**Opinion No. 12-943**

September 5, 1912

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Hon. James A. French, State Engineer, Santa Fe, New Mexico.

**RAYADO LAND AND IRRIGATION COMPANY.**

Duty of State Engineer to carry into effect the decision of the District Court.

**OPINION**

*{*99}* I have before me your letter of even date herewith asking me to give you in writing, the advice which I gave you orally in regard to taking action on the application of the Rayado Land and Irrigation Company about two weeks ago.

As I understand the condition of the case and as appears from a copy of the records which you sent with your letter, the Territorial Engineer took no action on the application in question and it appears to have been removed in some way to the Board of Water Commissioners, presumably under the clause of Section 63 of Chapter 49 of the Laws of 1907, which gives any applicant who is dissatisfied with a refusal to act of the Territorial Engineer a right to appeal to the board. That board on March 30, 1911, ordered that the application should be approved and I presume that the Farmers' Development Company took an appeal from this decision, as I find among the papers submitted to me by you the record of a decision by the District Judge of Colfax County made on June 7, 1912, affirming the decision of the Board of Water Commissioners. I find also among those papers an order made August 8, 1912, granting an appeal from the decision of the District Court to the Supreme Court of the state on the motion of the Farmers' Development Company.

On this state of facts I was of the opinion and still am, that it was your duty to proceed to carry into effect the decision of the Board of Water Commissioners which had been affirmed by the District Court. It seems from a letter from the Farmers' Development Company addressed to you under date of August 30, 1912, that the company has assumed that the mere taking of their appeal would stay the judgment of the District Court. This I believe to be a mistaken view of the law.

The statute under which you and the Board of Water Commissioners operate is the one already referred to printed as Chapter 49 of the Laws of 1907. Section 65 of that act provides that the decision of the board upon any appeal taken from the Territorial Engineer, shall be filed in the office of the engineer who shall act in accordance with such decision and the decision shall be final subject to appeal to the District Court. There is no further provision in the act as to any further appeal, but the organic act of the territory did provide that appeal should be allowed in all cases of final judgments of

the District Court, and this would be applicable under the territorial government, and this jurisdiction is quite fully preserved by Section 2 of Article VI of the Constitution.

*{*100}* The matter of supersedeas or stay of proceedings, however, is entirely separate and apart from the mere matter of appellate jurisdiction. It is at least a doubtful question whether in the absence of any statutory provision an appeal would of its own force operate as a stay of proceedings or as a supersedeas of the judgment appealed from, but certainly where the legislature has seen fit to take action the statute is our only guide. By reference to Section 16 of Chapter 57 of the Laws of 1907 it will be seen that the Legislature has declared that there shall be no supersedeas or stay of execution upon any final judgment or decision of any District Court in which an appeal has been taken, except upon conditions prescribed in that section. The first sentence of the section is applicable only to cases where there has been a recovery of a judgment for money against the appealing party who has to give bond in double the amount of the judgment against him. This, of course, has no application to such a case as the one which we are now considering. The next sentence provides for decisions appealed from which may have some recovery other than a fixed amount of money, in which case the amount of the bond is to be fixed by the District Court or judge and to be conditioned as stated in the statute. It may be stated that the judgment in the present case is not for any recovery at all against the appealing party but this would be a hypercritical way of viewing the case and would tend to narrow the real intent of the statute. If the successful party is to be held up and delayed in obtaining the benefits of the decision of the District Court, some security should be given to protect it against the damages occasioned by such delay. The Legislature having undertaken to provide what should be necessary to stay proceedings I feel compelled to take the view that such stay of proceedings can be had in no other way. If it could be held as above suggested that such a case as the present one does not fall within the scope of the statute, we would be driven to the conclusion that this is a case omitted by the Legislature and that the defect cannot be supplied by judicial legislation when the Legislature has attempted to cover the whole subject.

As far as I am informed and as far as I can discover from the papers submitted no effect has been made on the part of the appealing corporation to give any bond or to have its amount fixed by the District Court or judge so as to entitle it to any stay of proceedings, and, therefore, I must adhere to the opinion heretofore expressed to you.

I return herewith the various papers submitted with your letter.