

N.D.A.G. Letter to Meier (July 14, 1987)

July 14, 1987

Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58505

Dear Mr. Meier:

Thank you for your letter of June 3, 1987, requesting advice on whether your office has the authority to issue a certificate of authority to do business within the state of North Dakota to Common Title Bond and Trust (hereinafter Common Title) as a foreign business trust association. Your letter and enclosures indicate that Common Title, which is registered as a business trust in the state of South Dakota, applied for a certificate of authority from your office on a Foreign Cooperative form, but the form had been altered by replacing the words "foreign cooperative" and "cooperative" with the words "business trust association" and "business trust" throughout the application.

A business trust is a form of unincorporated business association that is set up by a declaration of trust. North Dakota's laws do not provide for the formal organization of business trusts, but some states such as South Dakota do register business trusts and issue them certificates of authority to do business.

S.D. Codified Laws Ann. § 47-14-1 (1983) defines a business trust as follows:

47-14-1. Business trust defined. The term "business trust" as used in this chapter shall mean an unincorporated business association of the type which at common law was known as a "commonlaw trust," "business trust," or "Massachusetts trust," created by a trust instrument commonly known as a declaration of trust under which property is held, invested, and reinvested by trustees for the benefit and profit of such persons as are or may become the holders of transferable certificates evidencing beneficial interests in the trust estate.

In addition to registering business trusts, the state of South Dakota registers cooperative corporations pursuant to S.D. Codified Laws Ann. ch. 47-15. Although N.D.C.C. ch. 10-15 provides for the formation of incorporated cooperative associations within North Dakota and the issuance of certificates of authority to do business within North Dakota to foreign cooperatives (N.D.C.C. § 10-15-51), there is no statutory provision authorizing the Secretary of State to issue a certificate of authority to do business in North Dakota to a foreign business trust association formed under the laws of another state.

N.D.C.C. § 10-15-01 provides, in part, as follows:

4. "Foreign cooperative" means an association incorporated under a cooperative law of another state which has members residing within this state and which is operating on the following cooperative bases:

(Emphasis supplied.)

Because Common Title is an unincorporated business association pursuant to S.D. Codified Laws Ann. § 47-14-01 (1983), and is not a foreign cooperative incorporated under a cooperative law of another state, the Secretary of State has no authority to issue a certificate of authority to do business within the state of North Dakota to Common Title. Furthermore, no other North Dakota law authorizes the Secretary of State to register a foreign business trust or issue a certificate of authority for the business trust to do business within the state of North Dakota.

In summary, it is my opinion that the application of Common Title for a certificate of authority to do business within the state of North Dakota must be rejected because it does not constitute a foreign cooperative to which a certificate of authority may be issued pursuant to N.D.C.C. § 10-15-51, and there is no other statutory basis for the Secretary of State to issue a certificate of authority to such a business trust.

You also inquired whether Common Title's application could be filed pursuant to state law with any other state agency. It appears that Common Title could register and seek a certificate of authority to do business in North Dakota if it were to organize itself into a form of business entity that is recognized by the state of North Dakota, such as a cooperative, corporation, general partnership, or limited partnership.

Although a business trust is actually a type of business association created for purposes which are dissimilar to those of most standard trusts, Common Title may be required to register as a trust in a district court or county court of this state in the county of the principal place of administration of the trust, pursuant to N.D.C.C. § 30.1-32-01.

The actual business activities to be undertaken by Common Title are set forth somewhat indefinitely in the Application for Certificate of Authority filed with your office and the Articles of Declaration of Trust filed with the South Dakota Secretary of State on March 18, 1987. However, it appears that some of Common Title's potential business activities may be subject to regulation by other North Dakota governmental agencies. Depending on what type of business activities are undertaken by Common Title, it may be subject to various statutes including, but not limited to, the following:

1. N.D.C.C. chs. 59-01, 59-02, 59-03, 59-04, 59-04.1, and 59-05 (trusts);
2. N.D.C.C. ch. 6-05 (trust companies);
3. N.D.C.C. ch. 13-04.1 (Money Brokers);

4. N.D.C.C. ch. 10-04 (Supervision of Issue and Sale of Securities); and
5. N.D.C.C. ch. 6-03 (banking).

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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