

## Opinion No. 13-984

January 29, 1913

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

**TO:** State Corporation Commission, Santa Fe, N. M.

### **BANKS AND TRUST COMPANIES.**

Trust Companies may not decrease their capital stock.

### **OPINION**

{\*149} I have before me your letter of the 25th instant with reference to a proposed reduction of the capital of the First State Bank & Trust Company of Roswell. You say in effect that the proposition is to retire fifty thousand dollars of the outstanding stock, leaving a paid up capital stock of only fifty thousand dollars, and you say that it is your opinion that there is no law authorizing such a reduction of capital.

As I understand this corporation was organized under the provisions of Chapter 52 of the Laws of 1903. Under that act, by Section 9 thereof, it was provided that the amount of capital stock of any such corporation actually subscribed shall not be less than two hundred and fifty thousand dollars and no less than one hundred thousand of the capital stock must have been actually paid up at the time of the filing of the articles of incorporation. These provisions have, however, been amended by Section 3 of Chapter 133 of the Laws of 1909 which declares that the amount of capital stock of such a corporation in cities, towns and villages of less than seven thousand inhabitants shall not be less than one hundred thousand dollars and not less than fifty thousand dollars thereof must have been actually paid up at the time of the filing of the articles of incorporation. I do not see that this can apply to the city of Roswell as my recollection is that Roswell by the census of 1910 had a population of more than seven thousand.

It is quite clear that there is no provision of law in the statute under which this corporation was created by which a decrease of its stock can be permitted, but by reference to Section 31 of Chapter 79 of the Laws of 1905 it will be seen that any corporation organized under any other general act or thereafter organized under any general act including trust companies as well as others, may increase or decrease its capital stock, and the manner of decrease of capital stock under the act of 1905 is set out in Section 33 thereof. In addition to this, Section 132 of the same act specifies that the acts referred to in the last preceding section, one of which is the act of March, 1903, under which this corporation was created, are not repealed, but the provisions of the new act and of the former act are to be construed together as one act, and all general provisions in the new act which can be enforced consistently with the provisions of the special acts, shall apply to all such corporations, and such corporations shall have the advantage of the provisions of the new act. This section, however, contains a proviso

that the powers to be exercised by corporations already incorporated under said special acts, shall not be held to be extended. Taking all these provisions together it is not entirely clear that this corporation may not have a {\*150} right to decrease its capital stock in accordance with the provisions on that subject in the act of 1905, but I incline to the opinion that those provisions as to the decrease of the stock cannot "be enforced consistently with the provisions" of the special act under which this corporation was incorporated, and that any attempt to decrease the stock as proposed might be dangerous. I incline to this opinion on account of the repeated use in the acts of 1903 and 1909 of language to the effect that the capital stock shall not be less than a fixed amount. It appears to have been the legislative intent to fix a minimum amount of capital stock, and if we can say that a corporation incorporated with that minimum amount of stock can under the act of 1905 decrease it, the legislative intent as to the amount of capital stock would clearly be evaded.

I am not willing to predict with any certainty that this view would prevail if the question were taken into the courts, and I suggest, if the matter is of sufficient importance to the corporation to justify it, that it should obtain a judicial decision as to whether it has any right to make the proposed decrease.