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Oregon

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OREGON

*Eric L. Martin*¹

I. INTRODUCTION

Even though no oil and only a small quantity of natural gas is produced in Oregon, the Oregon Legislature enacted bans in 2019 on hydraulic fracturing until 2025 and on using Oregon's territorial sea for oil and gas activities. Beyond that legislation, though, legal developments in Oregon this year concerning the oil and gas industry focused on downstream issues.²

II. CASE LAW

A. *Decision Awaited in U.S. Constitutional Climate Change Case*

Juliana v. United States is an Oregon lawsuit alleging that federal fossil fuels policy over the last fifty years constituted a deprivation of the plaintiff students' rights under the United States Constitution. Although the United States Supreme Court briefly stayed the case in late 2018 from going to trial pending its decision on

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2. For a broader look at oil and gas law in Oregon, see Eric Martin & Jerry Fish, *Mineral Rights*, in *OR. REAL EST. DESKBOOK 42* (2015).

a writ of mandamus,³ the United States Supreme Court ultimately denied the requested mandamus relief, concluding that the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) could grant the requested relief.⁴ By the end of 2018, the Ninth Circuit had denied the federal government’s request for a writ of mandamus but had granted an interlocutory appeal. The Ninth Circuit heard oral argument on the appeal in June 2019, and as of the date of this writing, a decision has not been issued.

B. Oregon Clean Fuels Program Rules Upheld

Oregon’s Clean Fuels Program (“CFP”) is intended to reduce greenhouse gas emissions from transportation fuels in Oregon to at least 10% lower than 2010 levels by 2025.⁵ In *Western States Petroleum Ass’n v. Env’tl. Quality Comm’n*, the Oregon Court of Appeals upheld the CFP rules the Environmental Quality Commission (“EQC”) had adopted in 2015. The rules were upheld against two challenges: (1) that the EQC had failed to consider legislatively-imposed factors; and (2) that the rules constituted a tax on motor vehicle fuel, which the Oregon Constitution requires be used for highway construction and maintenance.⁶ ORS 468A.266(5) calls for the EQC to “evaluate,” among other things, “safety; the potential adverse effects to public health, the environment, and air and water quality; and the potential adverse effects to the generation and disposal of waste in the state” when promulgating CFP rules.⁷ The court concluded that the EQC had evaluated all but one of these factors for the 2015 rules because they were addressed in a 2011 report listed on an EQC meeting agenda and described in the agenda as “documents relied on for rulemaking.”⁸ As to the factor that was not addressed in the 2011 report, the court found the issue moot because in 2017 the EQC had readopted the 2015 rules with a finding addressing the outstanding factor.⁹ The court then turned to whether CFP credits constitute a “tax levied on . . . the distribution [or] importation . . . of motor vehicle fuel,” which are subject to spending limitations under the Oregon Constitution.¹⁰ Because the proceeds from the sale of CFP credits

3. See Eric L. Martin, *Survey on Oil & Gas: Oregon*, 5 *TEX. A&M J. OF PROP. L.* 123, 124–25 (2018–2019) (summarizing *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018)).

4. Order in Pending Case, *In Re United States*, 586 U.S. ____ (Nov. 2, 2018) (No. 18A410), https://www.supremecourt.gov/orders/courtorders/110218zr2_8ok0.pdf [<https://perma.cc/VEE3-42EC>].

5. OR. ADMIN. R. 340-253-0000(2) (2017). The CFP was upheld in 2018 against a Dormant Commerce Clause challenge. See Martin, *supra* note 3, at 123–24 (summarizing *Am. Fuel & Petrochemical Mfrs. v. O’Keeffe*, 903 F.3d 903 (9th Cir. 2018)).

6. 439 P.3d 459 (Or. Ct. App. 2019).

7. *Id.* at 466.

8. *Id.* at 467.

9. *Id.* at 469.

10. *Id.* at 470.

are not paid to the state, the court concluded that the CFP does not constitute a “tax” for purposes of that provision in the Oregon Constitution.¹¹

III. ENACTED LEGISLATION

A great deal of legislative attention and effort in 2019 focused on the “cap-and-invest” concepts in House Bill 2020. That effort ultimately fell short, but other laws related to energy policy in Oregon were enacted in 2019.

A. *Hydraulic Fracturing Banned*

Following a series of unsuccessful efforts over the years, hydraulic fracturing was banned beginning on June 17, 2019 and continuing until January 2, 2025.¹² House Bill 2623 defined hydraulic fracturing as “the drilling technique of expanding existing fractures or creating new fractures in rock by injecting water, with or without chemicals, sand or other substances, into or underneath the surface of the rock for the purpose of stimulating oil or gas production.” Wells drilled for natural gas storage or geothermal energy production and existing coal bed methane wells are exempt from the ban.

B. *Offshore Drilling Banned*

In 2010, the Oregon Legislature enacted a ten-year moratorium on oil and gas leasing in Oregon’s territorial sea (i.e., within three miles from the coast).¹³ Following moves by the Trump Administration to potentially lease part of the Outer Continental Shelf (i.e., three or more miles from the coast) off the Oregon coast for oil and gas development and building upon Governor Brown’s executive order last year,¹⁴ in 2019 the Oregon Legislature amended ORS 274.705 to prohibit leasing Oregon’s territorial sea for development that would support oil and gas activities on the OCS and eliminate the ten-year sunset on the existing leasing moratorium.¹⁵

C. *Railroad Oil Spill Planning Required*

To address concerns associated with transporting oil by rail,¹⁶ the Oregon Legislature imposed additional regulatory requirements on railroads that own or operate “high hazard train routes” in Oregon.¹⁷ A “high hazard train route” exists

11. *Id.* at 471.

12. 2019 Or. Laws Ch. 406.

13. 2010 Or. Laws Ch.11.

14. *See* Martin, *supra* note 3, at 127–28. State agencies were directed in 2018 by Executive Order No. 18-28 “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.”

15. 2019 Or. Laws Ch. 14.

16. *See generally* Martin, *supra* note 3, at 124.

17. 2019 Or. Laws Ch. 581.

when rails that “abut[] or travel[] over navigable waters, a drinking water source or an inland location that is one quarter mile or less from the waters of the state” are used for the transport of a train containing either (1) a continuous line of at least twenty tank cars holding petroleum or petroleum products; or (2) at least thirty-five tank cars holding petroleum or petroleum products anywhere within the train. In that situation, among other things, such railroads must now have an Oil Spill Prevention and Emergency Response Plan (also known as a contingency plan) for responding to spills of petroleum or petroleum products, with such plan approved by the Oregon Department of Environmental Quality. In addition, such railroads must demonstrate their financial ability to pay the clean-up costs for a “worst case spill,” with those costs being based on a minimum cost of \$16,800/barrel of such a spill. This law also authorized the collection of additional fees on such railroads.

D. Acquisition of Renewable Natural Gas Encouraged

Oregon natural gas utilities now have statutory authorization to acquire renewable natural gas (“RNG”) in increasing quantities for their retail customers with a target of having RNG constitute 30% of the natural gas supplied by large utilities by 2045.¹⁸ RNG, for purposes of enacted Senate Bill 98, includes any of the following that meets pipeline quality standards or transportation fuel grade requirements: (1) methane released from the biological decomposition of organic materials; (2) hydrogen derived from renewable energy sources; or (3) methane derived from any of the aforementioned or from waste carbon dioxide. The Oregon Public Utilities Commission must adopt rules to implement the statute by July 31, 2020.

E. State Commitment to Purchase Zero-Emission Vehicles

Through a 2017 executive order, Governor Brown established, among other things, a goal of having at least 50,000 registered and operating electric vehicles in Oregon by 2020.¹⁹ To advance the utilization of “zero-emission vehicles,” which includes plug-in hybrids, state agencies are now required, with some exceptions, to purchase or lease zero-emission vehicles: (1) for at least 25% of new state light-duty vehicles by 2025; and (2) for all new state light-duty vehicles starting in 2029.²⁰ It also established statewide goals for zero-emission vehicle use and sales, including that by 2035 at least 90% of all new motor vehicles sold each year in Oregon will be zero-emission vehicles.

18. 2019 Or. Laws Ch. 541.

19. Exec. Order No. 17-21 (Nov. 5, 2017), https://www.oregon.gov/gov/Documents/executive_orders/eo_17-21.pdf [<https://perma.cc/P6LP-U8QK>].

20. 2019 Or. Laws Ch. 565.