

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the May 8, 1987
Assessment by the Minnesota
Insurance Guaranty Association.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before
Administrative Law
Judge George A. Beck on Monday, October 26, 1987 at 1:30 P.M., in the
Large
Hearing Room of the Minnesota Department of Commerce at 500 Metro Square
Building in St. Paul, Minnesota. The record in this matter closed on
December
21, 1987 upon receipt of the final written memorandum by a party.

James A. Neal, Esq., of the firm of Steffen & Munstenteiger, P.A., 301
Anoka Professional Building, 403 Jackson Street, Anoka, Minnesota 55303,
appeared on behalf of Empire Fire and Marine Insurance Company. Hugh
Alexander, Esq., of the firm of Sterling & Miller, P.C., Suite 3150, 370 -
17th Street, Denver, Colorado 80202, appeared representing Bituminous
Casualty
Corporation. Dennis Christofferson, Box 1820, Fargo, North Dakota
58107,
appeared pro se, representing Dawson Hail Insurance Corporation. James
H.
Overholt, c/o Overholt Crop Insurance, 6517 City West Parkway, Eden
Prairie,
Minnesota 55344, appeared pro se on behalf of American West Insurance
Company. John A. Harris, Esq., of the firm of Scott, McLeod,
Himmelberg,
Matz, Pires & Price, 2501 M Street N.W., Fourth Floor, Washington,
D.C. 20037,
appeared on behalf of the Intervenor, American Association of Crop
Insurers.

Michael J. Ahern, Esq. of the firm of Moss & Barnett, P.A., 1200
Pillsbury
Center, Minneapolis, Minnesota 55402, appeared on behalf of the
Minnesota
Insurance Guaranty Association. Jerome L. Getz, Special Assistant
Attorney
General, 515 Transportation Building, St. Paul, Minnesota 55155,
appeared
representing the Minnesota Department of Commerce .

This Report is a recommendation, not a final decision. The
Commissioner
of Commerce will make the final decision after a review of the record
which

may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Michael A. Hatch, Commissioner, Minnesota Department of Commerce, 500 Metro Square Building, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

(1) Whether the Minnesota Insurance Guaranty Association's (MIGA's) assessment of May 8, 1987 on any member reinsured by the Federal Crop Insurance Corporation (FCIC), as to any portion of a multi-peril crop

insurance policy in effect between January 1, 1986 and December 31, 1986 was invalid because it was preempted by federal law, including the Federal Crop Insurance Act and the standard reinsurance agreement entered into by the FCIC and its member insurers for the period of July 1, 1985 to June 30, 1987. (Ex. B).

(2) Whether the MIGA's right to levy an assessment on any member with respect to premiums payable on policies of multiple peril crop insurance reinsured by the FCIC, for any portion of a policy in effect between May 11, 1987 and June 30, 1987, has been preempted by 7 U.S.C. sec. 1506(k) and 7 C.F.R. 400.156(a), 52 Fed.Reg. 17545 (May 11, 1987). (Ex. B).

(3) Whether federally reinsured multiple peril crop insurers who received the MIGA notice of assessment, but did not appeal and did not participate as a party in this proceeding, may recover the assessment they have paid if the May 8, 1987 assessment is found to have been incorrectly based on premiums collected on multiple peril crop insurance reinsured by the FCIC.

(4) Whether federally reinsured multiple peril crop insurers who are not members of MIGA and who did not receive the MIGA notice of assessment of this proceeding, but which "indirectly" paid the May 8, 1987 MIGA assessment, may recover the assessments they have paid in the event the May 8, 1987 assessment is found to have been incorrectly based on premiums collected on multiple peril crop insurance reinsured by the FCIC.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background.

1. The Minnesota Insurance Guaranty Association (MIGA) is a non-profit entity formed under Minnesota law. Its members consist of all domestic and foreign insurers transacting business in Minnesota in certain kinds of insurance including multiple peril crop insurance. (Ex. C).

2. The purpose of MIGA is to provide a mechanism for the protection of Minnesota insureds against financial loss due to the liquidation or failure of

their insurer. Minnesota law authorizes MIGA to assess its member insurers in order to pay the claims of policyholders who have incurred a loss due to an insolvent insurer. (Ex. C).

3. Empire Fire and Marine Insurance Company (hereinafter 'Empire'), Bituminous Casualty Corp. ("Bituminous"), American West Insurance Company ('American West') and Dawson Hail Insurance Corporation ("Dawson") are insurers that sell various kinds of insurance in the State of Minnesota, including multiple peril crop insurance. Each is a member of MIGA.

Procedural Matters.

4. On May 8, 1987 the Board of Directors of MIGA assessed its members for loss claims, return of unearned premiums, and expenses resulting from the insolvency of 13 insurance companies. The assessments levied were based upon

premiums collected during the calendar year 1986 by MIGA members. A Notice of Assessment dated May 28, 1987 was sent to each member of MIGA.

5. The total assessment issued to Empire was \$71,365 of which \$43,205 was attributable to premiums for multi-peril crop insurance. (Ex. 4; Ex. 5). The assessment issued to Bituminous included \$18,914.63 which was based upon premiums for multi-peril crop insurance. (Ex. 18). American West was assessed a total of \$49,608 of which \$2,852.08 is based upon premiums for multi-peril crop insurance. (Ex. 19). Dawson was assessed \$28,223 of which \$12,397.91 is attributable to multi-peril crop insurance. (Ex. 20). Each insurer has paid the assessment to MIGA and each is reinsured by FCIC.

6. On June 9, 1987, Empire wrote to MIGA objecting to that portion of the assessment which was based upon premiums for multi-peril crop insurance on the grounds that the Federal Crop Insurance Corporation (FCIC) had preempted MIGA's authority to make such assessments. (Ex. 5). Similar objections were lodged by Bituminous, American West and Dawson. (See, Ex. 11).

7. On June 12, 1987, the Executive Director of MIGA wrote to Empire advising it that no revision would be made since it was MIGA's position that the preemption was not effective until July 1, 1987. (Ex. 6).

8. By letter dated June 26, 1987, Empire appealed the decision of MIGA to the Commissioner of Commerce and requested a hearing. (Ex. 7). Similar requests were made by Bituminous, American West and Dawson.

9. On August 27, 1987 a Notice of and Order for Hearing in this matter was issued by the Commissioner of Commerce. On September 3, 1987 the Notice of and Order for Hearing was mailed to each member of MIGA. (Ex. C).

10. The Notice of and Order for Hearing named Empire, Bituminous, American West, Dawson, MIGA and the Minnesota Department of Commerce as parties. It also specified that all requests for intervention must be received by the Administrative Law Judge on or before September 20, 1987. (Ex. C).

11. On September 18, 1987 a Petition to Intervene was received at the Office of Administrative Hearings from the American Association of Crop Insurers ('AACI'). AACI is a private national association of 22 multi-peril crop insurance companies that participate in the federal multi-peril crop

insurance program and whose policies are reinsured by the FCIC. (Petition to Intervene). AACI was granted party status in this proceeding in an Order dated October 9, 1987. No other petitions for intervention were received in this matter.

12. The following members of AACI paid the May 8, 1987 assessment; the portion of the assessment paid which is attributable to premiums for multi-peril crop insurance reinsured by the FCIC is indicated:

a. North Central Crop Insurance	\$ 3,286.00
b. Great American Insurance Company	2,837.11
c. Continental Group	4,222.63
d. Western National Mutual	17,378.75
e. American Security Insurance Group	4,561.88
f. Mutual Service Insurance	4,660.92
g. Transunion Casualty Company	101.13

(Ex. 12-16).

The Federal Legislation.

13. The Federal Crop Insurance Act was originally adopted in 1938 to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance." 7 U.S.C. 1502. The Act created the Federal Crop Insurance Corporation (FCIC) as an agency within the United States Department of Agriculture. 7 U.S.C. 1503.

14. In 1980 Congress passed the Federal Crop Insurance Act of 1980 which contained authorization for the FCIC to offer an expanded reinsurance program to insurers including private insurance companies. 7 U.S.C. 1508(e). Congress intended that "a serious effort must be made by FCIC to involve private industry in the Federal Crop Insurance Program. H.R. Rep. 96-430, 96th Cong. First Sess. 14 (1979).

15. 7 U.S.C. sec. 1506(k) was part of the 1980 amendments. It provides that the FCIC:

- (k) may enter into and carry out contracts or agreements necessary in the conduct of its business, as determined by the Board. State and local laws or rules shall not apply to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts or agreements.

(Ex. A-4).

The Standard Reinsurance Agreements.

16. In order to implement the reinsurance program, the FCIC prepared a standard reinsurance agreement to be entered into by the insurer and FCIC. The 1982 revision of this document contained a Section IX entitled "Insolvency". Section IX provided that in the event of the insolvency of an insurer, the reinsurance under the agreement would be payable directly by FCIC to the company or its liquidator, receiver or statutory successor except where the FCIC, with the consent of the direct insured or insureds, has assumed such policy obligations of the Company as direct obligations of FCIC to the payees under such policies and in substitution for the obligations of the insurer to such payees. (Ex. 1, p. 3).

17. The standard reinsurance agreement was later amended resulting in a

revision dated June 1985. Section IX of the 1982 revision was deleted in its entirety. Section VIII D of the 1985 agreement provided as follows:

- D. Whenever any Company reinsured hereunder is unable to fulfill its obligations to any policyholder reinsured herein by reason of a directive or order duly issued by any Department of Insurance, Commissioner of Insurance, or by any court of law having competent jurisdiction, or under

similar authority of any jurisdiction to which the Company is subject, all policies affected by such directive or order which are in force and subject to this Agreement as of the date of such inability or failure to perform shall, at the request of FCIC, be immediately transferred to FCIC. In the event of such a transfer, FCIC shall assume all obligations for unpaid losses whether occurring before or after the date of transfer, and the Company shall pay to FCIC all funds in its possession with respect to all such policies transferred including, but not limited to, premiums collected. The Company shall also assign to FCIC the right to all uncollected premiums.

(Ex. 2, p. 10).

18. Nelson Maurice was assistant to the manager of FCIC from the end of 1982 through July 1, 1985. (Tr. 16, 36). The manager of FCIC is the Chief operating Officer of the organization. (Tr. 17). Mr. Maurice was the primary person responsible for revising the standard reinsurance agreement during late 1984 and early 1985. (Tr. 17).

19. Mr. Maurice recommended that Section IX of the 1982 agreement be deleted because it did not insure that the program benefits were delivered to all farmers despite an insolvency. (Tr. 18-19).

20. Mr. Maurice's intent in drafting Section VIII D of the 1985 agreement was to implement a "cut through" clause which would provide that the FCIC would step in and take over the responsibilities of the insurer upon the insurer's insolvency. (Tr. 19).

21. Mr. Maurice believes that the "at the request of FCIC" language in Section VIII D was included to permit the federal government to look at the situation, but wait to intervene only if it was necessary to do so. (Tr. 20-21).

The 1987 Regulations.

22. On February 26, 1987 FCIC published a proposed rule entitled "Standard Reinsurance Agreement - Standards for Approval.* It invited written comments through March 30, 1987. 52 Fed. Reg. 5773. (Ex. A-2).

23. On May 11, 1987, the FCIC published a final rule. It stated that the effective date was May 11, 1987. (Ex. A-1, p. 17540). The "summary" portion of the publication stated that:

The intended effect of this rule is to: (1) Modify financial standards and financial reporting requirements applicable to commercial insurance companies applying for a Standard Reinsurance Agreement with the Federal Crop

Insurance Corporation, effective for the 1988 contract year (beginning July 1, 1987); (2) provide for the mandatory assumption by FCIC of all obligations for unpaid losses on policies reinsured under the Standard Reinsurance Agreement; (3) provide that no assessment for any State

guaranty fund may be computed or levied against companies for, or on account of, any premiums payable on policies of Multiple Peril Crop Insurance reinsured by FCIC;

(Ex. A-1, p. 17540).

24. The "background" portion of the rule publication provided in part as follows:

Most state laws regulating insurance provide for a guaranty fund assessment whereby the State obtains funds from regulated insurance companies licensed to operate within that State. The funds are used by the state to discharge any unfunded obligations of any such regulated insurance company.

Standard Reinsurance Agreement between FCIC and a reinsured Company provides that, whenever a company reinsured by FCIC is unable to fulfill its obligations to any policyholder reinsured under the Agreement, by virtue of an order or directive issued by a State Department of Insurance, or a court of competent jurisdiction, all such policies affected by such order or directive are immediately transferred to FCIC along with the obligations for all unpaid losses whether they occurred before or after such transfer. In addition, FCIC collects all funds with respect to all policies transferred and assumes from the Company the right to all uncollected premiums.

Since FCIC guarantees fulfillment of the Reinsured Company's obligations to the insureds, the guaranty fund will not be required to pay on such policies. Any requirement by a State Department of Insurance for guaranty fund assessment against insurance companies licensed to operate in a state who participate in the Standard Reinsurance Agreement with FCIC on policies reinsured by FCIC is unnecessary because, in reality, such obligations to insureds are and have been guaranteed by FCIC as a part of its reinsurance agreement.

Under the provisions of the Federal Crop Insurance Act, as amended (7 U.S.C. 1501, et seq. (The Act)), State and local laws or rules are not applicable to contracts or agreements of FCIC, or the parties thereto, to the extent that such contracts or agreements provide that such State or local laws or rules shall not apply, or that such laws or rules are inconsistent with such contracts or agreements (7 U.S.C. 1506(k)).

FCIC has determined that State laws or rules providing for guaranty fund assessment for the purpose of discharging unfunded obligations of insurance companies should be preempted because the Standard Reinsurance Agreement

provides adequate insurance that, with respect to Multiple Peril Crop Insurance reinsured by FCIC, any such State requirements will be properly met.

It is therefore determined that no such unfunded obligations, as are provided for and required by some State laws of insurance practice, will arise under any FCIC reinsured multiple peril crop insurance business conducted in any State and that such business should not be subject to any guaranty fund assessment.

For this purpose, FCIC exercises the preemptive authority contained in 7 U.S.C. 1506(k) by: (1) Providing for the mandatory assumption by FCIC of all obligations for unpaid losses on policies reinsured under the Standard Reinsurance Agreement; and (2) asserting that no assessment for any State guaranty fund may be computed or levied against companies for, or on account of, any premiums payable on policies of Multiple Peril Crop Insurance reinsured by FCIC.

25. One of the new regulations adopted by the FCIC on May 11, 1987 was 400.156 entitled "State Action Preemptions" which provides in part as follows:

(a) No policyholder shall have recourse to any state guaranty fund or similar state administered program for crop or premium losses reinsured under such Standard Reinsurance Agreement. No assessments for such State funds or programs shall be computed or levied on companies for or account of any premiums payable on policies of Multiple Peril Crop Insurance reinsured by the Corporation.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 60C.07, subd. 2(g) and 14.50.
2. That the Department of Commerce has fulfilled all relevant substantive and procedural requirements of law or rule.
3. That the Department of Commerce has given proper notice of the hearing in this matter.
4. That the appealing insurers have, by stipulation, perfected their appeals within the meaning of Minn. Stat. sec. 60C.07, subd. 2(g).
5. That the burden of proof in this proceeding is upon the appealing insurer members of MIGA to prove the facts at issue by a preponderance of the evidence.

6. That the 1985 FCIC standard reinsurance agreement did not preempt MIGA's authority to assess its members based, in part, upon premiums received for FCIC reinsured multi-peril crop insurance policies in effect during calendar year 1986.

7. That no preemption occurred with respect to premiums on policies in effect between May 11, 1987 and June 30, 1987.

8. That MIGA's assessment of May 8, 1987 was valid even though it was based upon premiums collected for multiple peril crop insurance written for 1986 and reinsured by the FCIC.

9. That any assessment by MIGA against its members which is based upon premiums payable on policies of multiple peril crop insurance reinsured by the FCIC and in effect between May 11, 1987 and June 30, 1987 would be valid.

10. Should the Commissioner of Commerce find a preemption due to the 1985 FCIC agreement, the recomputation of the assessment should be made not only for the parties to this case but for all similarly situated members of MIGA.

11. That those insurers who are not members of MIGA but who may have "indirectly" paid a portion of the May 8, 1987 assessment are not entitled to any payment from MIGA.

12. That insofar as any of the foregoing Findings of Fact are deemed to be Conclusions they are adopted as such.

13. That the above Conclusions are arrived at for the reasons set out in the memorandum which follows and which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Commerce issue an Order denying the appeal in this matter and affirming the assessment issued by the Minnesota Insurance Guaranty Association.

Dated: January 15th 1988.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. sec. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Transcript Prepared by
Karen Toughill

MEMORANDUM

This contested case proceeding is an appeal to the Commissioner of Commerce of an action of the Minnesota Insurance Guaranty Association (MIGA).

That action was its assessment of its members on May 8, 1987 to cover losses to insureds caused by the insolvencies of 13 insurance companies. That assessment was based upon premiums received by MIGA members for policies in effect during calendar year 1986, including premiums received on multi-peril crop insurance policies written by the appealing insurers for calendar year 1986. The insurers argue that federal law preempts MIGA's state statutory authority to make assessments relative to any insurance policies reinsured by the Federal Crop Insurance Corporation (FCIC).

The parties are in agreement that the FCIC has the authority and the ability to assert federal preemption of MIGA assessments. MIGA and the Department do not dispute that the FCIC's rule published on May 11, 1987 prospectively preempted state guaranty fund assessments on multiple peril crop insurance policies effective on July 1, 1987 and beyond. Accordingly, assessments may not be levied on premiums received for multiple peril crop insurance policies reinsured through the FCIC which are written on or after July 1, 1987. The parties have also agreed that because there is no dispute as to whether preemption can occur, there is no need for the Administrative Law Judge or the Commissioner of Commerce to determine the constitutionality of any portion of the Minnesota Insurance Guaranty Association Act. The question in this case is, rather, when the FCIC exercised its power to preempt the State Act, which authorizes MIGA to levy an assessment upon multi-peril crop insurance premiums among others. Therefore, this case involves the interpretation of statutes, regulations and contracts rather than a determination of constitutionality.

MIGA suggests that the appealing insurers do not have standing to assert preemption. It points out that the FCIC itself is not asserting any preemption occurring prior to 1987, in this proceeding. MIGA characterizes the insurer's position in this case as an attempt to "bootstrap" the insurer's private interests into a legal posture that can only properly be maintained by the FCIC. However, private parties often assert preemption arguments to protect their own rights. *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Additionally, 7 U.S.C. sec. 1506(k) provides that state law shall not apply to contracts of the FCIC "or the parties thereto" to the extent that the state law is inconsistent with the contract. The appealing insurers are parties to such contracts and therefore directly affected by the preemption issue. Additionally, as Bituminous

pointed out, the appealing insurers are attempting to show that the FCIC has already exercised its preempted power in the 1985 standard reinsurance agreement rather than attempting to assert the FCIC's preemptive powers initially in this contested case. The appealing insurers have standing to raise the preemption issue.

MIGA also asserts that the exercise of preemptive authority by the FCIC is a legislative rule which, under the Federal Administrative Procedures Act, would have to be adopted as a regulation under the APA, including publication

in the Federal Register. MIGA argues that the exercise of preemptive authority is " an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy' within the meaning of 5 U.S.C. sec. 551(4). Therefore, from MIGA's viewpoint, the FCIC can preempt only through rulemaking or possibly through adjudication.

It is certainly the case that the FCIC chose to exercise its preemptive authority through rulemaking in its May 11, 1987 publication. While the use of rulemaking, with its notice and comment procedure, may be a clearer and a preferable way of establishing preemption, it is not the exclusive means of doing so in this case. That is because the explicit language of 7 U.S.C. sec. 1506(k) authorizes preemption when state law is inconsistent with the FCIC's contracts. When such an inconsistency is created, preemption occurs by virtue of the language in the federal statute. No further authority is needed. R & R Farm Enterprises v. FCIC, 788 F.2d 1148, 1150 (5th.Cir.1986). Additionally, as Empire points out, the 1985 standard reinsurance agreement was published in the Federal Register as a final rule on June 11, 1985. 50 Fed.Reg.24503. It is concluded that Congressional intent was to permit the FCIC to preempt state law by specifically so stating in the contracts or agreements or simply by the creation of contracts which were inconsistent with state law. The FCIC need not specifically state that preemption has occurred when it creates such an inconsistency.

The main issue to be determined in this case is whether or not the 1985 standard reinsurance agreement adopted by the FCIC is inconsistent with the authority given to MIGA in Chapter 60C. to make assessments against its members including those writing multi-peril crop insurance reinsured by the FCIC. The federal law is clear: state law such as Chapter 60C. is not applicable to the parties to FCIC standard reinsurance agreements if the law and the agreement are inconsistent. 7 U.S.C. 1506(k). As Empire states in its brief, mere inconsistency between the state law and the agreement is sufficient to preempt the state law. Inconsistent is commonly defined as

"contradictory" or "incompatible". The American Heritage Dictionary (2d Coll.Ed. 1982). It is also been defined as "contradictory" or "mutually repugnant". Black's Law Dictionary (Rev.4th.Ed. 1968). Inconsistency may also be found for the purposes of preemption where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal scheme. Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941); U.S. v. Whitney, 602 F.Supp. 722, 728 (W.D.N.Y. 1985); People v. Conklin, 12 Cal.3d 259, 114 Cal.Rptr. 241, 249, 522 P.2d 1049, App. Dism. 419 U.S. 1064 (1974).

The parties have advanced several lines of argument concerning congressional and FCIC intent as to preemption. The appealing insurers point to the changes from the 1982 to the 1985 standard reinsurance agreement. The 1982 agreement specifically provided that in the event of an insolvency the reinsurance would be payable by the FCIC to a statutory successor, such as MIGA, except where the FCIC had directly assumed the policy obligations of the insurer. Finding of Fact No. 16. The Appellants argue that the deletion of this procedure from the 1985 contract was done because it was unnecessary since the FCIC was directly assuming those obligations in the 1985 contract. MIGA argues, however, that while there was an apparent change in coverage, the 1985 contract did not, as developed below, place a mandatory obligation upon the FCIC.

The appealing insurers point to the specific language of the 1985 agreement as creating a preemption. The agreement does provide that when an insurance company is unable to perform, its policy shall be transferred to the FCIC which will then assume all obligations for unpaid losses. Finding of Fact No. 17. The Appellants argue that this language creates a mandatory obligation on the FCIC and that therefore MIGA has no exposure which would justify an assessment. As Appellant Empire stated the issue, if the FCIC is responsible for the insolvency of a company there is no state interest in a compulsory assessment under Chapter 60C.

To support this interpretation, the Appellants point to the "background" information published with the 1987 regulation. In announcing the FCIC's intent to preempt state guaranty fund assessments in that regulation the FCIC noted that it was unnecessary because, "In reality, such obligations to insureds are and have been guaranteed by FCIC as a part of its reinsurance agreement." (Emphasis added). The Appellants see this language as indicating FCIC's belief that its 1985 contract guaranteed the obligations to insureds. MIGA states, however, that the entire thrust of the regulation is to announce a present intent to make those obligations mandatory after July 1, 1987. It convincingly argues that this publication and announcement would not be necessary if preemption had already occurred. MIGA also points out that the "summary" portion of the publication and the 'background' portion announce a present intent to prospectively preempt state law by the use of phrases such as the "FCIC has determined" that state laws 'should be preempted' and language such as the "FCIC exercises the preemptive authority". Finding of Fact No. 23, 24. Additionally, a reasonable interpretation of the *are and have been* language would not rule out the possibility that, as MIGA argues, the 1985 contract language did not impose a mandatory obligation upon the FCIC. An optional obligation on the part of FCIC might mean that at some point the obligations on certain policies 'had been' guaranteed by the federal agency.

However, the most persuasive part of MIGA's argument rests upon the portion of the 1985 agreement which states that policies on which an insurer is unable to perform shall, "at the request of FCIC, be immediately transferred to FCIC." MIGA suggests that this language means that the FCIC is not mandatorily obligated to make payment on those policies and that therefore MIGA, which has a mandatory obligation under state law, would have to pay if called upon to do so. MIGA describes the FCIC's role as 'an optional obligation'.

The appealing insurers offered the testimony of the principal drafter of the 1985 contract language as to the meaning of the 'at the request' language. He stated that the intent was to implement a 'cut through' clause which would require the FCIC to step in and take over the responsibilities of the insurer upon its insolvency. He testified that the 'at the request'

language was intended to permit the federal government to examine the insolvency or other difficulty which the insurer found itself in, but to permit FCIC to intervene only if it was necessary to do so. MIGA argues that the testimony of Mr. Maurice should be given little weight. It notes that Mr. Maurice is now employed by National Ag Underwriters, which is a general agent for one of the parties, namely, Empire Fire and Marine. (Tr. 21). MIGA also suggests that after the fact testimony of a staff assistant as to thought processes involved in drafting a regulation should not be considered.

it is generally true that in construing a statute a reference to the legislative history is only appropriate when the language of the statute or rule is ambiguous. Sutherland, Statutory Construction, sec. 48 (4th.Ed.); R & R Farm Enterprises, supra, 788 F.2d at 1151. Even where ambiguity exists, it is usually held that while written documents which have recorded the views of draftsmen are admissible, oral statements subsequent to adoption which are not based on recorded proceedings cannot be relied upon to determine legislative intent. Laue v. Production Credit Assoc. of Blooming Prairie, 390 N.W.2d 823 (Minn.App. 1986). County of Washington v. AFSCME, 262 N.W.2d 163 (Minn. 1978). Based upon the record in this matter it is clear at this point that, whether viewed as a matter of parol evidence or of the admissibility of oral testimony as to legislative intent, Mr. Maurice's testimony is not entitled to a great deal of weight. Whatever his intent was in drafting the language of 1985 agreement, which was part of the regulation published in 1985, the resulting language is unambiguous. It does not create a mandatory obligation on the part of the FCIC. The FCIC clearly has the option under its 1985 agreement not to assume the obligation if it chooses to do so.

The Appellants also advance, however, another important argument as to inconsistency. They point out that the federal act does not permit the recovery of guaranty fund assessments by an insurer by allowing them to be included in the premium paid by the insured. Under 7 U.S.C. 1508(b), premiums can include only an amount to cover losses and a reasonable reserve. Contrasting with this is Minn. Stat. sec. 60C.18 which specifically permits an insurer to recoup assessments in premiums and, as of 1987, in fact requires it. The Appellants argue, therefore, that the inconsistency is the imposition by state law of an assessment which is not recoverable in premiums pursuant to the federal law. They also argue that this in effect imposes a state penalty on participants under the federal program and that therefore the federal and state laws are repugnant or at least the state assessment poses an obstacle to the accomplishment of the federal scheme within the meaning of cases such as Whitney, supra.

MIGA and the Department have suggested that the premium tax, which is reimbursed to the insurance companies by FCIC, is an analogous situation. The companies point out however that the premium tax is reimbursed from funds appropriated by Congress for carrying out the crop reinsurance program. 7 U.S.C. sec. 1507(c). MIGA states that the fact that the FCIC does not specifically permit reimbursement of the state assessment does not preclude the insurers from paying the assessments out of profits or unallocated margins. Additionally, the insurer's relationship with the FCIC is, of course, voluntary and does not 1 guarantee the insurance companies the right to any particular rate of return. The contention by the Appellants that the assessment is an impediment must be decided by determining how great an

lalthough there are some statutory limitations on reimbursement of administrative and operating expenses, it should be possible that the actual amount of an assessment could be paid out of the FCIC's annual appropriations, as is the premium tax. It appears that the premiums are substantially subsidized by FCIC out of its administrative and operating budgets. R & R Farm Enterprises, supra, 788 F.2d at 1153. Thus, this is not a situation where the premiums charged are expected to cover the cost of the crop insurance.

obstacle a state assessment would be insofar as achieving the goals of the federal program. MIGA suggests that the burden cannot be very great since assessments based in part on multi-peril crop insurance have been paid in the past by the Appellants, albeit at a time when the guaranty fund assessments were almost de minimus. It must also be considered that since preemption is a reality after July 1, 1987, no insurer is likely to be discouraged from participation in the federal program due to a decision adverse to the Appellants in this case. Given the reasoning above and considering the amount of premiums attributable to multi-peril crop insurance (Findings of Fact Nos. 5 and 12), it is concluded that the assessment is not an obstacle to the execution of the full purposes of the federal scheme.

Based upon an examination of the foregoing arguments and analysis it is concluded that the FCIC did not in fact create a preemption under 7 U.S.C. sec. 1506(k) through the language of the 1985 agreement nor are 7 U.S.C. 1508(b) and Minn. Stat. sec. 60C.18 so inconsistent as to mandate preemption. The latter two statutes are compatible and the state assessment does not render the two statutes contradictory or mutually repugnant. Furthermore, the full purposes and objectives of the federal program can be accomplished despite an assessment. Based upon the examination of the statutes and regulations together with their history, it seems clear that the FCIC knows how to clearly establish a preemption when it seeks to do so as it did in 1987 regulation. The fact that it chose this method to announce preemption seems to suggest that it would not have simply relied upon an implication in 1985 to establish preemption. Furthermore, the "at the request" language in the 1985 agreement cannot reasonably be construed to be consistent with a mandatory obligation on the part of FCIC. If MIGA is therefore exposed because the FCIC can deny assuming the obligations of an insolvent insurer, then no inconsistency exists since both the state and federal acts can and must be implemented.

The second issue in this proceeding is whether a preemption occurs for an assessment against premiums payable on policies in effect between May 11, 1987 and June 30, 1987. The Appellants argue that preemption occurs on May 11, 1987 rather than July 1, 1987 because the 1987 regulation was effective on that date. The effective date of May 11, 1987 is specifically set out in the

final rule. (Ex. A-1, p. 17540). This issue was apparently framed due to initial arguments by Empire and Bituminous (Ex. 5, Ex. 9) to the effect that preemption occurred on May 11, 1987. However, as MIGA points out, the final regulation specifically states several times that the standard reinsurance agreement published on May 11, 1987 is only effective for the 1988 contract year beginning July 1, 1987. (Ex. A-1, p. 17540-17542). Since the agreement cannot be in effect before July 1, 1987, and since it is the agreement which beginning in 1987 contains a clear cut-through clause and a preemption of state law (Ex. 3, p. 21), no preemption occurs until the 1988 contract year. Any preemption prior to that time would necessarily have to be under the 1985 agreement and the 1987 regulation does not authorize preemption under the 1985 agreement.

Empire does raise an additional issue in its brief which relates to the fact that premiums received from multiple peril crop insurance from January 1, 1987 through January 30, 1987 could be subject to a 1988 MIGA assessment. This question is, strictly speaking, not an issue in this contested case proceeding. MIGA suggests however that the companies involved could provide a certified notice of the amount of written premium received during the first half of 1987 and that if an assessment is made in 1988 it could be based upon the premiums for the first half of 1987 only. MIGA brief p. 17.

The AACI raised two additional issues in this contested case proceeding. It argues first that MIGA members who received notice of this proceeding but chose not to participate due to the expense of representation in these proceedings should nonetheless receive a refund of their assessment if preemption is found based upon the 1985 agreement. AACI argues that if the assessment is invalid as a matter of law as to the parties to this proceeding then it is equally invalid as to those MIGA members writing crop insurance who have not actively participated. Refund of assessments is authorized in the MIGA plan of operation. MIGA responded that each of its members was provided notice of this case including a one-page form to be returned in order to become a party. It suggests that nothing more could have been done to encourage participation.

The Commissioner of Commerce has dealt with this issue in a prior decision. The case was In the Matter of the September 16, 1985 Assessment by the Minnesota Life and Health Insurance Guaranty Association. In Findings of Fact, Conclusions and Order issued by Deputy Commissioner James Miller on July 31, 1986 (p. 27), it was determined that where an assessment was wrongfully computed, a new assessment must be calculated for all members of the association and not just the appealing parties to the contested case hearing. That precedent appears to apply here. Case law in Minnesota suggests that where an assessment for an insolvent insurance company against a member insurer was computed contrary to law, this act renders the entire assessment void. *Swing v. H.C. Akeley Lumber Co.*, 62 Minn. 97, 64 N.W. 97, 98 (1895). *Minnesota Farmers Mutual Insurance Co. v. Landkammer*, 148 N.W. 305, 306 (1914). If an assessment is wrongfully computed it is logically void ab initio and therefore must be redetermined for all members of MIGA. Therefore, should the Commissioner decide that preemption occurred by virtue of the language of the 1985 agreement, the May 8, 1987 assessments should be recomputed for all members of MIGA who write multi-peril crop insurance reinsured by the FCIC.

AACI also contends that there are other parties in interest in this case. It cites out-of-state state insurers, who are not members of MIGA, who sell crop insurance in Minnesota utilizing 'fronting companies'. They would not

have received notice of these proceedings or would have received it only indirectly. It appears however that such unidentified companies who are not members of MIGA and were not directly assessed could not properly be the beneficiaries of any action taken by the Commissioner of Commerce in this contested case proceeding. Such companies might have received notice from the MIGA member with which they have a business relationship. Furthermore, it appears that the 'fronting company" may not even pay the assessment in question. (Tr. 62-63). Such companies would necessarily have to rely upon their business relationship with a MIGA member in order to receive any benefit from a preemption ruling by the Commissioner in this case.

G.A.B