ballot, we assume that the question must be limited to a situation where the resident of the federal enclave voted by absentee ballot in another state during the 12-month period next preceding the election in which the person desires to vote. N.M. Const. art. 7, § 1.

Even as we have interpreted the question, it cannot be answered conclusively as a general proposition but must be decided on the facts applicable to each prospective voter now residing on the federal enclaves. It is settled law that residence is a matter of intention. **Berry v. Hull**, 6 N.M. 643, 30 P.936 (1892); **Klutts v. Jones**, 21 N.M. 720, 158 P.490 (1916); cf. **Gallup American Coal Co. v. Lira**, 39 N.M. 496, 50 P.2d 430 (1935).

{*122} Our research does reveal that registration and voting does not conclusively prove either domicile or residence for any other purpose within the jurisdiction where the voting took place. See generally Annot., 107 A.L.R. 448 (1937). In view of the fact that residence is a matter of intention, a person physically present within a federal enclave within the State of New Mexico, for 12 months next preceding the election, etc., could very well sign the affidavit of registration indicating residence within the State of New Mexico. The county clerk would then have the burden of showing that the objective manifestations, including the casting of an absentee ballot in another jurisdiction within the 12-month period, indicated the person still had an intent to reside in the other jurisdiction.

It is possible that voting by absentee ballot in another jurisdiction with the intent to reside in the State of New Mexico only proves that the ballot cast in the other jurisdiction was illegal. In **Re Contested Election**, 21 Ohio Op.2d 16, 185 N.E.2d 809 (1962); see generally Annot., 97 A.L.R.2d 257, 275 (1964).

There are, of course, numerous cases involving a determination of residence or domicile of members of the armed forces. We can only refer you to these for assistance in determining a specific case of a resident of White Sands or Holloman presenting himself for registration to vote in New Mexico. Annot., 140 A.L.R. 1100 (1942); Annot., 148 A.L.R. 1402, 1413 (1944); Annot., 149 A.L.R. 1466, 1477 (1944); Annot., 150 A.L.R. 1460, 1468 (1944); Annot., 151 A.L.R. 1464, 1468 (1944); Annot., 152 A.L.R. 1459, 1471 (1944); Annot., 153 A.L.R. 1434, 1442 (1944); Annot., 154 A.L.R. 1459 (1945); Annot., 155 A.L.R. 1459, 1466 (1945); Annot., 156 A.L.R. 1465 (1945).

Although New Mexico has a special statute covering the matter, you may find some assistance on the question of intention by reviewing the divorce cases involving servicemen. See Section 22-7-4, N.M.S.A., 1953 Comp.; **Allen v. Allen**, 52 N.M. 174, 194 P.2d 270 (1948); **Crownover v. Crownover**, 58 N.M. 597, 274 P.2d 127 (1954); **Wallace v. Wallace**, 63 N.M. 414, 320 P.2d 1020 (1958); see generally, Annot., 106 A.L.R. 6 (1937); Annot., 159 A.L.R. 496 (1945); Annot., 21 A.L.R.2d 1163 (1952); cf. Annot., 98 A.L.R.2d 488 (1964).

Finally, we note that this discussion does not take into consideration the effect of Public Law 91-285, 84 Stat. 316, which alters the residence requirements for voting for the President and Vice-President. Although the federal law is now effective, the New Mexico legislature will have to provide for a shorter registration period in time for the 1972 election.

By: Mark B. Thompson, III
Assistant Attorney General