OREGON

By: Eric L. Martin[†]

I. INTRODUCTION

Legal developments in Oregon between 2017 and 2018 concerning the oil and gas industry primarily involved downstream issues, which reflects the fact that Oregon is not a major hydrocarbon producer.[1] According to the U.S. Energy Information Administration, Oregon ranks 28th out of the 34 states that produce natural gas in the United States.[2] Crude oil is neither produced nor refined in Oregon.

II. CASE LAW

A. *Oregon Clean Fuels Program Survives Dormant Commerce Clause Challenge*

Relying heavily on its 2013 decision concerning California's Low Carbon Fuel Standard ("LCFS"),[3] the Ninth Circuit Court of Appeals upheld Oregon's Clean Fuels Program ("CFP") from a Dormant Commerce Clause challenge in *American Fuel & Petrochemical Manufacturers v. O'Keeffe*.[4] The CFP is intended to reduce greenhouse gas emissions from transportation fuels in Oregon to at least 10% lower than 2010 levels by 2025.[5] The court quickly resolved the plaintiffs' claims that the CFP unconstitutionally discriminates on its face, in purpose, and in effect against interstate commerce. Rather than dis-

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† Eric L. Martin is a partner with the Stoel Rives LLP in Portland, Oregon.

1. For a broader look at oil and gas law in Oregon, see Eric Martin & Jerry Fish, "Mineral Rights," *Oregon Real Estate Deskbook* (2015).

2. U.S. ENERGY INFO. AGENCY, *Oregon*: *State Profile and Energy Estimates*, https://www.eia.gov/state/?sid=OR [https://perma.cc/9RHF-BR4E] (last visited Dec. 9, 2019).

3. *See* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).

4. Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, 903 F.3d 903 (9th Cir. 2018).

5. OR. ADMIN. R. 340-253-0000(2) (2017).

criminating against fuels based on the state of production, the court found that the CFP discriminates against fuels based on lifecycle greenhouse gas emissions, and public officials' statements about the economic benefits of the CFP to Oregon were insufficient to establish a discriminatory purpose.[6] As to the alleged discriminatory effect, the court found that the CFP placed essentially no burden on interstate commerce. The court noted that out-of-state fuel producers generated credits and sometimes more credits than Oregon's fuel producers even after accounting for transportation-related emissions. Additionally, the court found that "the pleadings do not provide a plausible basis from which to infer that the [CFP] will shift market shares to *in-state biofuel producers*, as opposed to biofuel producers in general," and thus, it did not discriminate against interstate commerce.[7]

The court then turned to the United States Supreme Court's *Pike v. Bruce Church* balancing test.[8] Under *Pike*, nondiscriminatory state and local laws that only have "incidental" effects on interstate commerce are nonetheless unconstitutional if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Here, the Ninth Circuit concluded that the plaintiffs had failed to plausibly allege that the economic and administrative burdens imposed on out-of-state fuel producers were *clearly excessive* in light of the state's substantial interest in mitigating the environmental effects of greenhouse gas emissions from transportation fuels."[9] The court also rejected the plaintiffs' argument that the CFP constituted extraterritorial regulation and was preempted by the Clean Air Act.[10]

B. *U.S. Supreme Court Stays Oregon Constitutional Climate Change Case*

In 2015, a group of students filed suit—*Juliana v. United States*—against the federal government in Oregon, alleging that federal fossil fuels policy over the last 50 years constituted a deprivation of their rights under the U.S. Constitution. This is because the federal government knew during that period that carbon dioxide emissions were causing global warming. In denying the federal government's motion to dismiss the following year, the district court recognized a fundamental right "to a climate system capable of sustaining human life."[11] In 2018, the district court issued its long awaited decision on the federal government's motions for judgment on the pleadings and sum-

6. *American Fuel*, 903 F.3d at 911–12.
7. *Id.* at 916.
8. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
9. *Am. Fuel & Petrochemical Mfrs.*, 903 F.3d at 916 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981)).
10. *Id.* at 916–17.
11. Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

mary judgment.[12] First, the court dismissed (without prejudice) President Trump as a defendant, concluding that "effective [injunctive and declaratory] relief is available through a lawsuit addressed only to lower federal officials."[13] Next, the court distinguished between claims for damages and claims for equitable relief, finding that the Administrative Procedures Act's "comprehensive remedial scheme" did not preclude the plaintiff's constitutional claims for equitable relief.[14]

The court then turned to standing, separation of powers, due process, and public trust doctrine arguments that it had previously considered in the context of the federal government's prior motion to dismiss[15] and found that the plaintiffs' claims survived summary judgement too. For example, the federal government argued that the plaintiffs had not demonstrated federal "deliberate indifference" to the plaintiffs' safety sufficient to satisfy the "danger creation" exception to the general rule that due process rights do not impose an affirmative obligation on the federal government to protect against harm.[16] Recognizing that the plaintiffs will need to "clear a very high bar to ultimately succeed," the court nonetheless concluded that they had introduced sufficient evidence to demonstrate a question of material fact regarding "deliberate indifference."[17]

The court also analyzed the plaintiffs' equal protection claims, declining to recognize "posterity" as a suspect class that should apply strict scrutiny.[18] However, the court did conclude that strict scrutiny should be applied because the plaintiffs had alleged an infringement of a fundamental right, namely the aforementioned "right to a climate system capable of sustaining human life."[19] Like the plaintiffs' due process claims, evaluation of this claim "would be aided by further development of the factual record."[20]

With the trial scheduled to begin shortly after this decision was issued, the federal government quickly filed a motion with the United States Supreme Court to stay the case pending its decision on a concurrently filed writ of mandamus. Chief Justice Roberts granted the requested stay.[21]

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12. Juliana v. United States, No. 6:15-CV-01517-AA, 2018 WL 4997032, at *1 (D. Or. Oct. 15, 2018) (Stating that earlier in 2018 the Ninth Circuit Court of Appeals had denied the federal government's petition for a writ of mandamus).
13. *Id.* at *10.
14. *Id.* at *13.
15. *Juliana*, 217 F. Supp. 3d at 1235.
16. *Juliana*, 2018 WL 4997032, at *27.
17. *Id.* at *29.
18. *Id.* at *31–32.
19. *Id.* at *32.
20. *Id.*
21. U.S. Supreme Court Order No. 18A410 (Oct. 19, 2018), https://www.supremecourt.gov/orders/courtorders/101918zr1_086c.pdf [https://perma.cc/5UF7-V6BS]. In July 2018 the U.S. Supreme Court declined a prior motion by the federal government for a stay. U.S. Supreme Court Order No. 18A65 (July 20, 2018), https://www.supreme

C. *Another Dormant Commerce Clause Challenge: Portland's Ban on Fossil Fuel Terminals Survives*

The Oregon Court of Appeals held in *Columbia Pacific Building Trades Council v. City of Portland* that the city's ban on new or expanded "bulk fossil fuel terminals" did not violate the Dormant Commerce Clause.[22] The court first concluded that the amendments could not discriminate against interstate commerce *in effect* by "examin[ing] how the amendments affect out-of-state versus in-state bulk exporters of fossil fuels."[23] The court found that out-of-state exporters were not discriminated against in-state interests because Oregon lacks in-state bulk exporters of fossil fuels.[24] Having concluded that the ban did not discriminate against interstate commerce, the court assessed whether it was nonetheless unconstitutional under the aforementioned *Pike* balancing test. Here, the court found that the plaintiffs had not carried their burden because the record did not contain sufficient information regarding the ban's burden on interstate commerce.[25] The Oregon Supreme Court subsequently declined to review this decision.

D. *Unlawful 35¢ Debit Card Fee for Gasoline Purchases Becomes $409 Million Damage Award*

In *Scharfstein v. BP West Coast Products, LLC* the Oregon Court of Appeals upheld a jury verdict that the defendant's 35¢ charge for using a debit card to buy gasoline violated Oregon's Unlawful Trade Practices Act ("UTPA") and the resulting $409 million statutory damage award.[26] In response to consumer complaints that gas stations were not adequately disclosing debit and credit card fees, Oregon's Gasoline Price Advertising Rule was updated in 2011 to define "conditions" that must be displayed on street signs and gas pumps as "any payment method (e.g., credit), service level (e.g., full service or mini service), or any other modifying circumstance affecting the price per unit of measurement of motor vehicle fuel from the lowest cash price."[27] The plaintiffs alleged that the defendant had not disclosed its 35¢ charge for using a debit card on street signs and gas pumps, and

court.gov/orders/courtorders/073018zr_8mjp.pdf [https://perma.cc/NX5F-UT68] (stating "The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion.").

22. 412 P.3d 258, 272 (2018). For more analysis of this decision and others concerning local government actions to disrupt the oil and gas industry, *see* Eric L. Martin, *Federal Roadblocks to Local Governments' Efforts to Stymy Crude Oil Transportation and 'Keep It in the Ground'*, 64 ROCKY MOUNTAIN MIN. L. INST. 25-1 (2018).

23. *Columbia Pacific Building Trades Council*, 412 P.3d at 264–5. Facial discrimination had not been alleged, and the court did not assess whether the purpose of the local government's ban was to discriminate against interstate commerce.

24. *Id.*

25. *Id.* at 267.

26. 423 P.3d 757 (2018).

27. OR. ADMIN R. 137-020-0150(1)(b) (2011).

they brought a class action lawsuit to recover $200 in statutory damages per class member.

On appeal, the defendant argued that its 35¢ debit card fee was not a "condition" that needed to be disclosed because it was a flat fee that did not affect the price per gallon.[28] The court rejected the argument:

> If one adds the 35-cent fee to the total cash price of the fuel dispensed, and divides that by the number of gallons dispensed, the result is an increase in the price per unit of measurement of motor vehicle fuel from the lowest cash price. For example, if a customer buys $5.00 of gas in cash and receives two gallons, the cash price per unit is $2.50 per gallon (5 ÷ 2 = 2.5). However, if a customer buys $5.00 of gas and uses a debit card the customer pays $5.35 for two gallons of gas, which results in a debit card price per unit of $2.67 per gallon (5.35 ÷ 2 = 2.675). In that example, the debit card fee increases the price per gallon by 17 cents. Thus, the 35-cent debit card fee makes an actual difference on "the price per unit of measurement of motor vehicle fuel from the lowest cash price."[29]

Plus, the court noted that the 2011 update to the Gasoline Price Advertising Rule was intended to address this very situation.[30]

The court also rejected the defendant's argument that the plaintiffs' UTPA claim under ORS 646.608(1)(u) for unfair or deceptive conduct required that the plaintiffs prove that the class would have relied on the required disclosure that the defendant failed to make. This is because the Oregon Supreme Court had recently found for a UTPA claim under ORS 646.608(1)(e) for a misrepresentation.[31] However, the court distinguished a UTPA misrepresentation claim from a UTPA failure to make legally required disclosure claim, finding that the UTPA requires that a customer's ascertainable loss, rather than his or her purchase, be the result of the unfair trade practice.[32]

III. Executive Orders

In January 2018, the Trump Administration released a draft of its proposed 2019–2024 Outer Continental Shelf Oil and Gas Leasing Program ("Draft Proposed Program"), which contemplated one lease sale off the coast of Oregon and Washington in 2021.[33] The Bureau of Ocean Energy Management estimates undiscovered, technically recoverable resources on the Pacific Northwest's outer continental shelf

28. *Scharfstein*, 423 P.3d at 763.

29. *Id.*

30. *See id.* at 765.

31. *Id.* at 769 (citing Pearson v. Philip Morris, Inc., 361 P.3d 3 (Or. 2015)).

32. *Id.* at 768.

33. 83 Fed. Reg. 829 (Proposed Jan. 8, 2018). In 2010 the Oregon Legislature enacted a moratorium until 2020 on oil and gas leasing in Oregon's territorial sea (*i.e.*, within 3 miles off the coast).

of 400 million barrels of oil and 2.28 trillion cubic feet of natural gas.[34] The Draft Proposed Program noted that Oregon Governor, Kate Brown, strongly opposed new leasing activity off the coast of Oregon.[35] In October 2018, Governor Brown reinforced her opposition by issuing Executive Order No. 18-28, which directs all state agencies to exercise all lawful authority and discretion in accordance with the following policy:

> It is the policy of the State of Oregon to oppose the exploration and production of oil or gas off the Oregon Coast, including on the OCS, and to prevent the development of any infrastructure associated with offshore oil or gas drilling, in order to protect coastal economies, marine fisheries, the environment, public health and safety, and cultural resources.[36]

This directive is primarily aimed at (1) oil and gas infrastructure that would cross Oregon's submerged and submersible lands, (2) consistency review under the Coastal Zone Management Act, 16 U.S.C. § 1456, and (3) section 401 water quality certifications under the Clean Water Act, 33 U.S.C. § 1341.

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34. BUREAU OF OCEAN MGMT., ASSESSMENT OF UNDISCOVERED TECHNICALLY RECOVERABLE OIL AND GAS RESOURCES OF THE NATION'S OUTER CONTINENTAL SHELF, 2016a, https://www.boem.gov/Oil-and-Gas-Energy-Program/Resource-Evaluation/Resource-Assessment/UTRR-Update.aspx [https://perma.cc/6F3D-XZQQ].

35. BUREAU OF OCEAN MGMT., 2019–2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM at 9-6 (2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

36. Exec. Order No. 18-28 (Oct. 24, 2018), https://www.oregon.gov/gov/Documents/executive_orders/eo_18-28.pdf [https://perma.cc/72TH-V6RV].