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NO.
STATE OF NEBRASKA
OFFICIAL
NOV 18 1994
DEPT. OF JUSTICE

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DEPUTY ATTORNEYS GENERAL

DATE: November 17, 1994

SUBJECT: Application of the Nebraska Corn Checkoff to corn grown in Nebraska but sold to a first purchaser outside Nebraska

REQUESTED BY: Nebraska Corn Development, Utilization and Marketing Board

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested the opinion of this office as to the application of the Nebraska Corn Checkoff to corn grown in Nebraska, but sold to a first purchaser outside Nebraska. Specifically, you have asked whether the checkoff fee may be collected on Nebraska corn sold out of state, and whether non-compliance with checkoff payment is subject to enforcement under Nebraska law.

In Op. Att'y Gen. No. 93007 (Jan. 28, 1993), we stated "a `fee' is to be collected on each bushel of corn grown in Nebraska and sold through commercial channels, and no corn shall be subject to `the fee' more than once. `The fee' applies to Nebraska-grown corn whether it is stored inside or outside of Nebraska." *See* Neb. Rev. Stat. § 2-3623; § 2-3629 (1989).

The "fee" levied pursuant to Neb. Rev. Stat. § 2-3623 is an excise tax on all corn grown in the State of Nebraska which is sold through commercial channels. The fee is expressly applicable to corn grown in Nebraska and stored elsewhere. Thus, the fee is owed regardless of where the corn is sold (through commercial channels). The issue is really one of enforcement. Nebraska law (i.e. the Nebraska Corn Resources Act) generally applies only to Nebraska

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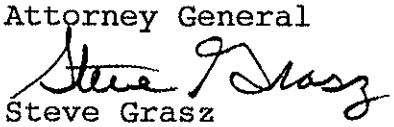
citizens and those persons otherwise falling under Nebraska's jurisdiction (i.e. those growing corn in Nebraska). Whether Nebraska could compel an out-of-state first purchaser to collect fees pursuant to a Nebraska statute is a complicated legal question which depends on the specific facts regarding the first purchasers' connections with Nebraska.

The Due Process and Commerce Clauses impose limits on the taxing powers of States with respect to out of state businesses. ***See Quill Corp. v. North Dakota By and Through Heitkamp***, 112 S.Ct. 1904, 1909 (1992). Due process requires that some definite link or minimum connection exist between the State and the property or transaction it seeks to tax. *Id.* at 1910. We believe such a minimum connection clearly exists here. However, the Commerce Clause further requires a "substantial nexus" between the taxing state and the activity taxed in order for a state to require collection of a tax by an out of state business. *Id.* at 1912-1913. This limitation ensures that state taxation does not burden interstate commerce. *Id.* at 1913. A first purchaser which has no buyers in Nebraska, no offices in Nebraska, and which makes no solicitation of business in Nebraska may not have sufficient nexus to be required to collect the checkoff fee. A first purchaser which has one or more of these connections with Nebraska may be subject to collection requirements. We also note that the fee would still be owed by the grower at the time of sale, since such grower would clearly be subject to Nebraska law. ***See*** § 2-3605 (Cum.Supp. 1994) (definition of "grower").

Therefore, we recommend the Board either seek voluntary collection by out of state first purchasers, seek to collect the fee directly from the grower, or enter into agreements (i.e. a reciprocal fee collection agreement), where practical, for the collection of the fee. As a last resort, refusal to collect the fee by specific out of state first purchasers may be referred to this office for review as to whether forced compliance would be possible.

Sincerely yours,

DON STENBERG
Attorney General



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Deputy Attorney General

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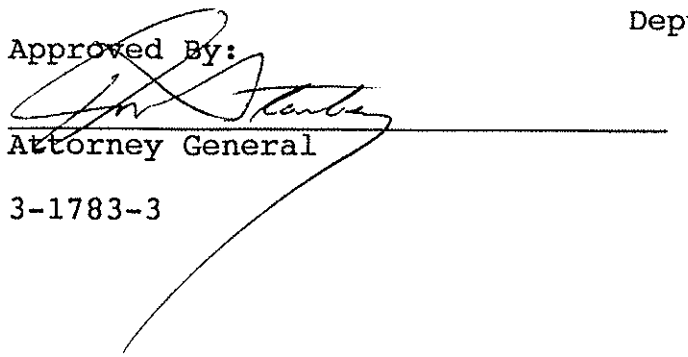

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