

N.D.A.G. Letter to Magnusson (Sep. 27, 1989)

September 27, 1989

Mr. Joe Magnusson
Seed Regulatory Supervisor
State Seed Department
State University Station
Fargo, ND 58105

RE: Potential Sale of Grain as Seed in North Dakota

Dear Mr. Magnusson:

Thank you for your June 19, 1989, letter regarding the potential sale of "grain" as seed within the state of North Dakota.

I have reviewed N.D.C.C. ch. 4-09 and associated rules coupled with a review of the Plant Variety Protection Act and Federal Seed Act. Those provisions limit the State Seed Department's enforcement capability regarding material which is sold, offered, exposed, transported, distributed, or held in storage for sale as seed within the state of North Dakota. The Department is further limited by the exemption in chapter 4-09 for a farmer who grows and sells only his own seed and does not advertise nor use a third party as an agent or broker.

The Plant Variety Protection Act provides:

§ 2541. Infringement of plant variety protection

Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a novel plant variety with the notice under section 2567 of this title:

- (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or Possession of it;
- (2) import the novel variety into, or export it from, the United States;
- (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or

- (4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or
- (5) use seed which had been marked "Unauthorized Propagation Prohibited" or "Unauthorized Seed Multiplication Prohibited" or progeny thereof to propagate the novel variety; or
- (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received: or
- (7) perform any of the foregoing acts even in instances in which the novel variety is multiplied other than sexually, except in pursuance of a valid United States plant patent; or
- (8) instigate or actively induce performance of any of the foregoing acts.

7 U.S.C.A. 2541 (1988).

The Federal Seed Act provides:

§ 1611. Illegal sales of uncertified seed

It shall be unlawful in the United States or in interstate or foreign commerce to sell or offer for sale or advertise, by variety name, seed not certified by an official seed certifying agency, when it is a variety for which a certificate of plant variety production under the Plant Variety Protection Act [7 U.S.C.A. 2321 et seq.] specifies sale only as a class of certified seed: Provided, That seed from a certified lot may be labeled as to variety name when used in a mixture by, or with the approval of, the owners of the variety.

7 U.S.C.A. 1611 (1988).

The key element in bringing an enforcement action under N.D.C.C. ch. 4-09 is the intent of the person selling the seed. Thus, it makes little difference what the buyer's intent or ultimate use of the product is.

In each of the instances referenced in your correspondence the State Seed Department must be able to show through competent evidence that the person selling the grain intended to sell it for seed or offer it for sale as seed within the state. Documents associated with the sale or information received directly from the farmers involved in the sale may be useful for this purpose. If the seed is marked or labeled or should have been marked or labeled in accordance with the Plant Variety Protection Act, that information could be used in an enforcement action. With these considerations in mind and given the

facts presented in your letter, my response to each question raised is that an enforcement action may not be taken.

The State Seed Department may not take enforcement action under either chapter 4-09 or the Plant Variety Protection Act if grain, not labeled as seed, is sold during the seed sales season by a dealer who asserts he is not selling seed and whose records support that assertion even though the buyer decides to plant the grain purchased. This is because enforcement turns upon the seller's, and not the buyer's, intent.

Likewise, the State Seed Department may not take enforcement action if, given the above facts, the State Seed Department follows the person to the field and watches the farmer use the grain for planting purposes. Even if the farmer tells the State Seed Department that the grain purchased is intended for planting purposes, the Seed Department may not take enforcement action.

It is my opinion the substitution of "Robust Barley" for "grain" in each of the above scenarios does not allow the Seed Department to take enforcement action.

I hope this information will be of assistance to you. Thank you for contacting me.

Sincerely,

Nicholas J. Spaeth

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