

## Opinion No. 35-845

January 5, 1935

**BY:** FRANK H. PATTON, Attorney General

**TO:** Mr. R. W. Bennett, Office Engineer, State Highway Department.

{\*30} We have your letter of January 4th, relative to condemnation proceedings of right of way on United States Public Works Project No. NRM 67-B (1935), together with petition which was signed in the District Court of Taos County, and the usual statutory notice to the effect that the petition will be presented before the court on February 23rd.

You have also enclosed copy of order of the District Judge which authorizes and empowers the plaintiff to take immediate possession of the property.

We have heretofore discussed this matter with the representative from your office but since receiving your letter we have given some more detailed study and have arrived at the conclusion that the District Judge is not empowered to issue such an order until after the presentation of the petition.

It will be noted in the law on eminent domain, which is contained in Chapter 43 of the 1929 Compilation, that the procedure is as follows:

First -- Filing of the petition

Second -- At least five days notice that the petition will be **presented**.

Upon the presentation of the petition the District Judge then appoints a commissioner to assess damages and upon the filing of the report of such commissioner, or perhaps at the time of the presentation of the petition, a District Judge may make an order permitting entry upon the premises.

Section 43-118 of the 1929 Compilation apparently contemplates that no action is to be taken by the plaintiff until after the report of the commissioner and the approval of same by the court. This section further provides that in all cases where it is necessary to obtain service by publication that the court may, upon plaintiff giving bond at the time the petition is presented, make an order authorizing the plaintiff to at once enter into the possession of the property.

It would be my belief that no bond would be required where the State or sub-division of the State is the party plaintiff. At any rate, it is very doubtful in my mind if the plaintiff has any right to take any affirmative action in such matters until the report of the commissioners has been confirmed by the District Court. Certainly, he has no right to take any affirmative action until the order of the court is obtained upon the date of the presentation of the petition.

You can readily see that inasmuch as the presentation of the petition in the present case has not been set for here until the 23rd day of February that you will be placed at a great disadvantage. We believe, however, that this situation could be remedied by having an amended statutory notice issued and while this should mean additional expense of publication, nevertheless you may decide that it is worth it.

Trusting the above sufficiently answers your inquiry, I am,

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