

From the desk of:  
Shelly Boshart Davis

## Oregon's cap and trade climate bill: A tax or not? It depends

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Senate Bill 1530, Democrats climate change bill, is not a tax in general, say lawyers for the Oregon Legislature. On the other hand, forcing fuel providers to buy emissions allowances is a likely tax, they concluded.

By Ted Sickinger | The Oregonian/OregonLive

The Legislature's lawyers issued an indecisive opinion this week on whether Democrats' controversial cap and trade climate bill should be considered a tax and if so, what additional constitutional restrictions apply to how it should be voted upon and its revenues spent.

The opinion by staff attorney Seth Nickerson was in response to questions sent to the Legislative Counsel's office by Rep. Shelly Boshart Davis, R-Albany.

Boshart Davis forwarded the opinion to all lawmakers Thursday morning, noting that "it states clearly that SB 1530 is a tax (yet somehow not a tax)... As you continue to consider your vote on this legislation, I would encourage you to read over this opinion and be aware of the significant constitutional hurdles this bill faces in its current form."

Republicans have raised a variety of constitutional objections to both the legislative process being used to pass the controversial climate change legislation, as well as how the money it raises would be used. And it's clear that if any version of the bill ends up passing, it likely will end up being challenged in court.

Democrats, meanwhile, want the broadest discretion possible in both areas of the policy, which would raise significant sums of money through the sale of emission allowances to companies in the transportation fuels, utility and industrial sector. Democrats have consistently argued that the proposal does not amount to a bill "for raising revenue."

That was the overarching question Boshart Davis posed to the Legislature's lawyers: Does the bill's required acquisition of emissions allowances amount to a tax?

The answer has significant implications. Tax bills are supposed to originate in the House of Representatives. Senate Bill 1530 did not.

Tax bills require a three-fifths majority vote in the House and Senate to pass. Democrats have a supermajority in both houses, but it's unclear they can hold that together for a vote on a carbon bill. They want a simple majority vote on SB 1530.

The Oregon constitution also prohibits lawmakers from including emergency clauses in any bill that "regulates taxation." Emergency clauses mean the legislation takes effect with the governor's signature. SB 1530 includes such a clause because Democrats want to start implementing the bill immediately on passage.

Republicans, meanwhile, want the bill's implementation delayed until Jan. 1 of 2021, as is the case for bills without emergency clauses. Ultimately, Republicans want the legislation referred to the ballot, so voters can weigh in.

So is it a tax? Nickerson's answer was 18 pages long, but it boils down to this: It depends.

In his opinion letter, Nickerson wrote that the bill was likely not an act regulating taxation. "Although SB 1530-A results in state revenues, the charges that generate the revenues have a regulatory purpose and the revenues are expended in a way that furthers that purpose."

In support of the argument, Nickerson cited the decision by California courts that the state's cap and trade system is not a tax because when an entity purchases an emission allowance, they receive a tradable, valuable asset: an authorization to emit one ton of carbon dioxide equivalent.

In lawyerly fashion, however, Nickerson equivocated: "There are... strong arguments that could persuade a court to depart from the analysis that we believe a court is likely to adopt. Consequently, our answer cannot be free from substantial doubt."

And what of the emergency clause? Can Democrats put it in the bill?

"We believe the answer is, more likely than not, yes," Nickerson wrote. "However, we caution that Oregon courts have never fully articulated how to analyze whether a measure is an 'act regulating taxation.'"

Oregon constitution also restricts the use of any motor vehicle fuel taxes exclusively for the construction, maintenance and operation of public roads. Boshart Davis asked legislative counsel whether forcing fuel providers to buy emissions allowances would amount to a tax for that purpose.

On this question, Nickerson had a clear conclusion. "We believe that the answer is yes," he wrote, adding that "the meaning of the term 'tax' is interpreted broadly" in that article of the constitution.

"A court would likely hold that state proceeds from the sale of allowances at auction are revenue from a tax with respect to, or measured by, the use of a motor vehicle."

Again, Democrats would like more discretion on how they use those funds, which will comprise the lion's share of money raised by the program. They'd like to use it for electric vehicle rebates, for instance, or vehicle charging infrastructure. But according to this analysis, at least, they won't have that option. The money is constitutionally restricted to the Highway Trust Fund.

Boshart Davis pointed out that Legislative Counsel issued an opinion last session that revenues raised via the sale of allowances related to natural gas are also dedicated by the constitution to the Common School Fund.

Combined, she said the state would be left with a fraction of the revenues proponents are counting on.

"There's little question that SB 1530 is going to be found unconstitutional or, at the bare minimum, spend years being fought in the courtroom," she told lawmakers. "I submit that we should not continue to advance this legislation knowing full well that these significant challenges exist."