

In re Belozer Farms, Inc., Case No. 394-31786-dds7
State of Oregon v. Morrow, BAP No. OR-96-1125-JHV

8/2/96

BAP aff'd DDS

Published at 199 B.R. 720

The trustee objected to priority claim of the Oregon Fryer Commission ("OFC"). OFC is a commodity commission with statutory authority to levy an assessment against the first purchaser of commodity sales. Debtor was a fryer producer and a first purchaser of fryers. Debtor failed to pay pre-petition assessments and the OFC filed a claim asserting the assessments were entitled to priority status as a tax pursuant to 11 U.S.C. § 507(a)(7). Judge Sullivan denied the OFC status as a priority claimant because the assessment is not a tax and because the OFC is not a governmental unit. [P95-31(6)]

The BAP affirmed. The assessment is not a tax under Lorber because it is not an involuntary pecuniary assessment, because it is not imposed for a public purpose, and because the OFC was not created under the state's police power. The court did not reach the issue of whether the OFC is a governmental unit.

*11 U.S.C. § 507(a)(7) was renumbered by the Bankruptcy Reform Act of 1994.

1 JONES, Bankruptcy Judge:

2 **SUMMARY**

3 The Oregon Fryer Commission filed a proof of claim listing
4 its debt, which was based upon unpaid assessments, as an
5 unsecured priority tax claim. The trustee objected. The
6 bankruptcy court upheld the objection, ruling that the unpaid
7 assessments were not entitled to priority because the Commission
8 was not a "governmental entity," nor was its claim a "tax." We
9 **AFFIRM.**

10 **I. FACTS**

11 Oregon has a statutory agricultural marketing scheme. Or.
12 Rev. Stat. tit. 47, chs. 576 et seq. (1995). Pursuant to that
13 scheme, a large number of commodity commissions have been
14 created. These commissions have been created in three different
15 ways. First, as part of the laws which created the agricultural
16 marketing scheme, the state legislature specifically created
17 four commodity commissions: the Oregon Beef Council, the Oregon
18 Sheep Commission, the Oregon Wheat Commission, and the Oregon
19 Potato Commission. Each of these four commissions has a lengthy
20 set of statutory guidelines dictating the reason for their
21 creation, the qualifications and terms of their members, the
22 duties and powers of the commission, and budgetary guidelines.

23 Second, the legislature enacted a statutory scheme whereby,
24 "[a]ny 25 or more persons interested in the production of a
25 particular commodity" could file a petition with the Oregon
26 Department of Agriculture and request a referendum be held among

1 the producers of that commodity on the question of whether a
2 commodity commission should be established. Or. Rev. Stat. §
3 576.055(1) (1995). If the referendum results in an affirmative
4 vote, the Oregon Department of Agriculture then holds hearings
5 to determine if there is a need for the creation of that
6 particular commodity commission. Id. §§ 576.075, 576.085.
7 Using this process, numerous industries have successfully
8 petitioned to have a commodity commission created, including the
9 Chewings Fescue and Creeping Red Fescue Commission, the Oregon
10 Clover Commission, the Oregon Processed Vegetable Commission,
11 and the appellant herein, the Oregon Fryer Commission. All
12 commodity commissions created in this manner are subject to
13 general commodity commission guidelines laid out in Oregon
14 Revised Statutes ("ORS") §§ 576.051 through 576.584. These
15 general guidelines contain many similarities to the specific
16 guidelines for the Beef Council and the Sheep, Wheat, and Potato
17 commissions, but they differ in many respects as well.

18 Finally, the Oregon legislature created five commodity
19 commissions--the Oregon Dairy Products Commission, the Oregon
20 Filbert Commission, the Oregon Dungeness Crab Commission, the
21 Oregon Salmon Commission, and the Oregon Grains Commission--
22 stating that these commissions "shall be considered to have been
23 created in all respects pursuant to ORS 576.051 to 576.584 and
24 [are] vested with all the rights and liabilities of commissions
25 created pursuant to ORS 576.051 to 576.584." Id. § 576.155.

26 Members of the fryer chicken industry in Oregon sought and

1 obtained approval to establish a commodity commission pursuant
2 to ORS § 576.055(1). The resulting commission--the Oregon Fryer
3 Commission (the "Commission")--levies assessments on the initial
4 purchaser of fryer chickens. The assessments are based upon the
5 weight of the fryers. Debtor Belozer Farms purchases and
6 processes fryers. From January, 1993 through February 1994,
7 Belozer Farms failed to pay its assessments. After Belozer
8 Farms filed bankruptcy, the Commission filed a proof of claim
9 for \$42,822.78, representing the unpaid assessments.¹ The
10 Commission characterized its claim as an unsecured priority tax
11 debt pursuant to § 507(a)(8)(C).²

12 The bankruptcy trustee objected to the claim, arguing that
13 it was not entitled to priority status. The bankruptcy court
14 agreed. In its decision, the bankruptcy court ruled first that
15 the assessments did not fit within the four-part definition of a
16 tax as outlined in In re Lorber Industries of California, Inc.,
17 675 F.2d 1062 (9th Cir. 1982). In addition, the bankruptcy
18 court held that the fryer assessments did not satisfy the "duck"
19 test of In re Camilli, 182 B.R. 247 (9th Cir. BAP 1995).
20 Finally, the bankruptcy court held that even if the assessments
21

22 ¹ The original proof of claim also sought tax priority status
23 for the penalties associated with the unpaid assessments.
24 However, the bankruptcy court ruled that even assuming the
25 assessments were "taxes," tax penalties are not entitled to
26 priority status. The Commission does not appeal this ruling.

27 ² Unless otherwise indicated, all references to Chapters,
28 Sections and Rules are to the Bankruptcy Code, 11 U.S.C. §§ 101,
29 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules
30 1001, et seq.

1 were a "tax," the Commission was not a "governmental unit" and
2 therefore its claim is not entitled to priority. The Commission
3 appeals.

4 II. ISSUES

5 1. Is the assessment levied on fryer purchasers by the
6 Commission a "tax" within the meaning of § 507(a)(8)(C)?

7 2. Is the Commission a "governmental unit" within the
8 meaning of § 507(a)(8)?

9 III. STANDARD OF REVIEW

10 Whether the assessments are a "tax" is a question of
11 federal law. Camilli, 182 B.R. at 249. Whether an organization
12 is a "governmental unit" within the meaning of the Bankruptcy
13 Code is also a question of law. In re Wade, 948 F.2d 1122, 1123
14 (9th Cir. 1991). We review questions of law de novo.

15 IV. DISCUSSION

16 The Commission seeks priority for the unpaid assessments
17 under § 507(a)(8)(C), which grants priority to a governmental
18 unit's unsecured claim if that claim is "a tax required to be
19 collected or withheld and for which the debtor is liable in
20 whatever capacity." 11 U.S.C. § 507(a)(8)(C) (1994). The
21 parties do not dispute that the debtor was liable for collection
22 and payment of the fryer assessments. At issue is whether the
23 assessments are a tax owed to a governmental unit.

24 A. Are the Assessments a Tax?

25 Whether an assessment is a tax does not turn on whether the
26 assessment is characterized as a tax or not, "especially when

1 the term is applied to an elaborate statutory scheme such as
2 that created by the Bankruptcy Code." Camilli, 182 B.R. at 249
3 (citing Union Pacific R. Co. v. Public Utility Comm'n, 899 F.2d
4 854, 861 (9th Cir. 1990)). Therefore, "[w]e look to federal law
5 to determine whether a debt is a tax entitled to priority in
6 bankruptcy." Id. (citing New York v. Feiring, 313 U.S. 283, 285
7 (1941)). The seminal case in the Ninth Circuit on what
8 constitutes a tax for purposes of priority in bankruptcy is In
9 re Lorber Industries of California, Inc., 675 F.2d 1062 (9th
10 Cir. 1982).³

11 As Lorber succinctly stated, whether or not an assessment
12 is a fee or a tax can be a "close question." Lorber, 675 F.2d
13 at 1067. In order for an assessment to be considered a tax, it
14 must be:

- 15 (a) An involuntary pecuniary burden, regardless of
16 name, laid upon individuals or property;
- 17 (b) Imposed by, or under authority of the
18 legislature;
- 19 (c) For public purposes, including the purposes of
20 defraying expenses of government or undertakings
21 authorized by it;
- 22 (d) Under the police or taxing power of the state.

21 Id. at 1066.

22 1. Are the Assessments an Involuntary Pecuniary Burden?

23 According to Lorber, an assessment is "involuntary" if it
24

25 ³ Although Lorber was decided under § 64(a) of the Bankruptcy
26 Act, its analysis has been adopted with respect to § 507 of the
Bankruptcy Code. Camilli, 182 B.R. at 250.

1 is "a non-contractual obligation imposed by state statute upon
2 taxpayers who had not consented to its imposition." Lorber, 675
3 F.2d at 1066. The Commission argues that the assessment is
4 involuntary because Belozer Farms cannot conduct its business
5 without incurring the assessment. Belozer Farms argues that the
6 assessment is voluntary because, the fryer industry has consented
7 to its imposition.

8 The case in which the Lorber test first made its appearance
9 was In re Farmers Frozen Food Co., 221 F.Supp. 385 (N.D. Cal.
10 1963), aff'd, Dungan v. Dept. of Agriculture, State of
11 California, 332 F.2d 793 (9th Cir. 1964), a case involving
12 interpretation of the California Marketing Act of 1937. This
13 act authorized the Director of the California Department of
14 Agriculture to enter Marketing Orders for the purpose of levying
15 assessments on agricultural commodity processors. However,
16 before a Marketing Order could be entered, the Director had to
17 receive the consent of a majority of that commodity's
18 processors. In Farmers Frozen Food, the Director had received
19 the consent of strawberry processors to enter a Marketing Order
20 and levy assessments. The debtor filed bankruptcy after falling
21 behind on the assessments. The court stated that even though a
22 majority of the processors had to consent to entry of the
23 Marketing Order, the assessments were nonetheless involuntary.
24 "The distinction between a voluntary and an involuntary
25 pecuniary burden in tax law hinges on a decision whether the
26 nature of the particular imposition is contractual or

1 statutory." Id. at 387. Under Farmers Frozen Food, therefore,
2 the statutorily authorized fryer assessment would seem to be
3 involuntary.

4 However, the contractual-statutory distinction in Farmers
5 Frozen Food has been rejected by many courts. In In re S.N.A.
6 Nut Co., 188 B.R. 392 (Bankr. N.D.Ill. 1995), the court stated
7 that "contrary to the Farmers Frozen Food decision, courts under
8 the Code have not hesitated to determine certain assessments to
9 be 'fees,' despite the fact that they stemmed from statutory
10 obligations." Id. at 395. In addition, the sewer use
11 assessment in Lorber, which the Ninth Circuit held was a non-tax
12 fee, was a statutorily-authorized assessment. Lorber, 675 F.2d
13 at 1064. Therefore, the simple fact that an assessment is
14 authorized by statute does not require a finding that it is
15 "involuntary."

16 In Lorber, the Los Angeles County Sanitation District
17 operated sewer lines used by both domestic and industrial users.
18 The District funded its operations through two separate types of
19 assessment. One assessment was made on every user--domestic or
20 industrial--of the sewer. This assessment was based strictly
21 upon the value of the user's property, and therefore bore no
22 relation to how much wastewater the user actually discharged
23 into the sewer. The District also made a second assessment
24 against industrial users. This "surcharge" was based upon the
25 amount of wastewater that the user discharged into the sewer.
26 The court held that this surcharge was a fee, not a tax, because

1 the user was free to increase or decrease the amount of
2 discharge, thereby increasing or decreasing the surcharge.

3 The Sanitation District argued that the surcharge was
4 involuntary because the user had no other practical or economic
5 choice but to use the County sewer system. The court stated,
6 however, that it "[was] not free to consider the practical and
7 economic factors which constrained [the person] to make the
8 choices it did. The focus is not upon [the person's]
9 motivation, but on the inherent characteristics of the charges."
10 Lorber, 675 F.2d at 1066. The court also noted that the first
11 assessment was a uniform tax based upon the value of the user's
12 property, while the surcharge was a non-uniform assessment based
13 upon the amount of wastewater the user discharged into the
14 sewer.

15 The fryer assessment fails the "involuntary" prong of the
16 Lorber test for the following reasons. First, the assessment is
17 imposed on people who have consented to its imposition. As
18 noted by the bankruptcy court, the Commission was an
19 organization created voluntarily by its members, who can elect
20 its own members and determine the amount of the assessment, and
21 who knew that such an organization meant that it would have to
22 levy assessments in order to fund itself. In addition, the
23 fryer producers can hold a referendum on discontinuing the
24 Commission at any time after five years from the date it was
25 created, without consent of the legislature. Or. Rev. Stat. §
26 576.505 (1995).

1 Second, under the Oregon statutory scheme, the first
2 purchaser of a fryer is responsible for reporting and paying an
3 assessment based upon the weight of the fryers purchased. Id.
4 §§ 576.325(4), 576.335(1). This assessment is analogous to the
5 surcharge in Lorber--which was based upon the amount the person
6 used the sewer and which arose out of the voluntary use of the
7 sewer--and in contrast to the first assessment in Lorber--which
8 was a uniform "tax" based upon the value of the user's property.

9 Finally, as the court in Lorber noted, the practical or
10 economic reasons as to why the person makes the choice to incur
11 the assessment are not relevant. Therefore, the Commission's
12 argument that Belozzer Farms could not operate its business
13 without incurring the assessment does not require a finding that
14 the assessment is "involuntary."

15 2. Are the Assessments Imposed By, or Under Authority of
16 the Legislature?

17 This prong is typically met, S.N.A. Nut Co., 188 B.R. at
18 394, because most cases involve an assessment which is clearly
19 imposed by a governmental unit. As a result, the caselaw on
20 whether an assessment is imposed by or under the authority of
21 the legislature is sparse.

22 According to Oregon law, all commodity commissions (whether
23 created voluntarily by producers of that commodity or created by
24 the state legislature) are excluded from the definition of
25 "state agency." Or. Rev. Stat. § 291.050(3) (1995). In
26 addition, for purposes of Oregon tax court jurisdiction, the

1 section of the ORS which provides for creation of commodity
2 commissions at the request of the producers of that commodity is
3 not considered a "tax law" of the State of Oregon. Id. §
4 305.410.

5 However, the statutory scheme which provides for the
6 creation of commodity commissions does provide some level of
7 state control over certain of the commodity commissions'
8 functions. For example, commodity commissions have the
9 authority to prosecute lawsuits for collection of assessments
10 "in the name of the State of Oregon." Id. § 576.305. The rules
11 applicable to the commodity commissions when interviewing and
12 hiring independent contractors were imposed by the Oregon
13 Department of Administrative Services and the Oregon Department
14 of Agriculture. Commodity commissions may also request from the
15 Department of Administrative Services such things as supplies
16 and equipment, printing services, accounting services, central
17 telephone and mail services, repair and maintenance, motor
18 vehicles, and clerical and stenographic pool services. Id. §
19 576.307. The statutory scheme provides the maximum assessment
20 that can be levied by a commodity commission. Id. § 576.325(2).
21 Finally, the budget of each commodity commission has to be filed
22 with the Oregon Department of Agriculture and approved by its
23 Director. Id. § 576.415.

24 On the other hand, commodity commission employees are not
25 subject to the state personnel compensation plans established by
26 the Oregon Department of Administrative Services. Id. §

1 576.320. Oregon has expressly disavowed any liability for the
2 acts or omissions of the commodity commissions and their agents.
3 Id. § 576.405. In addition, the assessments collected are not
4 placed into Oregon's general fund, but are kept in accounts
5 registered to the commodity commission and are used "only for
6 the payment of the expenses of the commission in carrying out
7 the powers conferred on the commission." Id. § 576.375. If the
8 state provides printing services, any printing which advertises
9 or promotes that commodity's products is not considered "state
10 printing." Id. § 576.307(1)(b). Finally, commodity commissions
11 must reimburse the state for the cost of any of the
12 aforementioned administrative services that the state is
13 requested to provide. Id. § 576.307((2)).

14 As indicated by the Commission, the Oregon court of appeals
15 has stated that the Oregon Sheep Commission is a "public body"
16 and that its assessments are "public funds" (which therefore
17 could not be donated to a political action committee).

18 Oregonians Against Trapping v. Oregon State Dept. of
19 Agriculture, 56 Or. App. 78, 81, 641 P.2d 72, 73 (Or. Ct. App.
20 1982). However, as pointed out by the bankruptcy court, the
21 Sheep Commission was specifically created by the state
22 legislature under its police power for the protection of the
23 public health and welfare. Or. Rev. Stat. § 577.705 (1995). On
24 the other hand, the Fryer Commission was created at the request
25 of the fryer producers and in their own interest.

26 There are other differences between the legislature-created

1 commissions and the voluntarily created commissions. For
2 example, the Director of Agriculture picks the members of the
3 Sheep Commission. Id. § 577.710. By contrast, the petitioners
4 seeking to create a commodity commission may include provisions
5 for the election of their own members by the producers of that
6 commodity. Id. § 576.055(2).

7 Whether or not the Commission has sufficient ties with the
8 state government to justify a finding that its fryer assessments
9 are imposed under the authority of the legislature is a close
10 question. The court's reasoning in Frozen Farmer Food seems to
11 dictate an affirmative answer to this question. Even the court
12 in S.N.A. Nut Co., which held that California Walnut Commission
13 was a "trade association" whose assessments were not a tax,
14 seemed to assume that the Walnut Commission satisfied this
15 prong. See S.N.A. Nut Co., 188 B.R. at 394. However, we need
16 not answer this question since we hold that other elements of
17 the Lorber test are not satisfied.

18 3. Are the Assessments Imposed For a Public Purpose?

19 The determination of the ultimate purpose for an assessment
20 goes to the heart of distinguishing a "fee" from a "tax."
21 "While a tax is an exaction for a public purpose, a fee relates
22 to an individual privilege or benefit to the payer." Camilli,
23 182 B.R. at 253 (Jones, J., dissenting) (citing In re Chateaugay
24 Corp., 153 B.R. 632, 638 (S.D.N.Y. 1993)). As stated by the
25 U.S. Supreme Court, if the agency exacting the charge "bestows a
26 benefit on the applicant [which is] not shared by other members

1 of society," then the charge is a fee, not a tax. National
2 Cable Television Assoc., 415 U.S. 336, 340-41 (1974). The
3 issue, therefore, is whether the Commission uses the assessments
4 "for the primary benefit of the payer," S.N.A. Nut Co., 188
5 B.R. at 394, or whether the benefits of those assessments inure
6 primarily "to the general public welfare." In re Suburban Motor
7 Freight, Inc. (Suburban II), 36 F.3d 484, 489 (6th Cir. 1994).

8 The Commission argues that the primary purpose of the
9 Commission is to defray the expenses of the state in promoting
10 and protecting the agricultural industry of Oregon. Belozer
11 Farms argues that the primary purpose of establishing the
12 Commission and in collecting the assessment is to enable the
13 fryer industry to pool its resources in order to receive the
14 benefits of joint marketing, product research, public relations,
15 and effective lobbying. In that way, it argues, the Commission
16 is in effect a trade association.

17 In creating the Beef Council, Sheep Commission, Wheat
18 Commission, and Potato Commission, the Oregon legislature
19 specifically stated that the purpose of these organizations is
20 to further the public interest, health and welfare of its
21 citizens. See Or. Rev. Stat. § 577.120(1) (1995) (Beef
22 Council); id. § 577.705(1) (Sheep Commission); id. § 578.020
23 (Wheat Commission); id. § 579.020 (Potato Commission). In
24 contrast, the decision on whether or not to allow the producers
25 of other commodities to petition for the creation of their own
26 commodity commission is based upon "whether or not there is need

1 for the creation of a commission in the interest of the general
2 welfare of the producers of the commodity" Id. §
3 576.085 (emphasis added).

4 There is no requirement in the Oregon statutory scheme that
5 the assessments which a voluntarily organized commodity
6 commission may impose have to be used for a public purpose. In
7 fact, these commissions have broad authority to further their
8 own interests, including the authority (1) to conduct research
9 in order to "discover and develop the commercial value" of the
10 commodity; (2) to disseminate information "showing the value of
11 the commodity and its products for any purpose for which they
12 may be found useful and profitable"; (3) to "represent and
13 protect the interests of the commodity industry" with respect to
14 state and federal tariffs, duties, trade agreements, and
15 legislation; and (4) borrow money "so that the [commodity]
16 responsible for the accumulation of funds may receive the
17 benefits of the efforts for which the funds are used." Id. §
18 576.305. Under a similar statutory scheme, a court found that
19 the California Walnut Commission was a trade association which
20 promoted its own interests, not the interests of the public at
21 large.

22 The degree to which this assessment can be considered
23 private is exacerbated by the activities for which the
24 assessment is used. The assessment funds are utilized
25 to create a common pool fund for the advertisement,
marketing, and promotion of walnuts--activities which
bestow a discrete, private benefit to the walnut
industry.

26 S.N.A. Nut Co., 188 B.R. at 395.

1 Although the Commission argues that the primary purpose of
2 Oregon's statutory agricultural marketing scheme is to benefit
3 the public interest, it provides no convincing support for this
4 contention. Under the plain language of the statutory scheme,
5 the main purpose and function of the Commission is to promote
6 the interests of the fryer industry in Oregon. Giving the
7 Commission priority in bankruptcy would in effect be placing the
8 interests of the Oregon fryer industry over that of similarly
9 situated unsecured creditors. The Sixth Circuit in In re
10 Suburban Motor Freight, Inc. (Suburban I), 998 F.2d 338 (6th
11 Cir. 1993) and In re Suburban Motor Freight, Inc. (Suburban II),
12 36 F.3d 484 (6th Cir. 1993), held that the test for determining
13 whether an assessment should be given priority as a tax should
14 take into consideration whether the assessment's benefit inures
15 "to the general public welfare," and not to someone's discrete
16 benefit. Suburban II, 36 F.3d at 489; see also Lorber, 675 F.2d
17 at 1066 (holding that even if an assessment is a "tax," it must
18 also be consistent with the policy behind the priority scheme in
19 order to receive priority). Under the Oregon statutory scheme,
20 the primary purpose of the Commission's assessments is to
21 benefit the interests of the fryer industry. The government
22 connection, through budget approval and oversight, seems only to
23 ensure that the collected assessments are not misused by the
24 Commission.

25 4. Are the Assessments Imposed Under Oregon's Police or
26 Taxing Powers?

1 A state has broad police powers to enact laws that are
2 related to the "health, safety, morals, or general welfare" of
3 its citizens. Lochner v. New York, 198 U.S. 45, 53 (1905); see
4 also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).
5 States also have broad powers to impose and collect taxes in
6 order to raise revenue. Allegheny Pittsburgh Coal Co. v. County
7 Comm'n of Webster County, West Virginia, 488 U.S. 336, 344
8 (1989). When creating the Beef Council and the Sheep, Wheat,
9 and Potato commissions, the Oregon legislature stated that the
10 commissions were being created pursuant to its police powers.
11 Or. Rev. Stat. § 577.120(1) (1995) (The Oregon Beef Council was
12 created pursuant to the state's authority to protect and further
13 "the public health and welfare."); id. § 577.705(1) ("It is a
14 legislative finding that the sheep industry of this state is
15 affected with a public interest in the following respects . . .
16 ."); id. § 578.020 ("It is the purpose of this chapter, in the
17 exercise of the police power, to promote the public health and
18 welfare by providing the means for the protection and
19 stabilization of the wheat industry in this state."); id. §
20 579.020 ("It is to the interest of all the people of the state
21 that the soil resources of Oregon be developed to the fullest
22 extent consistent with available market outlets for the products
23 of the soil. It is also to the interest of all the people that
24 consumers of the state be provided with an abundant supply of
25 food of the best quality obtainable and that prices for that
26 food are reasonable."). It is therefore unquestionable that

1 Oregon created these four commissions under its police powers.

2 However, the Oregon legislature's basis for allowing the
3 voluntary creation of other commodity commissions--like the
4 Oregon Fryer Commission--is stated differently.

5 (1) After the hearings provided for in ORS 576.075,
6 the [State Department of Agriculture] shall determine
7 upon the facts presented and other relevant data and
8 information available to it whether or not there is
9 need for the creation of a commission in the interest
10 of the general welfare of the producers of the
11 commodity sufficient to justify the holding of a
12 referendum thereon

13

14 (3) The [State Department of Agriculture's]
15 determination of need for the creation of a commission
16 shall be based upon a consideration of the following
17 factors as they may be applicable to any commodity:
18 (a) The current market price to producers.
19 (b) The costs of production, including all
20 elements of cost.
21 (c) Market price trends.
22 (d) Stability of prices.
23 (e) Relationship between the factors set forth in
24 paragraphs (a), (b), (c) and (d) of this subsection.
25 (f) Commodity utilization and the possibility of
26 increasing commodity utilization by research,
promotive advertising, improved marketing practices,
and improving time or place utility.

Id. § 576.085 (emphasis added). Nowhere in the voluntary
commodity commission scheme does the state legislature state
that these commissions will only be allowed if they act in the
furtherance of the health, safety, morals, or general welfare of
the state. In fact, the legislative scheme does not even
mention the public welfare as a factor to be considered in
deciding whether or not to allow the establishment of a
commodity commission. The only interest referenced in the

1 statute is the interest of the producers of that commodity.

2 Although the actions of such commissions might benefit the
3 public health, safety, and welfare, the state legislature did
4 not base the creation of the commissions on those grounds.

5 Based upon this, the bankruptcy court held that the Oregon Fryer
6 Commission's assessments were not levied under Oregon's police
7 or taxing powers.

8 The Commission argues that the statute allowing producers
9 of a particular commodity to create a commodity commission was
10 enacted for the same reasons that the specific commodity
11 commission were created. Since the statutory guidelines for the
12 Beef Council and the Wheat, Sheep, and Potato commissions are
13 similar to the general guidelines for the voluntarily created
14 commodity commissions, there is some merit to this argument.
15 However, the statute does state that the above four commissions
16 were created under the state's police powers for the public
17 welfare, yet states that the creation of other commissions is
18 based upon the interests of the producers of that commodity. In
19 addition, the legislature did not create the Fryer Commission--
20 it merely passed a statute which allowed the Fryer Commission to
21 be organized by, and for the benefit of, private commercial
22 organizations. For this reason, we affirm the bankruptcy
23 court's finding that the Fryer Commission was not created under
24 the state's police power.

25 **B. Is the Oregon Fryer Commission a Governmental Unit?**

26 The mere fact that a governmental unit makes an assessment

1 does not mean that the assessment is automatically a "tax." See
2 National Cable Television Assoc., 415 U.S. at 340-41
3 (distinguishing between governmental "fees" and "taxes").
4 Therefore, our holding that the assessments are a fee renders
5 moot the question of whether the Commission is a governmental
6 unit.

7
8 **V. CONCLUSION**

9 The bankruptcy court held that the fryer assessments are a
10 non-tax "fee" and are not entitled to priority in bankruptcy.

11 **We AFFIRM.**

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26