

OPINION
57-55

July 18, 1957 (OPINION)

COOPERATIVE ASSOCIATIONS

RE: Increasing Capitalization

With reference to your letter request of July 1, 1957, for an opinion of the corporate status of the above captioned company and the manner in which you may accept its proposed amendment providing for increased capitalization, we are pleased to submit the following:

The facts of the case, briefly restated are as follows: The Klose Farmers Elevator Company (hereinafter referred to as the "company") was organized under Chapter 13, Compiled Laws of 1913 as amended by Chapter 92, Session Laws of 1915. It was organized as a domestic capital stock cooperative association for profit. Its corporate existence commenced on March 26, 1917 for a period of twenty years. Its articles of incorporation were renewed on March 26, 1937 for a period of twenty years as authorized by Chapter 112, Session Laws of 1927. On June 15, 1943 the company amended its articles of incorporation to provide for a two-for-one stock split under authority of Section 4557, Compiled Laws of 1913 as reenacted and amended by Chapter 46, Session Laws of 1921. On March 26, 1957 the company renewed its articles of incorporation for a period of twenty years under authority of Section 10-0214 of the N.D.R.C. of 1943. It should be noted that the two renewals and the amendment were made under authority of general corporation statutes not under any cooperative law.

The laws under which the company were organized were repealed by Chapter 43, Session Laws 1921. The effect of the repeal was to preclude the company from acquiring any new rights under the repealed law. (See *Greenwood v. Union Freight R.R. Co.*, 105 U.S. 13, 26 L. Ed. 961, 964 (1881). All of the company's vested rights, privileges and powers actually exercised and enjoyed were retained, and by implication, those rights which had not vested and those rights which could have been acquired under statute but were not exercised, were lost. (Chapter 43, Section 18, Session Laws 1921). Vested rights include those rights provided for in the articles of incorporation and necessarily implied therefrom as well as rights actually exercised under a statute. The right to increase capitalization was not provided for in the articles of incorporation nor was it accomplished prior to 1921 under authority of statute. Therefore, subsequent to 1921 the company had no right to increase its capitalization under the 1913 cooperative law. The company could, however, increase its capitalization under general corporation statutes since they provide for ". . . every corporation . . .", which logically includes cooperative corporations. (See: Section 4557 Compiled Laws 1913; Section 10-0330 N.D.R.C. of 1943).

At the present time the company has three alternatives. It may increase its capitalization under general corporation statutes paying the same fees and using the same procedure as any private

corporation. (Section 10-0330 N.D.R.C. 1943) In fact, this it must do unless it accepts one of the two existing cooperative laws. It may accept under Section 10-1525 of the N.D.R.C. of 1943, or it may accept under Section 10-1560 of the new North Dakota Cooperative Association Act, Chapter 104, Session Laws of 1957. Neither of these latter two provisions is mandatory, although the new law will become mandatory July 1, 1959. If the company accepts the 1943 cooperative law its amendment for increased capitalization will be governed by Section 10-1513 of the N.D.R.C. of 1943; if the company accepts the new cooperative law its amendment for increased capitalization should be governed by Section 10-1537, Chapter 104, Session Laws of 1957. It would appear to be advisable from the company's point of view to accept and qualify under the new law since it will have to do so anyway, although it appears that there is nothing to prevent them from accepting the old law. If the company does not choose to accept either of the cooperative laws, you may accept its amendment for increased capitalization under the general corporation statutes charging them fees according to Sections 10-0331 and 54-0904 of the N.D.R.C. of 1943. If they accept the old cooperative law you should charge them according to Sections 10-1507 and 54-0904 of the N.D.R.C. of 1943. If they accept the new law they should be charged according to Section 10-1554, Session Laws of 1957 and Section 54-0904 of the N.D.R.C. of 1943. In each case no reference need be made to Section 54-0904 if the fees are otherwise provided for by the other statute. Until such time as the company accepts one of the new cooperative laws it is not entitled to the advantages to be gained thereby in payment of fees or otherwise.

You also have inquired about the original fees owed by the company on its articles of incorporation, stating that your office has no record of their payment. Your attention is directed to the reverse side of the original articles of incorporation on which is written beneath the signature of the deputy Secretary of State in the same handwriting as the signature, the words "fees \$33." Possibly that notation evidences payment. In any event it appears that fees owing since 1913 are now governed by Section 28-0116 of the N.D.R.C. of 1943, subsection 1 or 2, which is made applicable to the state through Section 28-0123 of the N.D.R.C. of 1943 * * which means that you have no way now of collecting the fee. If the amendment for increased capitalization is accepted on the basis of general corporation statutes, you may only charge for the amount of the increase, not for the total, since the statute refers specifically to the "amount of the increase." (Section 10-0331 of the N.D.R.C. of 1943).

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