

Opinion No. 36-1444

October 7, 1936

BY: FRANK H. PATTON, Attorney General

TO: Mr. Woodlan P. Saunders, State Bank Examiner, Santa Fe, New Mexico.

{*143} We have your letter of October 6th, asking our opinion with regard to the status of a State Bank which has allowed its charter to expire but which has continued to act in a banking capacity.

State Banks, in New Mexico, are organized under the general incorporation laws of this state together with special provisions regarding banks. Sec. 13-156, of the 1929 Code, provides that incorporated banks shall exercise and enjoy all of the rights and privileges and be subject to all liabilities and restrictions provided by law for corporations in general except as specifically provided in the New Mexico Banking Act. We find nothing in the banking laws of this state with regard to the expiration of a State Bank's charter and, therefore, must be guided by the provisions applicable to general corporations.

Sec. 32-131, of the 1929 Code, specifically provides that the corporate existence of a New Mexico corporation may be extended by amending its articles of incorporation and provides the method of making such amendment. This provision, in our opinion, is applicable to State Banks organized under the laws of New Mexico. Sec. 32-162, of the 1929 Code, provides that all New Mexico corporations, when they expire by their own limitations, shall be continued bodies corporate for certain purposes.

We find no specific decided cases in New Mexico with regard to the particular question which you ask. The question, however, has been before courts of other states and we find that these courts are divided in their decisions on the matter. Some courts hold that when the term of existence provided for in a corporation charter, or articles of incorporation, has expired that the corporation no longer exists and is not to be considered a de facto corporation. Other courts, namely Delaware, New York, Illinois, New Jersey, Missouri, Wisconsin and Montana, have held that in cases where the corporation's term of existence has expired and the corporation has continued in business that it is to be considered as a de facto corporation and that all of its acts are valid unless and until its corporate existence is attacked directly by the state, and that the state itself is the only one which can question its corporate existence. We believe that the rule, as laid down in the courts last abovementioned, {*144} is supported by the better reasoning although the numerical weight of authority seems to be to the contrary. We are unable to give you any authoritative opinion as to the law of this state on the subject for the reason, as stated before, that the matter has not been before the New Mexico courts and we are unable to say which line of authorities our courts would follow.

In the event that the bank in question now makes application for a revival of its charter we believe that it would be considered as a continuation of its original charter rather than the granting of a new charter under the circumstances.

By J. R. MODRALL,

Asst. Atty. General