Office of the Attorney General
State of North Dakota

Opinion No. 86-5

Date Issued: January 30, 1986

Requested by: Governor George A. Sinner

--QUESTIONS PRESENTED--

I.

Whether N.D.C.C. Ch. 28-29 is in effect.

II.

Whether N.D.C.C. Ch. 28-29 is constitutional.

III.

Whether N.D.C.C. Ch. 28-29 applies to federal land banks and production credit associations.

IV.

Whether N.D.C.C. Ch. 28-29 applies to the Farmers Home Administration and the Small Business Administration.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that N.D.C.C. Ch. 28-29 is in effect.

II.

It is my further opinion that N.D.C.C. Ch. 28-29 is constitutional.

III.

It is my further opinion that N.D.C.C. Ch. 28-29 does apply to federal land banks and production credit associations.

IV.

It is my further opinion that N.D.C.C. Ch. 28-29 does apply to the Farmers Home Administration and the Small Business Administration.

--ANALYSES--

I.

N.D.C.C. Ch. 28-29, as it is now codified, provides as follows:

28-29-04. POWER OF COURTS WHEN PRICES ARE CONFISCATORY.--Until the price of farm products produced in this state shall rise to a point to equal at least the cost of production, in comparison with the price of other commodities in general, entering into the business of agriculture, the supreme court of this state and all district and county courts in this state shall have power, when it is deemed for the best interests of litigants, to extend the time for serving and filing all papers requisite and necessary for the final determination of any cause. Any such court, in like manner, may stay the entry of judgment or the issuance of execution thereon, or may defer the signing of any order for judgment, or may defer terms of court, whenever in the judgment of the court the strictly legal procedure in any cause will confiscate or tend to confiscate the property of any litigant by forcing the sale of agricultural products upon a ruinous market.

28-29-05. COURTS MAY DELAY ORDERS IN FORECLOSURES.--Whenever any foreclosure proceeding is pending in any court in this state and the amount of the debt is less than the value of the property involved, and when any order for judgment will have the force and effect of depriving a defendant of his home and confiscating his property, the court may construe further proceedings to be unconscionable, and may delay the signing of such order to such time as it shall deem it advisable and just to enter the same.

28-29-06. PUBLIC POLICY.--Any court mentioned in section 28-29-04 may take judicial notice of the situation of producers and laborers when prices of farm products are confiscatory, and upon the ground of public policy may do all things necessary to be done lawfully to carry out the provisions of sections 28-29-04 and 28-28-05.

28-29-07. DEBTOR ALLOWED REASONABLE TIME TO MAKE GOOD DEFAULT UNDER SECURITY AGREEMENT.--In an action to foreclose or otherwise enforce a security interest in personal property, the court in its discretion, upon the application of the debtor, may make an interlocutory order fixing a reasonable time within which the debtor shall make good the default under the security agreement and shall pay all costs of suit to date. If the debtor shall show to the court, on or before the date fixed by the interlocutory order, that he has made such payment, or if he tenders it in court, then such action shall be dismissed, otherwise, a final order for judgment for plaintiff may be made as though such interlocutory order had not been

made. The court shall have the power to impound the personal property in controversy during the pendency of the interlocutory order at the expense of the debtor.

28-29-08. ENJOINING MORTGAGEE FROM FORECLOSING MORTGAGE OR VENDOR FROM TAKING POSSESSION OR SELLING PROPERTY PERMISSIBLE.--When the mortgagee has commenced foreclosure proceedings, or the vendor demands or takes possession of the property covered by the contract, and it shall be made to appear by the affidavit of the mortgagor or vendee, his agent or attorney, to the satisfaction of the judge of the district court of the county wherein such property is situated, that the mortgagor or vendee has a legal counterclaim or is entitled to take advantage of the provisions of section 28-29-07, or has any other valid defense against the collection of the whole or any part of the amount claimed to be due, such judge, by an order to that effect, may enjoin the mortgagee from foreclosing such mortgage by advertisement, or the vendor from taking possession of or selling such property, and may direct that all further proceedings be had in the district court having jurisdiction of the subject matter. For purposes of carrying out the provisions of this section, service may be made on the mortgagee or vendor or his attorney or agent. The provisions of this section shall apply to the assignee or transferee of any mortgagee or vendor and to the assignee or successor in interest of the mortgagor or vendee.

This chapter was originally adopted by the North Dakota Legislature in 1933. N.D.C.C. §§ 28-29-04, 28-29-05, and 28-29-06 were adopted as part of House Bill No. 182 which signed by Governor Langer on March 6, 1933, Ch. 99, 1933 N.D. Sess. Laws 145. N.D.C.C. §§ 28-29-07 and 28-29-08 were adopted as part of Senate Bill No. 186, which also was signed by Governor Langer on March 6, 1933, Ch. 222, 1933 N.D. Sess. Laws 343.

No part of N.D.C.C. Ch. 28-29, with the exception of N.D.C.C. § 28-29-07.1 which was repealed by Act of March 19, 1965, Ch. 296, § 32, 1965 N.D. Sess. Laws 562, has been explicitly repealed by the Legislature.

All statutes enacted by the Legislature are presumed to be in effect and the courts of North Dakota are bound by this presumption. N.D.C.C. § 1-02-38(2).

Despite this statutory presumption, some creditors have argued and at least one district court has held that N.D.C.C. § 28-29-04 has been 'self-repealed.' See Mem. Opn., Production Credit Association of Minot v. Lund, Northwest Judicial District, Civil No. 7075, October 7, 1985.

Very briefly, this argument asserts that N.D.C.C. § 28-29-04 was enacted during a time of economic crisis and that the statute was

effective only so long as that crisis continued. This argument further contends this statute 'self-repealed' when prices improved during the 1940's and that it cannot 'reactivate' itself even if prices again return to a level less than the cost of production.

I cannot agree with this argument. The North Dakota Supreme Court, in a well-reasoned and historical discussion, recently indicated that N.D.C.C. Ch. 28-29 is an available defense to debtors in foreclosure actions. Lang v. Bank of North Dakota, 377 N.W.2d 575, 579 (N.D. 1985) (noting that '[w]hile this Court has not yet been called upon to fully analyze the 'confiscatory price' provisions of Section 28-29-04, N.D.C.C., we observe that it does express an important legislative policy of judicial forbearance as to procedures during an agricultural depression.').

In Lang, the Court stated as follows:

That section [28-29-04] and Sections 28-29-05 and 28-29-06, N.D.C.C., were adopted by our legislature in 1933 as part of a comprehensive response to a well documented agricultural and economic crisis. Vogel, The Law of Hard Times: Debtor and Farmer Relief Actions of the 1933 North Dakota Legislative Session, 60 N.D.L.Rev. 488 (1984); see also Robinson, History of North Dakota, pp. 396-419 (1966). During the 1933 Legislative Session, various bills were proposed and adopted to deal with issues of foreclosure, farm debt, farm-debtor relief, and low farm prices. The actions taken during that legislative session included bills authorizing a grain embargo, extending the time period for the right of redemption, prohibiting deficiency judgments, and authorizing courts to delay foreclosures while farm prices were below the cost of production. Unlike other depression-era laws enacted during the 1933 Legislative Session, Sections 28-29-04 through 28-29-06, N.D.C.C., have never been repealed. [Footnote omitted.]

377 N.W.2d at 578-579.

The Court in Lang relied on two earlier cases in which it had recognized that N.D.C.C. § 28-29-04 is a 'defense' to a foreclosure and that an allegation that prices are confiscatory is adequate to enjoin a foreclosure by advertisement so that foreclosure must proceed by action. Folmer v. State, 346 N.W.2d 731, 735 (N.D. 1984); Heidt v. State, 372 N.W.2d 857, 858, n.1 (N.D. 1985). (Folmer and Heidt were remanded for trials on the merits.) 'These cases reflect the viability of the 'confiscatory price defense' as a defense available to a mortgagor.' Lang, 377 N.W.2d at 579.

The Supreme Court's recognition of N.D.C.C. § 28-29-04 as a viable defense to foreclosure is entirely consistent with the legislative history of N.D.C.C. Ch. 28-29. Had the Legislature intended N.D.C.C. Ch. 28-29, and in particular N.D.C.C. § 28-29-04,

to lapse upon the expiration of the farm crisis of the 1930's, it would not have recodified N.D.C.C. Ch. 28-29 in 1943. See R.C. 1943, Sections 28-2904, 28-2905, 28-2906; Act of March 4, 1943, Ch. 201, 1943 N.D. Sess. Laws 276.

The Revised Code of 1943 grew out of the 1939 Legislature's recognition that the statutory code of North Dakota was in need of systematic revision. As the North Dakota Supreme Court stated in a 1939 case construing the validity of the Recodification Act of 1939:

Our laws were compiled in 1913, and in 1925 a Supplement covering subsequent legislation was provided. Since then, separate volumes for each session of the legislature has been published, a total of seven; besides pamphlets covering special sessions. During that period there has been much new legislation and many amendments, many of which contain a general repeal clause. The result is that no one can be sure that he has seen all the laws on a given subject or knows just what laws are in force. It is of the utmost importance, not only to the bar and the public generally, but to the courts, that the Constitution and all the laws of the state be continued to date, annotated, revised and indexed.

The sole purpose of the Recodification Act is to make easily available for the courts and for the attorneys (who are officers of the courts) all constitutional provisions, statutes and judicial decisions. Under present conditions, with an ever increasing volume of legislation and decisions, the courts would be unable to function without systematic arrangement of the laws and adequate digests and annotations.

State ex rel. Mason v. Baker, 288 N.W. 202, 204-205 (N.D. 1939).

The Recodification Act of 1939 imposed the following duty on the Code Revision Commission:

POWERS OF CODE REVISION COMMISSION. It shall also be the duty of such commission to revise, annotate, and index the laws of this State, and in effecting such revision, it shall eliminate all statutes that have been repealed either directly or by implication, or that are inoperative or that are special and limited in their nature, to reconcile all inconsistencies, to eliminate duplication, to eliminate or restate all useless, contradictory and confusing words and language, to incorporate all amendments and statutes of general application, to harmonize the statutory and the declaratory law so far as possible, and to revise all laws wherever it may deem it necessary to make a perfect, complete and consistent code of laws.

Act of March 15, 1939, Ch. 110, § 3, 1939 N.D. Sess. Laws 150 (emphasis supplied).

Although the Commission's task was to be completed by 1941, the 1941 Legislature reauthorized the work of the Code Revision Commission for an additional two years. Act of March 14, 1941, Ch. 32, 1941 N.D. Sess. Laws 51.

The work of the Code Revision Commission was finally completed in 1943. Pursuant to § 4 of the Recodification Act of 1939, the proposed substantive law contained in the proposed code would become effective only when formally enacted by the Legislature. This enactment occurred on March 4, 1943. Act of March 4, 1943, Ch. 201, 1943 N.D. Sess. Laws 276.

The 1943 Legislature cannot be presumed to have acted idly in reenacting N.D.C.C. Ch. 28-29 in light of their intent to remove implicitly repealed or special and limited statutes from the code in the recodification process.

In 1959, the Legislature authorized the legislative research committee to 'make such substantive changes in the present law . . . as is necessary . . . to eliminate or clarify all obviously obsolete or ambiguous sections that exist in the law.' Act of March 16, 1959, Ch. 37, 1959 N.D. Sess. Laws 44. N.D.C.C. Ch. 28-29 was republished without change.

Had the Legislature believed that N.D.C.C. Ch. 28-29, or N.D.C.C. § 28-29-04, had become self-repealed, it would not have reenacted the chapter or the section in 1943 nor have republished the chapter and the section in 1959. In addition, if the Legislature believed that N.D.C.C. § 28-29-04 or any other part of N.D.C.C. Ch. 28-29 had self-repealed, it would not have made references in 1971 to 'Chapter 28-29' in N.D.C.C. § 41-09-49 (U.C.C. 9-503): 'Unless otherwise agreed and subject to chapter 28-29, a secured party has, on default, the right to take possession of the collateral. . . .' Act of March 2, 1971, Ch. 429, § 1, 1971 N.D. Sess. Laws 925 (emphasis supplied).

The foregoing analysis leads me to conclude that N.D.C.C. § 28-29-04, as well as N.D.C.C. Ch. 28-29 as a whole, is currently in effect.

II.

The presumption that a valid legislative enactment is constitutional is very strong:

An act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity.

So. Valley Grain Dealers v. Bd. of County Commissioners, 257 N.W.2d 425, 434 (N.D. 1977); see also Snortland v. Crawford, 306 N.W.2d 614 (N.D. 1981).

The strength of this presumption is illustrated by the fact that four of five Supreme Court justices must agree before a statute may be found unconstitutional. N.D. Const. Art. VI, § 4. The only basis by which a law may be found unconstitutional is clear repugnance with a provision of the federal or state constitutions. Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978). As stated in one Supreme Court case, '[o]ne who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely.' So. Valley Grain Dealers v. Bd. of Co. Commissioners, 257 N.W.2d at 434.

Unless and until the North Dakota Supreme Court rules that N.D.C.C. Ch. 28-29 is in whole or in part unconstitutional, I must presume that it is constitutional.

III.

The Federal Farm Loan Act of 1916 was adopted in response to a national demand for a rural credit system by which credit could be extended to those engaged in agriculture, upon the security of farm mortgages. Federal Farm Loan Act of 1916, Ch. 245, 39 Stat. 360 (current version at 12 U.S.C. §§ 2001- 2260, Farm Credit Act of 1971). To adapt the system to local needs, it was proposed and enacted that the loans should be made through local associations controlled by their membership, the borrowers of the system. Id. Due to their many characteristics of private business corporations, these local associations (federal land banks and production credit associations) have never been identified as wholly owned government corporations or agencies exclusively under federal control but rather have been classified as 'federal instrumentalities.' Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935); Federal Land Bank v. Gaines, 290 U.S. 247, 254 (1933).

Federal instrumentalities, like other creatures of the federal government, are regulated by acts of Congress as interpreted by the judiciary. First National Bank in St. Louis v. Missouri, 263 U.S. 640, 656 (1924). Under the Supremacy Clause, U.S. Const., Art. IV, cl. 2, Congress possesses exclusive power to determine the extent to which state law is preempted with respect to the activities of federal instrumentalities. 263 U.S. at 656.

Federal preemption of state law can be accomplished in either of two general ways. First, if Congress demonstrates an intent to occupy a given area, any state law falling within that area is preempted. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (state

law on punitive damages not preempted by federal law). Congressional intent to preempt state authority may be established by express terms in legislation, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), or implicitly from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. . . .' Pacific Gas and Electric v. Energy Resources Commission, 461 U.S. 190, 204 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

Second, even where Congress has not manifested the intent to displace state authority over a specific matter, state law is preempted to the extent that it actually conflicts with federal law. Pacific Gas, 461 U.S. at 204. 'Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941)." Pacific Gas, 461 U.S. at 204.

A comprehensive survey of the Farm Credit Act of 1971, 12 U.S.C.A. §§ 2001- 2260 (West 1980 & Supp. 1985), fails to reveal a congressional intent, whether express or implied, to preempt state law on mortgage foreclosures. Rather, a review of the Farm Credit Act of 1971 and the judiciary's interpretations of its predecessor statutes, first enacted in 1916, indicate that Congress intended state law to apply in all matters not specifically preempted by express statutory language.

The predecessor statutes to the Farm Credit Act of 1971, similar in most respects to the present codification, expressly directed the Land Bank Commissioner to examine the laws of each state and to report, among other things, whether in his opinion they are such as to safeguard against loss in the case of default. Farm Loan Act of 1916, Ch. 245, § 30, 39 Stat. 360, 382; Farm Credit Act of 1933, 12 U.S.C.A. § 971 (West 1957); (current version of 1916 act and 1933 act at 12 U.S.C.A. § 2259 (West 1980)). It further provided that, if examination shall show that the law of any state does not afford sufficient protection, the Farm Credit Administration may declare mortgages on land in that state ineligible and, thus, effectively preclude that particular state from the benefits of the Farm Credit System. Farm Loan Act of 1916, Ch. 245, § 30, 39 Stat. 360, 382; Farm Credit Act of 1933, 12 U.S.C.A. § 972 (West 1957); (current version of 1916 act and 1933 act at 12 U.S.C.A. § 2259 (West 1980)).

The Supreme Court has interpreted this statutory scheme in conformance with its plain meaning: state laws on foreclosure govern the federal instrumentalities organized pursuant to the Federal Farm Credit Act. Federal Land Bank v. Warner, 292 U.S. 53, 55 (1934) (Federal Land Bank held subject to Arizona foreclosure law concerning

counsel fees). Furthermore, it is well established that the United States is subject to the same exemptions as apply to private persons by the law of the state in relation to foreclosure proceedings. See Fink v. O'Neil, 106 U.S. 272, 284-285 (1882).

Relying on the plain meaning of the statute and the Supreme Court's interpretation thereof, the highest court of every state that directly addressed the issue during the 1930's held that federal land banks and production credit associations are subject to state laws relative to foreclosure. First-Trust Joint Stock Land Bank of Chicago v. Lehman, 283 N.W. 96 (Iowa 1938) (federal land banks held subject to Iowa's Emergency Act providing for continuance of actions for foreclosure of real estate mortgages and trust deeds); Warrener v. Federal Land Bank of Louisville, 99 S.W.2d 817, 819 (Ky. Ct. App. 1936) (federal land bank held subject to the state insurance requirements concerning mortgaged property); Union Joint Stock Land Bank of Detroit v. Baker, 11 N.E.2d 269 (Ohio Ct. App. 1937) (federal land bank subject to mortgage moratorium of Ohio which merely required payment of interest); Union Joint Stock Land Bank of Detroit v. Kissane, 270 N.W. 178, 179 (Mich. 1936) (joint stock land bank organized under Federal Farm Loan Act subject to the laws of Michigan regulating remedy in foreclosure proceedings and moratorium act) (cases involving joint stock land banks are persuasive for resolving the present issue inasmuch as the Federal Farm Loan Act of 1916, Ch. 245, § 16, 39 Stat. 360, declared that 'except as otherwise provided, joint stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal land banks by the Act. . . .'); and Rose v. Union Joint Stock Land Bank of Detroit, 270 N.W. 180 (Mich. 1936) (joint stock land bank held subject to mortgage foreclosure moratorium statutory provisions). See also Blake v. Federal Land Bank of Springfield, 469 N.Y.S.2d 908, 910 (N.Y. Sup. Ct. 1983) (state law governs federal land bank in mortgage foreclosure proceedings).

Decisions to the contrary were decided on grounds other than the basis that federal instrumentalities of the Farm Credit System are not subject to state law. Federal Land Bank of New Orleans v. Tatum, 164 So. 319 (Miss. 1935) (moratorium law expressly exempted agencies and instrumentalities of the federal government from its application); Dallas Joint Stock Land Bank of Dallas v. Ballard, 74 S.W.2d 297 (Tex. Civ. App. 1934) (moratorium statute held unconstitutional and therefore not applicable to federal instrumentalities or to any financial institution).

The North Dakota Supreme Court has held that a federal land bank is to be treated as a private person with respect to its transactions in this state and, consequently, can avail itself of the equitable remedies enforced by this state's judiciary. Federal Land Bank v. Koslofsky, 271 N.W. 907, 912 (N.D. 1936). An obvious corollary of the Koslofsky ruling is that federal land banks, when pursuing the

equitable remedy of foreclosure, are subject to the equitable rights afforded debtors by the North Dakota Legislature.

In Federal Land Bank v. De Rochford, 287 N.W. 522 (N.D. 1939), the Supreme Court of North Dakota upheld a state gas tax that incidentally burdened the activities of the Federal Land Bank. De Rochford clearly states the view that federal instrumentalities of the Farm Credit System are not exempt from state regulation. Thus, the North Dakota Supreme Court has long recognized that federal land banks and production credit associations are not immune from state law as a general matter.

Of particular importance in determining congressional intent on preemption of state law in the Farm Credit System is the 1971 revision of the Farm Credit Act in which Congress enacted a provision that substantially incorporates Sections 971 and 972 of the 1933 act, the progeny of Section 30 of the 1916 act, which required reference and analysis of applicable state law. 12 U.S.C.A. § 2259 (West 1980). This statute states as follows:

§ 2259. STATE LEGISLATION

Whenever it is determined by the Farm Credit Administration, or by judicial decision, that a State law is applicable to the obligations and securities authorized to be held by the institutions of the System under this Act, which law would provide insufficient protection or inadequate safeguards against loss in the event of default, the Farm Credit Administration may declare such obligations or securities to be ineligible as collateral for the issuance of new notes, bonds, debentures, and other obligations under this Act.

The enactment of § 2259 clearly manifested Congress' acquiescence of the judiciary's long-standing view that state foreclosure laws apply to federal instrumentalities of the Farm Credit System and left little maneuverability for the courts to assert federal preemption in the foreclosure area. Furthermore, the 1971 Farm Credit Act is not of such an interstitial nature as to warrant fashioning federal common law pursuant to the Clearfield Trust doctrine. See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

It is of some significance in determining congressional intent on preemption of state law in the Farm Credit System that Congress thought it necessary to preempt only two specific areas of state law during the Farm Credit System's 70-year existence. The first area of state law which Congress considered necessary to preempt was local taxation of the federal instrumentalities. 12 U.S.C.A. §§ 2055, 2079 (West 1980) (this exemption has existed since the original version of the Act; see Federal Farm Loan Act of 1916, Ch. 245, § 26, 39 Stat. 360, 380). A state's inability to tax the federal government has

been regarded as such a fundamental tenet of constitutional law since McCulloch v. Maryland, 4 Wheat. 316 (1819), that express legislation on the matter makes sense only if there existed a congressional assumption and intent that farm credit instrumentalities were otherwise generally subject to state regulation. See also Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941). The second area that Congress deemed necessary to preempt was local usury regulations as applied to the federal instrumentalities. 12 U.S.C.A. § 2015 (West 1980 & Supp. 1985).

Apart from these two specific areas, the Farm Credit Act of 1971 and the regulations issued pursuant to it are void of any congressional intent to otherwise preempt state law. An argument that Congress did intend federal preemption of state law, and merely failed to provide the appropriate federal rule, promotes the inconceivable notion that Congress intended the Farm Credit System to operate in a regulatory vacuum. I cannot accept this argument.

Even where Congress has not manifested an intent to exclusively regulate a particular field, the second prong of the Supreme Court's preemption test articulated in Pacific Gas, 461 U.S. at 424, indicates that there are situations in which state regulation must nevertheless be invalidated. Such situations arise when 'compliance with both federal and state regulations is a physical impossibility,' Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. at 142-143, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. at 67.

It is unlikely that the Supreme Court contemplated a need to reach the second step of its preemption analysis in situations where congressional intent to subject a creature of the federal government to state law is as unequivocal as in the present context. However, in the absence of an express Supreme Court ruling on this issue, an analysis of the second area of federal preemption is necessitated.

There exists no opportunity for the 'physical impossibility' of complying with both federal and state regulations in the foreclosure context due to the absence of federal legislation or regulation in this area. In fact, due to the congressional intent expressed in 12 U.S.C. § 2259 that federal instrumentalities of the Farm Credit System are subject to state law governing foreclosures, the conflict would arise only if state law was determined not to apply to an instrumentality.

Additionally, North Dakota's foreclosure law, in particular the 'confiscatory price' defense of N.D.C.C. Ch. 28-29, does not represent 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. at 67. A fundamental purpose of the Farm Credit Act is to

extend credit to the agricultural sector to promote a prosperous, productive agriculture, which is deemed essential to the well-being of the United States. 12 U.S.C.A. § 2001(a) (West 1980). In conformance with Congress' broad goal of fostering agricultural development, the Farm Credit System has a longstanding policy of 'forbearance' in the case of default by borrowers. 12 C.F.R. § 614.4510(d)(1) (1983). See also Testimony before the Subcommittee of the House Appropriations Committee, 98th Cong., 1st Sess. (Feb. 8, 1983).

In those hearings Mr. Donald E. Wilkinson, the governor of the Farm Credit Administration (FCA), responded to congressional concerns regarding the farm economic crisis and FCA's foreclosure policy. Mr. Wilkinson read a portion of the foregoing regulation into the record and stated to the Subcommittee Chair, James L. Whitten, as follows:

'This morning, members of the committee, the Federal Board, under the leadership of Mr. Nail, adopted a special statement on lending under stress conditions. It reaffirms the forebearance [sic] policy which I have just stated.

. . .

I am quoting 'The Federal Farm Credit Board,'--Mr. Wachter, this is a statement made by the Federal Board this morning, sir, to this very critical farm credit situation--'The Federal Board reaffirms the system's long standing policy of forebearance [sic] that is, sticking with a borrower so long as there appears to be a reasonable possibility for him to work out of financial difficulties and to reestablish a fully viable farm business. In so doing, and this is critical, 'System institutions must be prepared to require that adjustments be made or disciplines exercised to help assure the borrower's ultimate recovery. Foreclosure, or other such drastic action, is to be avoided unless and until there is no reasonable alternative course of action remaining.' That is the very last resort.' [Emphasis supplied.]

(Hearing before a subcommittee of the Committee of Appropriations, House of Representatives, 98th Cong., 1st Sess. (1983).)

The 'confiscatory price' defense of N.D.C.C. Ch. 28-29 similarly reflects policies of fostering agricultural development and forbearance during stress times. Lang v. Bank of North Dakota, 377 N.W.2d 575, 578-580 (N.D. 1985); ('[T]he legislative policy of judicial forbearance during agricultural depressions embodied in Section 28-29-04, N.D.C.C., is strongly rooted in the history and experience of our State. It has been carefully preserved by successive legislative sessions for over half a century.' Id. at 580); Folmer v. State, 346 N.W.2d 731, 732, 734 (N.D. 1984); Heidt

v. State, 372 N.W.2d 857, 860-861 (N.D. 1985). Thus, N.D.C.C. Ch. 28-29 does not operate as an obstacle to the purposes and objectives of the Farm Credit System; rather, it is entirely consistent with those policies.

Federal land banks and production credit associations are brought into existence under federal legislation, are instrumentalities of the federal government, and are necessarily subject to the paramount authority of the United States. Nevertheless, federal land banks and production credit associations are subject to the laws of a state with respect to their affairs in the absence of federal preemption of such state laws. It is my opinion, therefore, that the federal land banks and production credit associations operating in the state of North Dakota are subject to the 'confiscatory price' defense and the other remedies provided by N.D.C.C. Ch. 28-29.

IV.

The United States Supreme Court has held that federal law governs questions involving the rights of Farmers Home Administration (FmHA) and the Small Business Administration (SBA) arising under their nationwide programs. U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979).

Kimbell Foods is based on Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), in which the Court decided two issues. The first was that in certain instances where Congress has failed to act and overriding interests of the federal government are at stake, 'it is for the federal courts to fashion the governing rules of law according to their own standards.' Id. at 367. The second, pivotal for purposes of this discussion, was whether the federal courts should adopt a uniform nationwide rule or should adopt state law as the appropriate federal rule. Id. (noting that 'in our choice of the applicable federal rule we have occasionally selected state law').

In Kimbell Foods, the suit involved the claimed priority of contractual liens serving loans guaranteed by the Small Business Administration (SBA) and the Farmers Home Administration (FmHA). The Court, exercising its federal rule-making authority, rejected a uniform nationwide rule in favor of adopting ready-made state law.

Kimbell Foods sets forth three considerations relevant to the determination of whether state law should be adopted as the appropriate federal rule. 440 U.S. at 728-729. First, whether there exists a need for a nationally uniform body of law with respect to the federal program in question. Id. at 728. Second, whether 'application of state law would frustrate specific objectives of the federal programs.' Id. Third, the 'extent to which application of a

federal rule would disrupt commercial relationships predicated on state law.' Id. at 729.

In Kimbell Foods, the Supreme Court effectively disposed of the uniformity consideration by holding that, with respect to lien priority disputes involving FmHA and SBA, 'nationwide standards' are not 'necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors.' Id. at 729. The Court further reasoned that a uniform federal rule is unnecessary where the state commercial codes have established convenient and adequate solutions in relation to lien priorities among creditors.

The reasoning of Kimbell Foods that a uniform federal rule is not warranted in the lien priority context is equally persuasive in the foreclosure area. State laws on lien priority result in a final resolution of the various parties' interests whereas a 'confiscatory price' defense is merely a temporary remedy that in no way affects the ultimate priority rights of FmHA or SBA. As such, the uniformity consideration does not warrant holding the 'confiscatory price' defense of N.D.C.C. Ch. 28-29 inapplicable to FmHA or SBA.

Apart from considerations of uniformity, it must also be determined whether 'application of state law would frustrate specific objectives of the federal programs.' Kimbell Foods, 440 U.S. at 728. Congress has many times, in connection with farm legislation, expressed its objective to foster and encourage family farms (7 U.S.C. § 2266(a)) and to keep existing farms operating (7 U.S.C. § 1921). In 1978, Congress passed 7 U.S.C. § 1981a with the intention of expanding the power of FmHA to meet the serious financial needs of farmers resulting from repeated drought conditions and unusually low farm prices. (H.R. Rep. No. 986, 95th Cong. 2d Sess. (1978)).

7 U.S.C. § 1981a permits the deferral of loan payments upon the borrower's 'showing' that due to circumstances beyond his or her control 'the borrower is temporarily unable to continue making payments . . . without unduly impairing the standard of living of the borrower.' 7 U.S.C.A. § 1981a (West Supp. 1985). Pursuant to 7 U.S.C. § 1981a, the FmHA has promulgated extensive regulations that permit a borrower to defer loan payments in various situations where the borrower's delinquency is due to circumstances beyond his or her control. 50 Fed. Reg. 45,774 (November 1, 1985) (to be codified at 7 C.F.R. § 1951.44).

7 C.F.R. § 1951.44(b)(1)(i)(D) provides that one of the situations for deferral occurs when:

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(D) Economic factors that are widespread and not limited to an individual case, such as high interest rates or low market prices for agricultural commodities as compared to production costs, that reduce

the repayment ability of the borrower so that the scheduled payments cannot be made.

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Congress granted SBA similar authority to defer repayment of outstanding SBA loans at the request of the small business concern when such deferral would help the concern 'become or remain viable.' 15 U.S.C.A. § 634(e)(1), (2) (West Supp. 1985). Thus, SBA, like FmHA, possesses authority to defer loan repayment, in lieu of foreclosure, where the circumstances warrant such action.

The policies underlying the 'confiscatory price' defense of N.D.C.C. Ch. 28-29 are clearly consistent with the policies of FmHA and SBA as expressed in 7 U.S.C. § 1981a, 7 C.F.R. § 1951.44 (currently at 50 Fed. Reg. 45, 774, Nov. 1, 1985), and 15 U.S.C. § 623(e)(1) and (2). To conclude otherwise 'would be to ignore the teaching of [the Supreme Court's] decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists.' Rice v. Norman Williams Co., 458 U.S. 654, 664 (1982) (quoting Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960)); see also Wallis v. Pan American Pet. Corp., 384 U.S. 63, 68 (1966) ('In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown'). [Emphasis supplied.] The 'confiscatory price' defense of N.D.C.C. Ch. 28-29 does not significantly conflict with specific objectives of the FmHA or SBA programs and, thus, application of N.D.C.C. Ch. 28-29 to FmHA and SBA cannot be objected to on this basis.

The final consideration emphasized in Kimbell Foods was the 'extent to which application of a federal rule would disrupt commercial relationships predicated on state law.' 440 U.S. at 729, 739-740. Kimbell Foods declined to alter settled commercial practices based on ready-made state law. Of critical importance to the court's decision was the justifiable reliance on state law by creditors other than the United States. The Court reasoned that supplanting state law for the benefit of the United States would thwart this reliance and seriously undermine the stability essential for reliable evaluation of the risks involved in structuring financial transactions.

A failure to subject FmHA and SBA to the 'confiscatory price' defense while permitting the defense to operate against other creditors would disrupt the commercial equilibrium that presently exists in North Dakota. Creditors, whether commercial banks, Federal Land Banks, Production Credit Associations, SBA, or FmHA, have developed reasonable expectations concerning their relative security

status in the agricultural sector. To exempt one of these entities at the exclusion of the others would undermine these expectations.

Additionally, North Dakota borrowers enter their commercial transactions with certain expectations. Borrowers justifiably rely on the protections granted by the North Dakota Legislature concerning foreclosure proceedings when they procure agricultural loans. The need to protect these reasonable expectations militates strongly against disregarding state law in favor of federal common law. Thus, the 'commercial relationships' analysis required by Kimbell Foods strongly favors adoption of state law respecting debtors' rights in foreclosure proceedings as the appropriate federal rule.

Consistent with the federal common law test established by Kimbell Foods, North Dakota foreclosure law, including the 'confiscatory price' defense of N.D.C.C. Ch. 28-29, should be adopted as the appropriate rule of law in proceedings where FmHA or SBA is a litigant in conjunction, of course, with applicable federal rules and regulation. This conclusion comports with several United States Supreme Court and lower court decisions. United States v. Yazell, 382 U.S. 341 (1966) (Texas coverture law applicable to SBA loans); Fink v. O'Neil, 106 U.S. 272 (1882) (U.S. subject to state homestead exemption when attempting to levy execution against property); RFC v. Beaver County, 328 U.S. 204 (1946) (U.S. Government subject to settled state rules as to what constitutes 'real property'); Wallis v. Pan American Pet. Corp., 384 U.S. 63 (1966) (U.S. subject to Louisiana law in the resolution of disputes over leases of federal lands); U.S. v. Brosnan, 363 U.S. 237 (1960) (Court adopted state law to govern divestiture of federal tax liens); United States v. Ellis, 714 F.2d 953 (9th Cir. 1983) (FmHA subject to state law respecting redemption rights); U.S. v. Dismuke, 616 F.2d 755 (5th Cir. 1980) (Georgia foreclosure law applies to SBA deficiency action; relying on United States v. S.K.A. Associates, Inc., 600 F.2d 513, 516 (5th Cir. 1979) which held that government agencies 'should fare no better, and no worse, than a private lender' in their lending activities); U.S. v. Irby, 618 F.2d 352 (5th Cir. 1980) (SBA subject to state law in loan foreclosure action); U.S. v. Kukowski, 735 F.2d 1057 (8th Cir. 1984) (North Dakota law applies in SBA foreclosure action); Larson v. Larson, ---- F. Supp. ---- (D.C.N.D. 1985) (North Dakota's interest in its laws affecting real estate liens overrides SBA's interest in a uniform rule of priority).

It is my opinion, therefore, that the confiscatory price defense of N.D.C.C. Ch. 28-29 is applicable to the FmHA and SBA in foreclosure proceedings involving North Dakota borrowers.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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