OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

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FILE NO. 97-009

MOTOR VEHICLES:
Use of All-Terrain Vehicles
on Unmaintained County Right of Way

Honorable Kim G. Noffke
State's Attorney, Pope County
Post Office Box 689
Golconda, Illinois 62938

Dear Mr. Noffke:

I have your letter wherein you inquire whether the county board of Pope County may lawfully enact and enforce an ordinance designating old, unmaintained county road rights of way as "recreational corridors" for all terrain vehicle (hereinafter referred to as "ATV") use. For the reasons hereinafter stated, it is my opinion that the county board does not have the authority to designate road rights of way for such purposes.

Based upon your letter, and other correspondence which I have received regarding this matter, it appears that there has been considerable controversy locally concerning the desire of some persons to use ATVs on and near land located in Pope County which is part of the Shawnee National Forest. In general, ATV

use on United States Forest Service property in the Shawnee National Forest has been prohibited pursuant to Federal regulations (36 C.F.R. part 261) and orders of the Forest Supervisor. (Order No. 95-08-1, June 15, 1995, Order Nos. 95-08-2, 95-08-3, 95-08-4, June 8, 1995.) In an effort to accommodate the use of such vehicles, the county board has proposed designating old, unmaintained road rights of way as recreational corridors for ATV use. Most of these old rights of way are on Forest Service property, and the county has not maintained or asserted jurisdiction over them for many years, in most cases not since the property was transferred to the Federal government. I have been advised that such rights of way are not referred to in deeds held by the Forest Service, and that the Forest Service does not recognize any county claim of right of way. The county board asserts that its proposed action is authorized by subsection 11-1427(h) of the Illinois Vehicle Code (625 ILCS 5/11-1427(h) (West 1994)), which provides, in part:

> "It is unlawful for any person to drive or operate any all-terrain vehicle or off-highway motorcycle in the following ways:
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> * * *
>
> (h) On publicly owned lands unless such lands are designated for use by all-terrain vehicles or off-highway motorcycles. For publicly owned lands to be designated for use by all-terrain vehicles or off-highway motorcycles a public hearing shall be conducted by the governmental entity that has juris-

> diction over the proposed land prior to the designation.
>
> * * *

Firstly, there are significant questions regarding whether long disused and unmaintained rights of way constitute publicly owned land, for purposes of this section. Although each circumstance must be examined upon its specific facts, many such rights of way were established through prescription or through easements for roadway purposes only. Easements for roadway purposes are abandoned by nonuse where the public has ceased to travel on them for a length of time sufficient to indicate clearly their acceptance of a new highway acquired with the consent of the public authorities, or when the necessity for another highway has ceased to exist. (Yaste v. Rust (1988), 169 Ill. App. 3d 800, 803, appeal denied, 122 Ill. 2d 596 (1988); Brockhausen v. Bochland (1891), 137 Ill. 547, 551.) Even if they are not deemed to have been abandoned, such easements do not constitute fee simple ownership and therefore do not entitle the county to designate their use for purposes other than as roadways.

Secondly, if the old rights of way retain their status as public roads, then the proposed use by ATVs is prohibited by section 11-1426 of the Illinois Vehicle Code (625 ILCS 5/11-1426 (West 1994), as amended by Public Act 89-445, § 9A-87, effective February 7, 1996). Section 11-1426 provides that it is unlawful

to operate any ATV or off-highway motorcycle on any street, highway or roadway, except for the purpose of making a direct crossing over the roadway. Therefore, to the extent that the subject rights of way may still be in existence as such, their designation as "recreational corridors" would be inconsistent with their use as public roadways.

Moreover, the fact that most of these possible rights of way now lie within land owned by the United States raises additional legal issues. Article IV, section 3, clause 2 of the United States Constitution provides:

> " * * *
>
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.
>
> * * * "

This clause, together with the Supremacy Clause (U.S. Const., art. VI, cl. 2), has been broadly interpreted to give the Federal government control over its property notwithstanding conflicting State law. As was stated in Utah Power & Light Co. v. United States (1916), 243 U.S. 389, 404-05:

> " * * *
>
> * * * From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the

> use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. [Citations.] And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. 'A different rule,' as was said in Camfield v. United States, [167 U.S. 518], 'would place the public domain of the United States completely at the mercy of state legislation.'
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> * * *

In Utah Power & Light Co. v. United States it was held that easements over public land statutorily granted for particular purposes could not be used for another purpose, and that the United States was entitled to compensation for the unauthorized use of its property.

With respect to land acquired by the United States for national forests, 16 U.S.C. § 518 (1996) provides:

> "Such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of this Act. Such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed."

Regulations promulgated by the Secretary of Agriculture pursuant to the statute provide, in part:

> " * * *
>
> (d) Upon the abandonment of a reserved right-of-way, either by formal release, by termination, or by non-use for a period of one calendar year, all improvements thereon not the property of the United States shall be removed therefrom within three months from the date of the abandonment, otherwise such improvements shall vest in and become the property of the United States.
>
> * * * "

(Emphasis added.) (36 C.F.R. § 51.18(d).)

I have been advised by Forest Service personnel that the rights of way claimed by the county are not referred to in the various deeds by which the United States acquired national forest property in Pope County. Therefore, the Forest Service does not acknowledge their existence.

Even defined, reserved rights of way are subject to Federal rules and regulations. In this instance, regulations provide that rights of way which are not used for a period of one calendar year are deemed to be abandoned. Further, the Forest Supervisor's orders authorized by applicable regulations prohibit, with defined exceptions, the use of motorized vehicles off forest development roads; on forest development trails; and on forest development roads posted as being closed to motorized traffic, in a designated wilderness study area, and also during specified seasons on forest development roads having grass and/or dirt surfaces. These regulations and orders supersede any county ordinance or State law with respect to property which is subject to Forest Service regulation.

The Forest Service does not claim jurisdiction over existing, public roadways regularly maintained by the State, counties or townships, and identified as such in public land records and deeds. The constitutional authority of the United States to govern the use of its property, however, is certainly sufficient to extinguish any interest which a county may once have held in an unmaintained, unused right of way for highway

purposes. That authority appears to have been properly exercised in accordance with the statute and regulations cited above.

For the reasons stated, it is my opinion that Pope County does not have the authority under State law to designate unmaintained highway rights of way as recreational corridors for ATV use. Moreover, such unused, unmaintained and unrecorded rights of way on property now owned by the United States as part of the Shawnee National Forest are subject to Federal regulations regarding their use by ATVs.

Sincerely,

JAMES E. RYAN
ATTORNEY GENERAL