Opinion No. 53-5881

December 30, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Cosme Garcia Chief Clerk State Corporation Commission Santa Fe, New Mexico

*{*312}* You have requested an opinion from this office upon two questions, the first is whether a National Bank properly authorized under the National Banking Laws, 12 U.S.C.A., Section 1 et seq, that has its Home Office in another state, would be "doing business within the State of New Mexico" when acting as an ancillary administrator of assets located in this State, and if the answer to this question is yes, will the Bank be required to obtain a certificate to do business in New Mexico?

The second question is whether the same type of Bank would be doing business in the State of New Mexico when acting as a trustee of assets physically located in this State, and if the answer is yes, would such Bank be required to obtain a certificate authorizing it to do business in this State?

In answer to your first question, our Supreme Court recently in the case entitled, **In the Matter of the Last Will and Testament of Eloisa Armijo, et al., vs. First National Bank of Elgin, Illinois,** opinion filed October 6, 1953, as yet unreported, has decided this question as to the act of performing the duties of an ancillary administrator stating as follows:

"It is the conclusion of this Court that appellee, a national bank domiciled in Illinois, is authorized to act in a fiduciary capacity as ancillary administrator in New Mexico in this case. Appellee is not admitted to do business in the State of New Mexico. If this is of importance in the determination of the question before us, we are satisfied 'that this act' does not constitute 'doing business' in the state of New Mexico in contravention of our general corporate laws having to do with foreign corporations. Goode v. Colorado Inv. Loan Co., 16 N.M. 461, 117 P. 856 (1911); Vermont Farm Mach. Co. v. Ash, 23 N.M. 647, 170 P. 741 (1918); Young v. Kidder, 33 N.M. 654, 275 P. 98 (1929)."

Your second question presents a more complex problem. Section 54-804 N.M.S.A., 1941 Comp., as amended, Laws 1951 Ch. 126, Section 1, is the section of our law that requires foreign corporations to secure a certificate authorizing them to do business in this State. Banking, Insurance and Railroad Corporations *{*313}* are specifically exempted from the requirements set out in this section. As to Railroad and Insurance companies not here involved, statutory requirements for them to do business in the State of New Mexico appear in other sections of our laws. As to foreign banking corporations, our laws have singled out Building and Loan Associations and set out the specific requirements for them to comply with before they may conduct business in the

State of New Mexico, Section 50-1422 et seq., N.M.S.A., 1941 Comp., Laws 1899, Ch. 72, Section 15.

Section 54-801 N.M.S.A., 1941 Comp., generally provides that all foreign corporations coming into this State and having complied with the requirements of our law shall have the same liabilities as like corporations organized under the laws of this State. The Bank Act of the State of New Mexico, with the exception of the aforesaid Building and Loan Association, makes no mention of any provisions for foreign banks qualifying to do business in the State of New Mexico. This problem has received the attention of prior Courts and prior Attorneys General, particularly in the matter of foreign banks loaning money and acquiring mortgages or trust deeds and the foreclosure of the same in this State.

In order to allow the free flow of commerce and the necessary performance of the business of foreign banks upon the above stated matters, the 1951 Legislature passed subparagraph (b) under Section 54-804 (b) N.M.S.A., 1941 Comp., as amended, which in substance provided that a foreign bank could loan money on real estate, and take, hold and acquire notes, mortgages and trust deeds thereon and foreclose the same, and that such shall not constitute doing business in this State. The Legislature added a proviso which appears as follows:

"* * * provided, that nothing herein contained shall be construed as authorizing any such foreign corporation or bank to transact the business of a bank or trust company in this State."

It is to be noted that the Legislature did not differentiate between a foreign National Bank and a foreign State Bank. It is to be noted that the proviso is not prohibitionary in nature but is merely explanatory.

It is to be noted that the Bank Act does not apply to National Banks, Section 50-102 N.M.S.A., 1941 Comp., as amended, Laws 1915, Ch. 67, Section 2.

In the above cited recently reported case, **In the Matter of the Last Will and Testament of Eloisa Armijo, et al, vs. First National Bank, supra,** the following appears:

"The measure of the powers of a national bank is the National Banking Act, and powers not conferred by Congress are denied. Texas & Pacific Ry. Co. v. Pottorff, 291 N.S. 245, 78 L. Ed. 777, 54 S. Ct. 416 (1934). The National Banking Law as originally passed gave no authority to act in a fiduciary capacity. From a competitive standpoint, this was a severe handicap to a national bank domiciled in a state permitting state banks to act in such capacity. Therefore, in 1913, Congress enacted paragraph 11 (k) of the Federal Reserve Act, 12 U.S.C.A. 248(k), as amended in 1918 in the light of actual experience, which reads in part as follows:

'The Board of Governors of the *{*314}* Federal Reserve System shall be authorized and empowered; . . . . 'To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

'Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this chapter.'"

Therefore, a National Bank properly authorized to conduct the banking business of a trustee under 12 U.S.C.A., 248(k) as amended, would under its charter have the right to do the banking business of a trustee in this State if the laws of this State accorded equal privileges to State Banks. It is to be noted that under the other sub-paragraphs of Section 248(k), such bank would be required to segregate its assets or examinations made by the comptroller of the currency to ascertain that these banks are not violating state laws, and that the capital and surplus requirements of such a National Banking Association desiring to do business as a trustee in such State shall be in compliance with the requirements of the State law upon similar State Banking Corporations.

Therefore, in accordance with the above cited recent case of the Supreme Court of New Mexico, and decisions cited therein, this office is of the opinion that a National Bank domiciled in another State can act as ancillary administrator without further authorization and, after acquiring a permit under 12 U.S.C.A Section 248(k), can perform the duties of trustee in the State of New Mexico without obtaining a certificate of authorization to do business in the State of New Mexico from the State Corporation Commission.

By: William J. Torrington

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