



Oregon

Theodore R. Kulongoski, Governor

Department of Agriculture

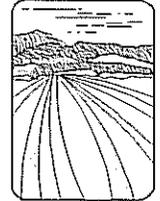
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July 13, 2005



Andrew J. Heimert, Executive Director & General Counsel
Antitrust Modernization Commission
Attn: Public Comments
1120 G Street, NW, Suite 810
Washington, DC 20005

RE: Comments on Antitrust Modernization Considerations

I am writing to discuss specific items related to the Commissions' considerations, particularly section V, Immunities & Exemptions and State Action Doctrine.

The fundamental reasons that Congress passed the Capper-Volstead Act have not changed. As noted in a U.S. Department of Agriculture publication titled "Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act" (USDA, Rural Business-Cooperative Service, Report 59, pg 91), Justice Blackmun explained the Supreme Court's perspective on the rationale for the Act in a leading case, *National Broiler Marketing Association v. United States*.

The first reason for the enactment of Capper-Volstead was to "allow farmers to raise capital and engage in value-added activities that prepared their products for market without violating antitrust law." The second reason is because "individual farmers were considered to be at a severe disadvantage in the marketplace. They lack the economic strength to deal with the vagaries of agricultural markets. And they were subject to manipulation by processors and distributors who could force farmers to sell at prices and terms of sale dictated by the buyers."

The reasons are just as valid today as they were 80 years ago when the Capper-Volstead Act was passed.

The same logic applies to all of these situations: a. Capper-Volstead Act. 7 U.S.C. 291-92; b. Non-profit agricultural cooperatives exemption. 15 U.S.C. 17; c. Agricultural Marketing Agreement Act. 7 U.S.C. 608b, 608c; d. Fishermen's Collective Marketing Act. 15 U.S.C. 521-22.

The ability for growers (including fishermen) to voluntarily join in association to add value to their products or pool their products in order to bargain with buyers or input suppliers is a vital and important tool for farmers and fishermen.

Anyone familiar with agriculture understands that individual producers rarely have the ability to influence the prices that they pay for inputs or the prices that they are paid for their products. They cannot pass on price increases of labor, seeds, fertilizers, electricity, etc.

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As President Kennedy stated: "The farmer is the only man in our economy who buys everything he buys at retail, sells everything he sells at wholesale, and pays the freight both ways." (Campaign address, Sioux Falls, SD, 1960). This remains true in most of agriculture today, as it was then, and as it was 100 years before that.

I believe the Capper-Volstead Act has worked reasonably well to assist farmers, and perhaps should be strengthened, giving growers additional protection against market forces in order to level the economic playing field versus buyers. Indeed, in today's global economy, mega-retailers control much of the market, source from anywhere in the world where prices are cheapest, and dictate production quantity, quality, and terms of sale back to producers. Without some balance to this power, growers will continue to face an untenable situation of increasing costs for inputs and lower prices for their products.

Cheap products for consumers should not be the only, or the predominant measure for public policy. Domestic food and fiber production is every bit as much a strategic national interest as domestic energy, manufacturing, technology, and other capabilities that we must ensure as a nation.

I am opposed to any sunset provisions on Capper-Volstead or the other immunities granted to agricultural cooperatives, marketing associations or fishermen's organizations (those noted above). These provisions serve a purpose and do not need to be rehashed nor constantly reevaluated. The need and merits are self-evident.

Further, I would like to comment on the State Action Doctrine. The State of Oregon, Department of Agriculture, presently oversees a state supervised price negotiation as authorized by the Oregon Legislature (HB 3811, 2001).

This process was carefully designed through consultation with the State Attorney General and legislators to ensure that the all tenants of state and federal law are met and court interpretations are followed.

The statute clearly articulates the purpose of the law as to "displace competition with a regulatory program to a limited degree" by granting immunity from federal and state antitrust laws for collectively bargaining between growers of perennial ryegrass seed and dealers/buyers of these products. The department is present at all meetings, supervises the discussions, considers all information presented including any recommended pricing agreements, and ultimately sets the price for seed grown under contract in this specific agricultural sector.

The Legislature has since passed expanded authority (2003) to add state supervised price negotiations for seafood and other types of grass seeds (2005, annual ryegrass and tall fescue).

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The state action immunity is a unique tool that enables the growers, who are organized as a bargaining association under Capper-Volstead, to meet collectively with dealers, to discuss all aspects of supply, demand, production factors, and other influences on pricing, with the active oversight of the State of Oregon, Department of Agriculture.

The actions of the state and parties are clearly articulated in statute, and the process is actively supervised from start to finish. I believe the process is important, is carefully and thoughtfully applied, and meets the intent and purpose of the state action doctrine. Thank you for the opportunity to comment on these important issues and I strongly encourage the Commission to recognize the continued need for all agricultural and fishery exemptions to antitrust laws and the on-going validity of Capper-Volstead.

Sincerely,

A handwritten signature in cursive script, appearing to read "Katy Coba".

Katy Coba
Director