

October 21, 2002

Transmitted via facsimile, original mailed

The Honorable J.B. Penn
Under Secretary for Farm and Foreign
Agricultural Services
United States Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

RE: August 5 Grain Warehouse Regulations

Dear Under Secretary Penn:

Thank you for establishing a 90-day moratorium on accepting new federal warehouse applications from state-licensed warehouse operators and for supporting the NASDA-proposed task force to work through the preemption issues raised by the August 5 rulemaking. It is a good first step.

While preemption of state grain dealer laws appears to be the main issue for many of my colleagues, it is not mine. Kansas does not have a grain dealer law. My primary concern is the vague and overreaching preemption language that asserts preemption like a modern-day baseball trade – player to be named later. Only in this case, it is a regulatory program to be designed and implemented later. I believe this vague and overreaching language, on its face, is beyond USDA authority as spelled out in case law. Further, it appears no regard was given to the uncertainty and harm such an action would create, and USDA apparently has disregarded the purpose of the grain warehouse laws and what Congress intended when it passed the U.S. Grain Warehouse Act.

I recognize that the 1931 amendments to the U.S. Grain Warehouse Act clearly outline Congressional intent to make “the federal warehouse act independent of any state legislation on the subject.”¹ The United States Supreme Court confirmed this fact in 1947 in its decision in *Rice et al. v. Santa Fe Elevator Corp. et al.* In 1988, the Illinois federal district court in *Demeter, Inc. v. Werries* stated that Congress’ regulation in the area of bonds to secure the performance of grain warehousemen precludes state action in the same area. They enjoined the State of Illinois from enforcing its grain insurance act because it duplicated the purpose and effect of the federal bond requirement to secure the performance of a federal grain warehouse.

¹US House of Representatives, Committee on Agriculture, Report 4, 71st Congress, 1st Session, p. 5.

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Case law does not support USDA reserving the field for future regulatory requirements that currently do not exist as articulated in the August rule. In both cases, the courts point to the plain language of the statute, as well as Congressional intent, and then to the regulatory requirements in place for federal grain warehouse license holders, to determine state action in the same area. A comprehensive reading of *Rice v. Santa Fe* reveals that the Supreme Court reversed a portion of the lower court's ruling where the issues in question were not specifically required by the U.S. Grain Warehouse Act and spelled out in federal regulation. The Supreme Court cited *Federal Compress & Warehouse Co. v. McLean*, stating that the "mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy." In addition, in *Demeter, Inc. v. Werries*, the district court noted that the federally licensed warehouses had paid their grain dealer license fee and made no ruling on the state requirement. In sum, the comprehensive reading of case law shows that USDA must actively occupy the arena in order to preempt state action in that area. The threat is not preemption of state law by a duplicative federal law. Instead, the threat is preclusion of state law where no federal substitute exists.

At the NASDA meeting in Lexington earlier this month, USDA counsel Ralph Linden pointed to *Apple Brothers v. U.S.* and claimed this 1999 decision forces the federal grain warehouse regulatory scheme into the realm of merchandising. This is an extremely liberal interpretation of a tort case which, at the very most, provides weak support for USDA's position. In reality, the court held USDA to their own, already-established rules. It did not forge any new territory. Nowhere in the case does it discuss or allude to the idea that USDA has a responsibility in the grain merchandising area. Most disturbing about this case are the arguments USDA made to defend their inaction. USDA argued that their actions were undertaken to further regulatory goals, and that the farmers who stored grain at the federally licensed warehouses were only incidental beneficiaries of USDA's enforcement activities. This is contrary to the message of your staff in Lexington. However, I have to wonder if it is a viewpoint still held given the ramifications of the August rule.

The vague and overreaching preemption language in the August rule could have many negative ramifications for Kansas producers. Will it preempt provisions in the Kansas grain warehouse law, which allow producers to retrieve their grain within 15 days of receiving a bad check, or the provisions that set out requirements for the basic content of a deferred pricing contract? Will it preempt state weights and measures laws regarding scales at federally licensed warehouses, or the collection of a state remediation check-off to clean up polluted sites? Will it preempt the collection of state commodity check-off funds used by Kansas producers to conduct research and to promote Kansas products? Will it preempt provisions adopted by the Kansas Legislature that govern merchant transactions under the Uniform Commercial Code?

I suggest that USDA pull back CFR 735.1(c) and proceed with another rulemaking on the preemption subject only. When drafting this substitute language, USDA should narrowly interpret the court cases in this area and ensure that the primary goals of the U.S. Grain Warehouse Act – protecting depositors and the credibility of warehouse receipts – are advanced.

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Congressional intent also should be carefully considered. Anything less than rewriting this provision is not acceptable. Without clear language in the rule, agriculture, state departments of agriculture and state legislatures will function under a cloud of uncertainty. Most importantly, USDA is inappropriately attempting to invalidate legitimate state action meant to protect producers and to reduce their risk in a very risky business.

Thank you for considering my thoughts and ideas.

Sincerely,

Jamie Clover Adams
Kansas Secretary of Agriculture

cc: Senator Pat Roberts
Congressman Jerry Moran
Kansas Association of Wheat Growers
Kansas Cooperative Council
Kansas Corn Growers Association
Kansas Farm Bureau
Kansas Farmers Union
Kansas Grain & Feed Association
Kansas Grain Sorghum Producers Association
Kansas Rural Center
Kansas Soybean Association