

## Opinion No. 47-5100

November 13, 1947

**BY:** C. C. McCULLOH, Attorney General

**TO:** J. R. Poe State Dairy Commissioner State College, New Mexico

{\*108} In your letter dated November 10, 1947 you refer to the Dairy Commissioner Law wherein your duties are set forth and state that in carrying out your duties and condemning milk or cream which is unfit for human consumption, you add a harmless coloring matter instead of destroying the milk or cream, in order that the farmer can use the same for poultry or hog feed. Some question has arisen as to your right to add such coloring matter in condemning the dairy products.

Section 49-2102 of the 1941 Compilation in setting forth your duties as State Dairy Commissioner provides in part as follows:

"It shall further be his duty to condemn for food purposes, unclean or unwholesome milk, cream, butter, cheese or ice cream, wherever he may find them."

Some question may arise as to your authority to summarily condemn dairy products unfit for human consumption. However, in a case involving an ordinance or statute authorizing a health officer to seize, condemn, and destroy unwholesome food, the Supreme Court of the United States in the case entitled North American Cold Storage Company vs. City of Chicago, 29 Sup. Ct. 101, 211 U.S. 306, 53 L. Ed. 195, held that the officer could seize, condemn and destroy unwholesome products and that a provision for a hearing thereon in the law was unnecessary. This decision is based upon the theory that if the officer makes a mistake of fact and the owner of the product brings suit, the officer must prove that the product actually was unfit for human consumption.

In view of this decision, I believe the New Mexico Statute authorizing you to condemn milk and cream which is unfit for human consumption without a hearing would be upheld. Since the statute does not provide the procedure for condemning such products, I believe any reasonable procedure would be valid and I see no reason why the addition of harmless coloring matter to the milk or cream to prevent further sale of the product would not be a reasonable means of condemning the product.