



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

September 25, 2015

The Honorable Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Supreme Court Building
1163 State Street
Salem, OR 97310

Re: *Nik Blosser v. Ellen Rosenblum*
SC S063528 (Control), S063532

Dear Chief Justice Balmer:

Petitioners Nik Blosser and Paul Romain have filed ballot title challenges in the above-referenced matters. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Matthew J. Lysne

Matthew J. Lysne
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

MJL:aft/6812846

cc: Steven C. Berman
Paul R. Romain
Lila Leathers-Fitz/without encl.
Charles Ireland/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063528 (Control)

PAUL ROMAIN,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S063532

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 46

Pursuant to ORS 250.085, petitioners seek review of the Attorney General's certified ballot title for Initiative Petition 46 (2016) (IP 46). Petitioner Blosser challenges the caption, "yes" vote result statement, and summary. Petitioner Romain challenges the caption, "no" vote result statement, and summary. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum pursuant to ORAP 11.30(6). As explained below, the Attorney General's ballot title for IP 46 substantially complies with ORS 250.035.

A. The caption substantially complies with ORS 250.035(2)(a).

Petitioners Blosser and Romain both object to the caption. The caption must reasonably identify the “subject matter” of the measure and contain no more than 15 words. ORS 250.035(2)(a). The “subject matter” of a ballot title is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)). The caption reads:

Restricts low carbon fuel standards to requiring blends of gasoline/diesel with commercially available fuels

For the reasons explained below, petitioners’ objections to the caption lack merit.

1. The authorization for lawsuits is not an actual major effect of IP 46.

Petitioner Blosser objects to the caption in one respect: he argues that the caption should identify that IP 46 would “authorize lawsuits.” (Petition, 3-5). IP 46 provides that the Environmental Quality Commission (EQC) shall notify gasoline or diesel importers when it has determined that a liquid fuel substitute for gasoline or diesel is “available in commercial quantities” and that any person required to blend that substitute fuel may contest that determination “in the manner provided for challenging administrative rule adoption.” IP 46, §

1(6)(2)(d). However, that language does not expressly authorize “lawsuits.” It appears to authorize a specific type of administrative rule challenge available under existing law to challenge promulgated administrative rules. *See* ORS 183.400(1) (“[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases”); *see also* ORS 183.400(2) (“[t]he validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to ORS 183.480 or upon enforcement of such rule or order in the manner provided by law”).

More importantly, the creation of that remedy is not an “actual major effect” of IP 46 because it is, at most, a substitution of remedies available under existing law. Existing law provides a general mechanism for challenging agency actions like those contemplated under IP 46, the “other than contested case” provisions in ORS 183.484. *See* ORS 183.484(1) (providing jurisdiction for judicial review of orders other than contested cases”); ORS 183.484(3) (providing that a petitioner must show how the petitioner is “adversely affected or aggrieved by the agency order and the ground or grounds upon which the petitioner contends the order should be reversed or remanded”). Whether IP 46 would replace or supplant the review procedure provided in ORS 183.484 with

the review procedure provided in ORS 183.400 may not be entirely clear, but

that is not a matter to be resolved in a ballot title. In any event, the caption need not identify the potential substitution of judicial remedies IP 46 may or may not provide. Nor must the caption identify that a new law may trigger an agency action that may require parties to seek judicial review—that is the type of possibility that could occur for virtually any legislation that requires an agency to take an action that may adversely affect a person or entity. Accordingly, the caption need not identify that IP 46 “authorizes lawsuits.”

2. The elimination of fuel credits is not an “actual major effect” of IP 46.

Petitioner Romain contends that the caption is deficient in a different respect: it fails to identify that IP 46 would eliminate the buying and selling of fuel credits to satisfy the low carbon fuel standards. (Romain Petition, 6). He proposes that the caption should instead read: “Low carbon fuel standards can only require liquid fuel blends; eliminates buying/selling fuel credits.” (Id.). That objection lacks merit.

To the extent that the elimination of fuel credits is a significant effect of IP 46, it is not an “actual major effect” that must be specifically and individually identified within the caption. The primary actual major effect of IP 46 is a fundamental legal change in the scope and breadth of the low carbon fuel standards—eliminating numerous alternative fuels (with or without the use

of a credit system) from those standards, and substituting standards that concern only the blending of fuels with gasoline or diesel. The additional change identified by petitioner Romain is perhaps a part of that fundamental change, but not the type of independently significant change that should be specifically and separately identified as an “actual major effect” of IP 46—especially in light of the 15-word limitation for the caption.

In conclusion, the caption for IP 46 appropriately captures the primary and actual major effect of IP 46—the requirement for blends of fuels with gasoline or diesel—and appropriately identifies that there are other new limits to the low carbon fuel standards. That language satisfies ORS 250.035(2)(a).

B. The “yes” and “no” vote result statements comply with ORS 250.035(2)(b) and ORS 250.035(2)(c).

Petitioner Blosser challenges the “yes” vote result statement, and petitioner Romain challenges the “no” vote result statement. A ballot title must contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). “[T]he result of a proposed measure’s enactment that belongs in the ‘yes’ vote result statement is that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). A “no” vote result statement describes

the result if the proposed measure is rejected. ORS 250.035(2)(c). The “yes” and “no” vote result statements should be read together. *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996). Because petitioners separately challenge separate vote result statements, but those statements should be read together, the response will consider them together. Those statements read:

Result of “Yes” Vote: “Yes” vote restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels; eliminates fuel credit system for satisfying standards.

Result of “No” Vote: “No” vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

For the reasons explained below, the petitioners’ objections to the vote result statements lack merit.

1. The phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is accurate.

First, petitioner Blosser argues that the phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is inaccurate because the term “commercially available” is not necessarily accurate and because IP 46 further restricts the standards by requiring those “commercially available” fuels to also be the same price (or cheaper) than the gasoline or diesel they are mixed into (and meet other

potential restrictions). (Blosser Petition, 5-9). However, the phrase “commercially available fuels,” as used in that context, is accurate and proper.

The challenged phrase is accurate as it identifies the broadest and most predominant legal restriction regarding the possible fuels that may be blended with gasoline or diesel if IP 46 is approved. IP 46 changes the low carbon fuel standards to make them applicable to only “the blending of liquid fuel available in commercial quantities in this state.” IP 46, § 1(6)(b). IP 46 defines “available in commercial quantities” to mean that “the liquid fuel must actually be available in this state in sufficient quantities for all persons who import gasoline or diesel to comply with the standards.” IP 46, § 1(6)(d).

Relying on *Tauman v. Myers*, 343 Or 299, 302-03, 170 P3d 556, 557 (2007), petitioner argues that the ballot title’s use of the term “commercially available” identifies a class of eligible fuels that is broader than what would actually be allowed under IP 46. He points out that what is “commercially available” under IP 46 is complicated, suggesting that the definition is not consistent with what a voter might understand from that phrase. Specifically, petitioner Blosser argues that a voter would mistakenly understand that IP 46 would allow fuels “available for purchase in commerce” even though the requirements of the measure are more restrictive.

Petitioner Blosser relies on *Tauman* to support this argument. But the case is inapposite. In that case, this court considered whether the caption term “charity (defined)” was proper for a measure that defined a “charity” as “a nonprofit organization that is organized for the conduct of charitable, benevolent, humane, patriotic, religious, philanthropic, recreational, social, educational, medical, eleemosynary, civic or fraternal activities * * * [.]” This court compared that definition with a common dictionary definition of the term “charity”—that is, an organization that helps “the poor, the suffering, or the distressed”—and concluded that the caption was inaccurate because a voter could mistakenly believe the measure was limited to such organizations (when it was not). *Tauman*, 343 Or at 303; *see id.* (explaining that the measure’s definition of a “charity” could apply to “a symphony association, the Boy Scouts, a private college, and some fraternities, none of which is commonly understood to be a charity”). This court was concerned that the caption might give voters the mistaken impression that the proposed measure’s scope was far narrower than it actually was, that is, that the caption understated the scope of that measure. *See Kain v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004 (“the caption must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact”).

The proposed ballot title does not implicate the concerns identified in *Tauman*. The complete phrase, “restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels,” makes it clear that the fuels in question must be available for purposes of blending them with gasoline or diesel. That context makes it sufficiently clear that the fuels must be “commercially available” to those who blend fuels. That impression, in turn, is consistent with the actual definition IP 46 gives to the phrase “available in commercial quantities. Consequently, the term “commercially available fuels” does not “understate or overstate the scope of the legal changes that the proposed measure would enact.” Petitioner Blosser has not shown that the “yes” vote result statement fails to comply with ORS 250.035(2)(b).

2. The phrase “require rules to control costs” in the “no” vote result statement is not misleading.

Petitioner Romain argues that the “no” vote result statement is misleading because it implies that IP 46 “eliminates rules to control costs of compliance” and that a “no” vote will “retain those cost control provisions”, and because it implies that the rules “will actually control costs.” (Romain Petition, 6-7). Neither argument is correct.

The phrase “require rules to control costs” is accurate description of existing law. Under existing law, the EQC is required to “adopt by rule

provisions for managing and containing the costs of compliance with the standards[.]” Or Laws 2015, ch 3, § 3; Or Laws 2009, ch 754, § 6(1)(2)(d). IP 46 would eliminate that provision in existing law. IP 46, § 1. Thus, to the extent the “no” vote result implies an elimination of that existing requirement, that is not inaccurate.

To the extent that petitioner Romain urges that the “no” vote result statement implies more than that, i.e. that IP 46 “eliminates rules to control costs of compliance,” that is similarly incorrect. Accurately stating that current law “require rules to control costs” does not imply that cost controls would be lacking under IP 46. What either a yes vote or a no vote would “actually” mean with regard to costs is a political question that the proposed ballot title does not address. That question is properly left to proponents, opponents, and voters to decide.

D. The summary substantially complies with ORS 250.035(2)(d).

ORS 250.035(2)(d) provides that a ballot title summary be “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The function of the summary is “to provide voters with enough information to understand what will happen if the measure is approved.” *Caruthers*, 347 Or at 670. That information may include a

description of the effect of the measure at issue on other laws, so long as the

description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual “effect” of enacting the measure; it is not permissible to “speculate about the possible effects of a proposed measure.” *Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007). The Attorney General’s summary provides:

Summary: Currently, the Environmental Quality Commission sets low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and other transportation fuels, including non-liquid fuels. Commission currently must adopt rules to control costs, must allow fuel distributors to meet standards by purchasing credits from others whose produces exceed required standards. Measure restricts low carbon fuel standards to apply only to blending gasoline and diesel with other liquid fuels, making standards inapplicable to other types of fuels and eliminating the credit system. Measure further provides that adopted standards cannot require carbon reductions unless low carbon fuel needed to meet the blending requirements is “available in commercial quantities” (defined) and costs no more than the gasoline or diesel into which it is blended. Other provisions.

1. The term “available in commercial quantities (defined)” is not inaccurate.

Petitioner Romain objects, as he did regarding the “yes” vote result statement, that the phrase ““available in commercial quantities’ (defined)” is inaccurate. (Blosser Petition, 9-10). However, for the reasons discussed above, that objection lacks merit.

2. The summary need not specify that IP 46 authorizes lawsuits or attorney-fee awards

Petitioner Blosser also objects that the summary fails to explain that IP 46 “authorizes lawsuits, including attorney fee awards” for prevailing gasoline or diesel importers who successfully challenge a determination that alternative fuels are “available in commercial quantities.” (Blosser Petition, 10).

However, this objection lacks merit for reasons discussed above.

3. The summary does not imply that the EQC has the ability to control costs or actually reduce greenhouse gas emissions.

Petitioner Romain argues that the summary is “not impartial” and is inaccurate because it “give[s] the impression that the [EQC] has the ability to control costs and actually reduce greenhouse gas emissions * * * [.]” (Romain Petition, 8). However, the summary does not give such an “impression.” To the contrary, the summary explains that the EQC does three things: (1) to set low carbon fuel standards for reducing average greenhouse gas emissions in transportation fuels; (2) to adopt rules to control costs; and (3) to allow the purchase of fuel credits to satisfy the standards. The summary does not suggest or imply that the EQC has any “ability to control” costs other than the ability it has—to establish certain rules. Whether those rules actually control costs is a matter of political debate, discussion, including statements in the voter’s pamphlet. Likewise, the summary does not imply that the EQC has the ability

to “actually reduce greenhouse gas emissions.” Again, that is a matter for political debate and discussion. The summary does not purport or pretend to provide any insight or answer to either political question.

For the reasons explained above, the summary substantially complies with ORS 250.035(2)(d) and neither petitioner has demonstrated otherwise.

E. Conclusion

For the reasons discussed above, the Attorney General’s ballot title substantially complies with ORS 250.035(2). This court should certify the ballot title without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
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Attorneys for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 25, 2015, I directed the original Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for petitioner Nicholas Blosser; and served upon Paul R. Romain, attorney for petitioner; by using the court's electronic filing system.

I further certify that on September 25, 2015, I directed the Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 to be served upon Lila Leathers-Fitz and Charles Ireland, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

Charles Ireland
P.O. Box 815
Myrtle Creek, OR 97457

/s/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
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Attorney for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon

IN THE SUPREME COURT OF THE STATE OF OREGON

NIK BLOSSER,

Petitioner,

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ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

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Supreme Court No. S063528 (Control)

PAUL ROMAIN,

Petitioner,

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ELLEN F. ROSENBLUM, Attorney
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Supreme Court No. S063532

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 46

Pursuant to ORS 250.085, petitioners seek review of the Attorney General's certified ballot title for Initiative Petition 46 (2016) (IP 46). Petitioner Blosser challenges the caption, "yes" vote result statement, and summary. Petitioner Romain challenges the caption, "no" vote result statement, and summary. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum pursuant to ORAP 11.30(6). As explained below, the Attorney General's ballot title for IP 46 substantially complies with ORS 250.035.

A. The caption substantially complies with ORS 250.035(2)(a).

Petitioners Blosser and Romain both object to the caption. The caption must reasonably identify the “subject matter” of the measure and contain no more than 15 words. ORS 250.035(2)(a). The “subject matter” of a ballot title is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)). The caption reads:

Restricts low carbon fuel standards to requiring blends of gasoline/diesel with commercially available fuels

For the reasons explained below, petitioners’ objections to the caption lack merit.

1. The authorization for lawsuits is not an actual major effect of IP 46.

Petitioner Blosser objects to the caption in one respect: he argues that the caption should identify that IP 46 would “authorize lawsuits.” (Petition, 3-5). IP 46 provides that the Environmental Quality Commission (EQC) shall notify gasoline or diesel importers when it has determined that a liquid fuel substitute for gasoline or diesel is “available in commercial quantities” and that any person required to blend that substitute fuel may contest that determination “in the manner provided for challenging administrative rule adoption.” IP 46, §

1(6)(2)(d). However, that language does not expressly authorize “lawsuits.” It appears to authorize a specific type of administrative rule challenge available under existing law to challenge promulgated administrative rules. *See* ORS 183.400(1) (“[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases”); *see also* ORS 183.400(2) (“[t]he validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to ORS 183.480 or upon enforcement of such rule or order in the manner provided by law”).

More importantly, the creation of that remedy is not an “actual major effect” of IP 46 because it is, at most, a substitution of remedies available under existing law. Existing law provides a general mechanism for challenging agency actions like those contemplated under IP 46, the “other than contested case” provisions in ORS 183.484. *See* ORS 183.484(1) (providing jurisdiction for judicial review of orders other than contested cases”); ORS 183.484(3) (providing that a petitioner must show how the petitioner is “adversely affected or aggrieved by the agency order and the ground or grounds upon which the petitioner contends the order should be reversed or remanded”). Whether IP 46 would replace or supplant the review procedure provided in ORS 183.484 with

the review procedure provided in ORS 183.400 may not be entirely clear, but

that is not a matter to be resolved in a ballot title. In any event, the caption need not identify the potential substitution of judicial remedies IP 46 may or may not provide. Nor must the caption identify that a new law may trigger an agency action that may require parties to seek judicial review—that is the type of possibility that could occur for virtually any legislation that requires an agency to take an action that may adversely affect a person or entity. Accordingly, the caption need not identify that IP 46 “authorizes lawsuits.”

2. The elimination of fuel credits is not an “actual major effect” of IP 46.

Petitioner Romain contends that the caption is deficient in a different respect: it fails to identify that IP 46 would eliminate the buying and selling of fuel credits to satisfy the low carbon fuel standards. (Romain Petition, 6). He proposes that the caption should instead read: “Low carbon fuel standards can only require liquid fuel blends; eliminates buying/selling fuel credits.” (Id.). That objection lacks merit.

To the extent that the elimination of fuel credits is a significant effect of IP 46, it is not an “actual major effect” that must be specifically and individually identified within the caption. The primary actual major effect of IP 46 is a fundamental legal change in the scope and breadth of the low carbon fuel standards—eliminating numerous alternative fuels (with or without the use

of a credit system) from those standards, and substituting standards that concern only the blending of fuels with gasoline or diesel. The additional change identified by petitioner Romain is perhaps a part of that fundamental change, but not the type of independently significant change that should be specifically and separately identified as an “actual major effect” of IP 46—especially in light of the 15-word limitation for the caption.

In conclusion, the caption for IP 46 appropriately captures the primary and actual major effect of IP 46—the requirement for blends of fuels with gasoline or diesel—and appropriately identifies that there are other new limits to the low carbon fuel standards. That language satisfies ORS 250.035(2)(a).

B. The “yes” and “no” vote result statements comply with ORS 250.035(2)(b) and ORS 250.035(2)(c).

Petitioner Blosser challenges the “yes” vote result statement, and petitioner Romain challenges the “no” vote result statement. A ballot title must contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). “[T]he result of a proposed measure’s enactment that belongs in the ‘yes’ vote result statement is that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). A “no” vote result statement describes

the result if the proposed measure is rejected. ORS 250.035(2)(c). The “yes” and “no” vote result statements should be read together. *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996). Because petitioners separately challenge separate vote result statements, but those statements should be read together, the response will consider them together. Those statements read:

Result of “Yes” Vote: “Yes” vote restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels; eliminates fuel credit system for satisfying standards.

Result of “No” Vote: “No” vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

For the reasons explained below, the petitioners’ objections to the vote result statements lack merit.

1. The phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is accurate.

First, petitioner Blosser argues that the phrase “restricts standards to requiring gasoline/diesel blends with commercially available fuels” in the “yes” vote result statement is inaccurate because the term “commercially available” is not necessarily accurate and because IP 46 further restricts the standards by requiring those “commercially available” fuels to also be the same price (or cheaper) than the gasoline or diesel they are mixed into (and meet other

potential restrictions). (Blosser Petition, 5-9). However, the phrase “commercially available fuels,” as used in that context, is accurate and proper.

The challenged phrase is accurate as it identifies the broadest and most predominant legal restriction regarding the possible fuels that may be blended with gasoline or diesel if IP 46 is approved. IP 46 changes the low carbon fuel standards to make them applicable to only “the blending of liquid fuel available in commercial quantities in this state.” IP 46, § 1(6)(b). IP 46 defines “available in commercial quantities” to mean that “the liquid fuel must actually be available in this state in sufficient quantities for all persons who import gasoline or diesel to comply with the standards.” IP 46, § 1(6)(d).

Relying on *Tauman v. Myers*, 343 Or 299, 302-03, 170 P3d 556, 557 (2007), petitioner argues that the ballot title’s use of the term “commercially available” identifies a class of eligible fuels that is broader than what would actually be allowed under IP 46. He points out that what is “commercially available” under IP 46 is complicated, suggesting that the definition is not consistent with what a voter might understand from that phrase. Specifically, petitioner Blosser argues that a voter would mistakenly understand that IP 46 would allow fuels “available for purchase in commerce” even though the requirements of the measure are more restrictive.

Petitioner Blosser relies on *Tauman* to support this argument. But the case is inapposite. In that case, this court considered whether the caption term “charity (defined)” was proper for a measure that defined a “charity” as “a nonprofit organization that is organized for the conduct of charitable, benevolent, humane, patriotic, religious, philanthropic, recreational, social, educational, medical, eleemosynary, civic or fraternal activities * * * [.]” This court compared that definition with a common dictionary definition of the term “charity”—that is, an organization that helps “the poor, the suffering, or the distressed”—and concluded that the caption was inaccurate because a voter could mistakenly believe the measure was limited to such organizations (when it was not). *Tauman*, 343 Or at 303; *see id.* (explaining that the measure’s definition of a “charity” could apply to “a symphony association, the Boy Scouts, a private college, and some fraternities, none of which is commonly understood to be a charity”). This court was concerned that the caption might give voters the mistaken impression that the proposed measure’s scope was far narrower than it actually was, that is, that the caption understated the scope of that measure. *See Kain v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004 (“the caption must use terms that reasonably identify the proposed measure’s subject matter and do not understate or overstate the scope of the legal changes that the proposed measure would enact”).

The proposed ballot title does not implicate the concerns identified in *Tauman*. The complete phrase, “restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels,” makes it clear that the fuels in question must be available for purposes of blending them with gasoline or diesel. That context makes it sufficiently clear that the fuels must be “commercially available” to those who blend fuels. That impression, in turn, is consistent with the actual definition IP 46 gives to the phrase “available in commercial quantities. Consequently, the term “commercially available fuels” does not “understate or overstate the scope of the legal changes that the proposed measure would enact.” Petitioner Blosser has not shown that the “yes” vote result statement fails to comply with ORS 250.035(2)(b).

2. The phrase “require rules to control costs” in the “no” vote result statement is not misleading.

Petitioner Romain argues that the “no” vote result statement is misleading because it implies that IP 46 “eliminates rules to control costs of compliance” and that a “no” vote will “retain those cost control provisions”, and because it implies that the rules “will actually control costs.” (Romain Petition, 6-7). Neither argument is correct.

The phrase “require rules to control costs” is accurate description of existing law. Under existing law, the EQC is required to “adopt by rule

provisions for managing and containing the costs of compliance with the standards[.]” Or Laws 2015, ch 3, § 3; Or Laws 2009, ch 754, § 6(1)(2)(d). IP 46 would eliminate that provision in existing law. IP 46, § 1. Thus, to the extent the “no” vote result implies an elimination of that existing requirement, that is not inaccurate.

To the extent that petitioner Romain urges that the “no” vote result statement implies more than that, i.e. that IP 46 “eliminates rules to control costs of compliance,” that is similarly incorrect. Accurately stating that current law “require rules to control costs” does not imply that cost controls would be lacking under IP 46. What either a yes vote or a no vote would “actually” mean with regard to costs is a political question that the proposed ballot title does not address. That question is properly left to proponents, opponents, and voters to decide.

D. The summary substantially complies with ORS 250.035(2)(d).

ORS 250.035(2)(d) provides that a ballot title summary be “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” The function of the summary is “to provide voters with enough information to understand what will happen if the measure is approved.” *Caruthers*, 347 Or at 670. That information may include a

description of the effect of the measure at issue on other laws, so long as the

description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual “effect” of enacting the measure; it is not permissible to “speculate about the possible effects of a proposed measure.” *Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007). The Attorney General’s summary provides:

Summary: Currently, the Environmental Quality Commission sets low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and other transportation fuels, including non-liquid fuels. Commission currently must adopt rules to control costs, must allow fuel distributors to meet standards by purchasing credits from others whose produces exceed required standards. Measure restricts low carbon fuel standards to apply only to blending gasoline and diesel with other liquid fuels, making standards inapplicable to other types of fuels and eliminating the credit system. Measure further provides that adopted standards cannot require carbon reductions unless low carbon fuel needed to meet the blending requirements is “available in commercial quantities” (defined) and costs no more than the gasoline or diesel into which it is blended. Other provisions.

1. The term “available in commercial quantities (defined)” is not inaccurate.

Petitioner Romain objects, as he did regarding the “yes” vote result statement, that the phrase ““available in commercial quantities’ (defined)” is inaccurate. (Blosser Petition, 9-10). However, for the reasons discussed above, that objection lacks merit.

2. The summary need not specify that IP 46 authorizes lawsuits or attorney-fee awards

Petitioner Blosser also objects that the summary fails to explain that IP 46 “authorizes lawsuits, including attorney fee awards” for prevailing gasoline or diesel importers who successfully challenge a determination that alternative fuels are “available in commercial quantities.” (Blosser Petition, 10).

However, this objection lacks merit for reasons discussed above.

3. The summary does not imply that the EQC has the ability to control costs or actually reduce greenhouse gas emissions.

Petitioner Romain argues that the summary is “not impartial” and is inaccurate because it “give[s] the impression that the [EQC] has the ability to control costs and actually reduce greenhouse gas emissions * * * [.]” (Romain Petition, 8). However, the summary does not give such an “impression.” To the contrary, the summary explains that the EQC does three things: (1) to set low carbon fuel standards for reducing average greenhouse gas emissions in transportation fuels; (2) to adopt rules to control costs; and (3) to allow the purchase of fuel credits to satisfy the standards. The summary does not suggest or imply that the EQC has any “ability to control” costs other than the ability it has—to establish certain rules. Whether those rules actually control costs is a matter of political debate, discussion, including statements in the voter’s pamphlet. Likewise, the summary does not imply that the EQC has the ability

to “actually reduce greenhouse gas emissions.” Again, that is a matter for political debate and discussion. The summary does not purport or pretend to provide any insight or answer to either political question.

For the reasons explained above, the summary substantially complies with ORS 250.035(2)(d) and neither petitioner has demonstrated otherwise.

E. Conclusion

For the reasons discussed above, the Attorney General’s ballot title substantially complies with ORS 250.035(2). This court should certify the ballot title without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

Attorneys for Respondent
Ellen F. Rosenblum, Attorney General,
State of Oregon

Thomas Alicia F

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Tuesday, September 08, 2015 10:53 AM
To: THOMAS Alicia F
Subject: Initiative Petition #46 Appeal
Attachments: 046cbt.pdf; 046dbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR
255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

September 8, 2015

The Hon. Ellen Rosenblum, Attorney General
Anna Joyce, Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Ms. Joyce:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Steven Berman on Initiative Petition **2016-046**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

JEANNE P. ATKINS

SECRETARY OF STATE

ROBERT TAYLOR

DEPUTY SECRETARY OF STATE



JIM WILLIAMS

DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: July 23, 2015

SUBJECT: Initiative Petition **2016-046** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on July 23, 2015, for Initiative Petition **2016-046**, proposed for the November 8, 2016, General Election.

Caption

Provides that low carbon fuel standards can only require liquid fuel blends. Limits permissible standards

Chief Petitioners

Lila Leathers-Fitz 255 Depot St Fairview, OR 97024
Charles E. Ireland PO Box 815 Myrtle Creek, OR 97457

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
August 6, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

July 23, 2015

RECEIVED
2015 JUL 23 PM 4 30
SECRETARY OF STATE

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Provides That Low Carbon Fuel Standards Can Only
Require Liquid Fuel Blends. Limits Permissible Standards
DOJ File #BT-46-15; Elections Division #2016-046

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to providing that low carbon fuel standards can only require liquid fuel blends, and limiting permissible standards.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Alicia Thomas
Legal Secretary

AFT/6678881

Enclosure

Paul Romain
707 SW Washington St., Ste. 927
Portland, OR 97205

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

Charles E. Ireland, Jr.
P.O. Box 815
Myrtle Creek, OR 97457

DRAFT BALLOT TITLE

Provides that low carbon fuel standards can only require liquid fuel blends. Limits permissible standards

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; alternative fuel cost, availability limit permissible requirements.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

Summary: Currently, Environmental Quality Commission must set low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and substitute transportation fuels, including non-liquid fuels; rules for controlling costs of compliance are required. Measure limits scope of low carbon fuel standards to apply only to liquid fuels, and limits potential greenhouse gas emission reductions to those reductions that are achievable by blending low carbon intensity fuels with gasoline, diesel and liquid substitutes. Measure further provides that adopted standards cannot require carbon reductions unless necessary low carbon fuel costs no more than the fuel into which it is blended, and is available in sufficient quantities for all fuel importers in Oregon to meet the standards. Measure requires modifying existing Oregon Clean Fuels Program. Other provisions.

JEANNE P. ATKINS
SECRETARY OF STATE
ROBERT TAYLOR
DEPUTY SECRETARY OF STATE



JIM WILLIAMS
DIRECTOR
255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722
(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties
FROM: Lydia Plukchi, Compliance Specialist
DATE: August 21, 2015
SUBJECT: Initiative Petition **2016-046** Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on August 21, 2015, for Initiative Petition **2016-046**, proposed for the November 8, 2016, General Election.

Caption

Restricts low carbon fuel standards to requiring blends of gasoline/diesel with commercially available fuels

Chief Petitioners

Lila Leathers-Fitz 255 Depot St Fairview, OR 97024
Charles E. Ireland PO Box 815 Myrtle Creek, OR 97457

Appeal Period

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division of Ballot Title Challenge. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

Appeal Due

September 4, 2015

How to Submit Appeal

Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

Notice Due

1st business day after
appeal filed with
Supreme Court, 5 pm

How to Submit Notice

Scan and Email
Fax
Mail

Where to Submit Notice

irrlisnotifier.sos@state.or.us
503.373.7414
255 Capitol St NE Ste 501, Salem OR 97310

THE ROMAIN GROUP, LLC

LAWYERS & PUBLIC POLICY ADVOCATES

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PAUL R ROMAIN
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August 6, 2015

VIA FACSIMILE (503) 373-7414 & Email

Jeanne P. Atkins
Secretary of State
Elections Division
255 Capitol St. N.E., Suite 501
Salem, OR 97310

RECEIVED
2015 AUG 6 PM 1 45
SECRETARY OF STATE

Re: Written Comments on Draft Ballot Title for Initiative Petition No. 2016-046

Dear Secretary Atkins:

Our office represents Paul Romain, an elector and a person dissatisfied with the Attorney General's draft ballot title for Initiative Petition No.46. Mr. Romain objects to the Attorney General's draft ballot title on the grounds that the draft ballot title does not substantially comply with ORS 250.035(2).

For the reasons set forth below, we respectfully request that the alternative ballot title caption, statements and summary set forth in this submission be certified in lieu of the Attorney General's draft ballot title.

1. THE DRAFT CAPTION DOES NOT COMPLY WITH ORS 250.035(2)(a).

The draft caption states:

**Provides that low carbon fuel standard can only require liquid fuel blends.
Limits permissible standards**

ORS 250.035(2)(a) provides that the ballot title caption must contain "not more than 15 words that reasonably identif[y] the subject matter of the state measure." "The caption is the 'headline' of the ballot; it 'provides the context for the reader's consideration of the other information in the ballot title' and must describe the proposed measure's subject matter accurately." *Towers v. Rosenblum*, 354 Or 125, 129, 310 P3d 1136 (2013) (quoting *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995)).

The "subject matter" of a measure refers to "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Buehler v. Rosenblum*, 354 Or 318, 323, 311 P3d 882 (2013) (quoting *Whitsett v.*

Kroger, 348 Or 243, 247, 230 P3d 545 (2010)). “The caption must also identify the measure’s subject matter in terms that will not ‘confuse or mislead potential petition signers and voters,’ *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001), and it cannot overstate or understate the scope of the legal changes that the measure would enact. *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62(2004).” *Buehler*, 354 Or at 323.

“A caption may describe accurately the actual major effect of a measure and still not comply with the requirements of the statute if the description is ‘too vague and gives voters no clear picture of what is at stake.’” *Girod v. Kroger*, 351 Or 389, 397, 268 P3d 562 (2011) (quoting *Hunnicutt/Stacey v. Myers*, 343 Or 387, 391, 171 P3d 349 (2007)).

In this case, the draft caption for Initiative Petition No. 46 is incorrect in stating that it “limits permissible standards”. The proposed measure does not limit permissible standards. It still requires a 10 percent reduction in carbon content if the fuel is available to achieve that reduction. The proposed measure simply eliminates compliance with the low carbon fuel standard by buying your way into compliance. It eliminates the buying and selling of carbon credits as a means of compliance, and requires that lower carbon intensity fuel be blended when it is available.

For this reason, we suggest the caption should read:

Low carbon fuel standards can only require liquid fuel blends; eliminates obtaining/selling fuel credits

2. THE DRAFT “YES” AND “NO” VOTE STATEMENTS DO NOT COMPLY WITH ORS 250.035(2)(b) AND (c).

The draft “yes” and “no” vote statements read as follows:

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; alternative fuel cost, availability limit permissible requirements.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

ORS 250.035(2)(b) requires the “yes” vote statement to describe “the result if the state measure is approved” within 25 words. “[T]he result of a proposed measure’s enactment that belongs in the ‘yes’ vote result statement is that outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public. Stated differently, the legislature intended the 25-word ‘yes’ vote result statement to notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Carley v. Myers*, 340 Or 222, 231, 132 P3d 651 (2006) (quoting *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004)).

ORS 250.035(2)(c) requires the “no” vote statement to describe “the result if the state measure is rejected” within 25 words. The “no” vote result statement “should state accurately what voters would retain, under their existing legal or contractual arrangements, if they defeat the measure.” *Carson v. Kroger*, 351 Or 508, 518, 270 P3d 243 (2012) (quoting *Earls v. Myers*,

330 Or 171, 177, 999 P2d 1134 (2000)). “The object is to advise ‘potential voters as to the choice they are being asked to make.’” *Carson*, 351 Or at 518, 270 P3d 243 (quoting *Whitsett v. Kroger*, 348 Or 243, 252, 230 P3d 545 (2010)).

The proposed draft “yes” and “no” vote statements are inaccurate. Stating in the “yes” vote statement that “alternative fuel cost, availability limit permissible requirements” is incorrect. The requirements are not limited by anything in the proposed measure. Compliance is simply limited to using liquid fuel that is available and not cost prohibitive.

The current low carbon fuel standard is premised upon the concept that traditional liquid fuel like gasoline and diesel will not be able to comply with a 10 percent reduction in carbon content by blending anything that will likely become available in the marketplace. Therefore, those who produce and use gasoline and diesel will have to buy carbon credits from those who produce and use alternative fuels like electricity. In other words, it is simply a means of requiring those consumers of gasoline and diesel to pay money for the privilege of using those fuels, and the recipients of that money will be those who produce and use alternatives.

If low carbon-intensity liquid fuel is produced that can be blended into gasoline and diesel, and if it is available at a reasonable cost, those who produce gasoline and diesel will have to blend it. The requirements are the same in the proposed measure as they are in existing law. It is only the compliance scenario that is different.

The phrase in the “no” vote statement saying “requiring rules controlling costs of standards” is very misleading to the voter. It implies that there are actual rules that control costs (there are none), and it implies that the proposed measure does not have means of controlling costs. The current law states that rules should be developed to control costs, but no such rules exist. The proposed measure controls costs by eliminating in the measure itself those things that actually increase the cost of the program. Only actual existing fuels can be used to comply with the program, those fuels must have a reasonable cost related to the cost of the fuel into which it is blended, and the ability to buy your way out of compliance is eliminated. The buying and selling of carbon credits is the major cost factor in the low carbon fuel standard, and the debate is over just how much the price of gasoline and diesel will increase, not whether or not it will increase.

Accordingly, the “yes” and “no” vote statements should instead read as follows:

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions by blending available liquid fuel; eliminates compliance by obtaining and selling fuel credits.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards, allowing for compliance by blending fuel or purchasing carbon credits from alternative fuel providers and users.

3. THE DRAFT SUMMARY DOES NOT COMPLY WITH ORS 250.035(2)(d).

The draft summary states:

Summary: Currently, Environmental Quality Commission must set low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and substitute transportation fuels, including non-liquid fuels; rules for

controlling costs of compliance are required. Measure limits scope of low carbon fuel standards to apply only to liquid fuels, and limits potential greenhouse gas emission reductions to those reductions that are achievable by blending low carbon intensity fuels with gasoline, diesel and liquid substitutes. Measure further provides that adopted standards cannot require carbon reductions unless necessary low carbon fuel costs no more than the fuel into which it is blended, and is available in sufficient quantities for all fuel importers in Oregon to meet the standards. Measure requires modifying existing Oregon Clean Fuels Program. Other provisions.

ORS 250.035(2)(d) requires that a ballot title contain "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The purpose of an initiative ballot summary "is to help voters understand what will happen if the measure is approved, and ...[it] should ...be worded so that voters will understand the breadth of its impact." *Wyant v. Myers*, 336 O 128, 139, 81 P3d 692 (2003) (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989)).

In *Novick/Crew*, the Oregon Supreme Court described the "major effect" requirement as follows:

Logically, those would include additional important consequences or details that the result statement does not convey and helpful contextual information about the impact of the proposed measure on existing law.

337 Or at 574, 100 P3d 1064.

In order to fully understand what the proposed Initiative measure does, you have to understand exactly what the current law requires. The statement in the draft summary that the "[m]easure requires modifying existing Oregon Clean Fuels Program" is incorrect. The existing statute never refers to an "Oregon Clean Fuels Program." That phrase is a political concoction of the supporters of the existing program that was adopted by the Environmental Quality Commission as a way to make the low carbon fuel standard more palatable to the voters. The program is a "low carbon fuel standard," and to call it anything else is simply politicking. Any description of the existing law should use the language that is in the law, not some political phrase developed by a public relations firm.

The low carbon fuel standard law requires the Environmental Quality Commission to determine the carbon intensity of gasoline, diesel and other fuels used as substitutes for gasoline and diesel. Once that carbon intensity of the particular fuel is determined, only gasoline and diesel have to reduce that carbon intensity by 10 percent over a ten year period. There is no requirement that a fuel like propane or electricity reduce its carbon intensity by any number. Gasoline and diesel can reduce their carbon intensity numbers by blending into that fuel other fuels, like ethanol and biodiesel, which have a lower carbon intensity number. However, there is a limit on just how much ethanol and biodiesel can be blended into gasoline and biodiesel. Depending upon the carbon intensity number of the ethanol or biodiesel that is available to blend, it soon becomes impossible for anyone producing or using gasoline or diesel to comply with the program simply by blending fuel.

As an alternative to making lower carbon intensity fuel, the Environmental Quality Commission has given the gasoline and diesel producers and users an expensive way out. All

fuels that are lower in carbon intensity than gasoline and diesel will generate carbon credits, and these credits can be sold to those who produce gasoline and diesel. Those credits, which do nothing to reduce the carbon intensity of gasoline and diesel, can be used by the producers to comply with the program. In other words, you do not have to make a lower carbon intensity fuel; you simply have to have enough money to transfer to those who are producing or using fuel like propane or electricity. If the government collected this money from gasoline and diesel producers and transferred it to those who produce propane or electricity, it would be called a tax. Since it is a mandate to produce, pay or stop selling, it avoids the consequences of a fuel tax.

A simple description of the low carbon fuel standard is that it requires gasoline and diesel producers to do something with their fuel that is impossible with existing alternatives. Once it becomes impossible to comply, those producers have to subsidize those who produce and use alternative fuels like propane and electricity, or go out of business. The proposed initiative simply removes the "impossibility" alternative. It requires carbon reduction when the alternative fuel exists, and it removes the mandated subsidization of other alternative fuels by those who produce and use gasoline and diesel.

For these reasons, we propose the following summary.

Summary: Current law requires Environmental Quality Commission to reduce carbon intensity of transportation fuels by 10% over 10 years. Requires importers of gasoline and diesel to reduce the carbon intensity of fuel by blending lower carbon intensity fuels like ethanol and biodiesel. If lower carbon intensity fuels are not available, importers must buy credits from producers and users of alternative fuels like electricity and propane, or stop selling fuel. This measure allows importers to continue selling gasoline and diesel if there is not enough comparably priced lower carbon intensity fuel available to blend; eliminates the requirement to buy credits from alternative fuel providers; limits the standard to liquid fuels; prohibit EQC from requiring more than 10% ethanol, 5% biodiesel blends. Phased reductions tied to fuel availability.

Thank you for your consideration of these comments.

by Paul R. Romain

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

August 6, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Steph C. Berman
sberman@stollberne.com

SECRETARY OF STATE

AUG 6 PM 4 16

RECEIVED

Re: Initiative Petition No. 46 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Nik Blosser regarding the ballot title for Initiative Petition No. 46 for the General Election of November 8, 2016 (the "Initiative"). Mr. Blosser is an elector in the State of Oregon. This letter is written in response to your office's press release, dated July 23, 2015, which invites comments on the draft ballot title for the Initiative.

Mr. Blosser recognizes the difficult task the Attorney General faces in drafting a ballot title for an initiative as convoluted as this one. Mr. Blosser believes that, for the most part, the draft ballot title accurately describes the Initiative. However, Mr. Blosser respectfully submits that certain aspects of the caption, results statements and summary for the draft ballot title do not meet the requirements of ORS 250.035(2). Mr. Blosser requests that Attorney General certify a ballot title that corrects those deficiencies and substantially complies with the statutory requirements.

I. An Overview of Initiative Petition No. 46

The Initiative is the second of three Initiatives from the same chief petitioners this election cycle that attacks Oregon's recently amended Clean Fuels law. Mr. Blosser also is providing comments regarding the draft ballot titles for the other initiative petitions, Initiative Petitions Nos. 45 and 47. Mr. Blosser provides the following background regarding Oregon's Clean Fuels program, to place the Initiative and its impact on current law in context.

A. House Bill 2186 (2009)

In 2009, the Oregon legislature passed House Bill 2186. That bill was signed into law on July 22, 2009, and designated as Oregon Laws 2009, Chapter 754.

The 2009 Clean Fuels law provided the Environmental Quality Commission ("EQC") with authority to adopt rules to establish low carbon fuel standards for gasoline, diesel and fuel

alternatives for gasoline and diesel. Or Laws 2009, ch 754, § 6(2)(a). Those standards included, but were not limited to:

- A schedule to phase in a reduction in the average amount of greenhouse gas emissions to 10% below 2010 levels by the year 2020. Or Laws 2009, ch 754, § 6(2)(b)(A).
- Standards for greenhouse gas emissions attributable to fuels throughout their lifecycles, including, but not limited to, emissions from production, storage, transportation and combustion of fuels and from changes in land use associated with fuels. Or Laws 2009, ch 754, § 6(2)(b)(B).
- Provisions allowing the use of “all types of low carbon fuels” to meet the low carbon fuel standards, including (but not limited to) biofuels, biogas, compressed natural gas, gasoline, diesel, hydrogen and electricity. Or Laws 2009, ch 754, § 6(2)(b)(C).
- Provisions for deferrals from the low carbon fuel standards, as necessary to ensure adequate fuel supplies. Or Laws 2009, ch 754, § 6(2)(b)(D).
- Exemptions for liquefied petroleum gas and other fuel alternatives used in volumes below thresholds established by the EQC. Or Laws 2009, ch 754, § 6(2)(b)(E).
- Standards, specifications and testing requirements and other measures, as needed, to ensure the quality of fuels produced pursuant to the low carbon fuel standards. Or Laws 2009, ch 754, § 6(2)(b)(F).
- Adjustments to the amounts of greenhouse gas emissions assigned to fuels for combustion and drive train efficiency. Or Laws 2009, ch 754, § 6(2)(b)(G).

The 2009 Clean Fuels law required the EQC to consider low carbon fuel standards from other states, including but not limited to Washington, before the EQC adopted low carbon fuel standards for Oregon. Or Laws 2009, ch 754 § 6(2)(c). The 2009 Clean Fuels law also required the EQC to provide exemptions and deferrals to the low carbon fuel standards, to mitigate the costs of compliance with those standards. Mitigation would be based on a 12-month rolling average of the price of gasoline or diesel in Arizona, Nevada, Oregon and Washington. Or Laws 2009, ch 754, § 6(2)(d). Finally, the 2009 Clean Fuels law required the EQC to evaluate a series of factors in adopting rules, including: safety; feasibility; net reduction of greenhouse gas emissions; cost-effectiveness; potential adverse impacts to public health and the environment (including, but not limited to air and water quality, and waste generation and disposal); minimizing costs of compliance; and technical and economic studies of greenhouse gas emissions reduction measures in other states. Or Laws 2009, ch 754, § 6(3). Exempted from the 2009 Clean Fuels law were: tractors, farm vehicles and certain other vehicles used in agriculture; and, motor trucks used primarily to transport logs. Or Laws 2009, ch 754, § 6(4).

Section 6 of HB 2186 (2009) specifically incorporated the definition of “greenhouse gas” in ORS 468A.210. Or Laws 2009, ch 754, § 6(1)(a). Under that definition, “greenhouse gas” means “any gas that contributes to anthropogenic global warming including, but not limited to,

carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.” ORS 468A.210(2). HB 2186 (2009) defined “low carbon fuel standards” as “standards for the reduction of greenhouse gas emissions, on average, per unit of fuel energy.” Or Laws 2009, ch 754, § 6(1)(b).

The effective date for section 6 of the 2009 Clean Fuels law was July 1, 2011. However, the law allowed the EQC to adopt rules before July 1, 2011 to take effect on July 1, 2011. Or Laws 2009, ch 754, § 7. Section 6 had a sunset provision. Under HB 2186 (2009), section 6 would be repealed on December 31, 2015. Or Laws 2009, ch 754, § 8.

In summary, the 2009 Clean Fuels law provided the EQC with the authority to adopt low carbon fuel standards to reduce greenhouse gas emissions. The bill set certain requirements and limits on the scope of the EQC’s rulemaking authority. The EQC has enacted rules adopting Oregon’s Clean Fuels program, pursuant to the authority granted by the 2009 law. Those rules are codified at OAR 340-253-0000, *et seq.*

B. Senate Bill 324 (2015)

The 2015 Oregon legislature amended the 2009 Clean Fuels law with Senate Bill 324. That bill was signed by the Governor and became effective on March 12, 2015. It has been designated as Oregon Laws 2015, Chapter 4.

Section 1 of the 2015 Clean Fuels law repeals the sunset provisions of the 2009 Clean Fuels law. Or Laws 2015, ch 4, § 1. Section 2 requires codification of the operative provisions the 2009 Clean Fuels law – Section 6 of HB 2186 (2009) – as part of Oregon Revised Statutes, chapter 468A. Or Laws 2015, ch 4, § 2.

Section 3 of the 2015 Clean Fuels law contains multiple amendments to Section 6 of HB 2186 (2009). The most significant changes to the Clean Fuels program made by the 2015 enactment are:

- Making the low carbon fuel standards in Oregon’s Clean Fuels law mandatory, rather than permissive. Or Laws 2015, ch 4, § 3(2)(a).
- Extending by five years, from 2020 to 2025, “or by later date if the commission determines that an extension is appropriate to implement the standards,” the deadline to obtain a reduction in low carbon fuel emissions to 10% below 2010 levels. Or Laws 2015, ch 4, § 3(2)(b)(A).
- Removing the provision of the 2009 law allowing the EQC to issue exemptions and deferrals based on a 12-month rolling average price of gasoline and diesel in four states (Oregon, Arizona, Nevada and Washington). Or Laws 2015, ch 4, § 3(2)(d).
- Adding a cost containment requirement that the EQC adopt rules to manage and contain costs of compliance with the required low carbon fuel standards, including (but not

limited to) ensuring the ability to obtain and trade credits for fuels used as substitutes for gasoline or diesel. Or Laws 2015, ch 4, § 3(2)(d).

- Requiring the commission to exempt from the low carbon fuel standards any importer of less than 500,000 total gallons of diesel or gasoline in each calendar year. Or Laws 2015, ch 4, § 3(2)(e). This was an increase from the 250,000 total gallon exemption established by rule. OAR 340-253-0100(1)(b); OAR 340-253-0040(51).
- Prohibiting biodiesel from being considered an “alternative fuel” under the Clean Fuels program unless it meets certain requirements. Or Laws 2015, ch 4, § 3(2)(f).

Section 3 of the 2015 Clean Fuels law also:

- Modifies the non-exclusive list of low carbon fuels that may be used to meet the low carbon fuel standards. Or Laws 2015, ch 4, § 3(2)(b)(C).
- Modifies the exemptions in the 2009 law, to clarify that it applies to fuel for certain vehicles, expands the list of vehicles, and requires the EQC to adopt rules setting forth qualifications for those exemptions. Or Laws 2015, ch 4, § 3(4).

Section 4 of the 2015 Clean Fuels law amends the provision of the 2009 Clean Fuels law requiring the EQC to report to the legislature on the status of Oregon’s Clean Fuels law. Section 5 is an emergency clause.

Following the passage of SB 324 (2015), Oregon’s Clean Fuels law currently:

- Requires the EQC to adopt rules to reduce the average amount of greenhouse gas emissions from transportation fuels to 10% below 2010 levels by 2025 (or later, if necessary).
- Allows for a wide variety of low carbon alternative fuels, including liquefied petroleum gas, to meet the Clean Fuels standards.
- Excludes biodiesel as an “alternative fuel” under the Clean Fuels standards, unless it meets certain fuel quality requirements.
- Mandates that the EQC take cost containment into consideration in adopting the rules including providing a means for trading credits for diesel and gasoline substitutes.

C. The Initiative

The Initiative makes significant changes to Oregon’s low carbon fuel standards. The changes will allow significantly more greenhouse gas emissions in Oregon than under current law.

First, the Initiative provides that only liquid fuels – rather than all alternative fuels – may be used to meet the low carbon fuel standards. Initiative, §§ 1(2)(a), 1(2)(b)(C). As a result, the

Initiative converts Oregon's Clean Fuels program into a biofuels blending program, and excludes natural gas, electricity (and electric vehicles) and other clean fuel options from consideration (including many options that represent the lowest carbon fuels, such as biogas, and can be made in Oregon, rather than imported).

Second, the Initiative provides that only liquid fuels "available in commercial quantities" may be blended to meet the low carbon fuel standards. Initiative, § 1(1)(d). The Initiative requires the EQC to adopt rules for what constitutes "available commercial quantities." Initiative, § 1(2)(c). The Initiative provides only limited guidance as to what constitutes "available commercial quantities." "Available commercial quantities" cannot include any requirement that: biofuel blends for gasoline or diesel exceed existing statutory requirements; or, gasoline or diesel importers use alternative fuels that are more expensive than gasoline or diesel. Initiative, §§ 1(2)(c)(A), (B).

Third, the Initiative provides standing and a cause of action to any gasoline or diesel importer to "contest the finding of commercial availability in the matter provided for challenging administrative rule adoption." Initiative, § 1(2)(d). That includes the right to judicial review (ORS 183.480), appellate judicial review (ORS 183.400) and prevailing party attorneys' fees and costs (ORS 183.497). In other words, the Initiative provides gasoline and diesel importers with the right to bring litigation to challenge a finding of "commercial availability" and to recover their attorneys' fees and costs.

Fourth, the Initiative eliminates the requirement that the EQC look to other states before adopting low carbon fuel standards. Initiative, § 1(2)(e).

Fifth, the Initiative eliminates the cost containment provisions in the 2015 Clean Fuels law. Initiative, § 1(2)(d).

Finally, the Initiative eliminates the requirement that oil importers track and report on their carbon pollution, thereby allowing and encouraging importers to obtain fuel from more carbon-intensive (or dirtier) sources. Initiative, § 1(2)(g).

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption must "state or describe the proposed measure's subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters." *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The "subject matter" of an initiative is its "actual major effect." *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The "actual major effect" is the change or changes "the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). "The caption is the cornerstone for the other portions of the ballot title." *Greene v. Kulongoski*,

322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175.

The draft caption provides:

**Provides that low carbon fuel standards can only require liquid fuel blends.
Limits permissible standards**

Mr. Blosser respectfully submits that the caption accurately describes the subject matter of the Initiative, and the changes that the Initiative would have on current law, with two exceptions. The caption does not convey to voters that the Initiative drastically limits the fuels that may be used to meet the low carbon fuel standards by *eliminating* a series of alternative fuels, including liquid fuels, from consideration in meeting those standards. That elimination of multiple alternative fuels (for example, biogas, natural gas, liquefied petroleum gas, hydrogen and electricity) should be made clear to voters.

Second, the caption is underinclusive, because it fails to inform voters that the Initiative authorizes litigation. A caption that is underinclusive, because it does not notify readers of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362 (2006). “When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate.” *Towers*, 341 Or at 361. *See also McCann v. Rosenblum*, 354 Or 701, 706 (2014) (“[w]hen the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of ‘sufficient significance’ that they must be included in the description”). Each major effect of an initiative should be conveyed in the caption.

As was set forth above, the caption allows any gasoline or diesel importer to challenge any finding of “commercial availability” in court, and on appeal. Initiative, § 1(2)(d); ORS 183.400; ORS 183.480. A prevailing oil or gasoline importer is entitled to recover attorneys’ fees and costs. ORS 183.497. The Attorney General generally includes enforcement provisions within the caption of a ballot title. *See, e.g.*, Certified Ballot Title for Initiative Petition No. 40 (2016) (discussing litigation enforcement provision in all sections of ballot title); July 23, 2015 letter from Assistant Attorney General Shannon T. Reel to Jim Williams, Director, Elections Division, Oregon Secretary of State at 3 (letter accompanying certified ballot title for IP 40 (2016), explaining changes to draft ballot title, providing: “we agree that the caption should inform voters that the initiative authorizes lawsuits”). Section 1(2)(d) is the sole enforcement provision in the Initiative. It is a major effect, and part of the subject matter of the Initiative. Accordingly, voters must be informed that the Initiative “authorizes lawsuits.”

A caption that complies with the statutory requirements would provide:

**Low carbon fuel standards can only require liquid blends; limits permissible
standards, alternatives; authorizes lawsuits**

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the ballot title contain “simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is” approved or rejected. The yes statement “should describe the most significant and immediate effects of the ballot initiative for the general public.” *McCann v. Rosenblum*, 354 Or 701, 707 (2014) (internal quotation marks omitted; citation omitted). The yes statement must “provide the voter with sufficient substantive information to understand the policy choice proposed by the measure’s operative terms.” *Rasmussen v. Rosenblum*, 354 Or 344, 348 (2013). A result of yes statement is not statutorily compliant if it is inaccurate, confusing or misleading. “To substantially comply with [ORS 250.035(2)(b)], an *accurate* description of the change that will be caused by the measure is key.” *Lavey*, 350 Or at 564 (emphasis in original). *See also Dixon v. Rosenblum*, 355 Or 364, 374 (2014) (referring certified ballot title to Attorney General for modification because result of no statement was “confusing, if not misleading”). The results statements cannot create even an “erroneous inference” of current law or the impact the Initiative would have on current law. *McCormick v. Kroger*, 347 Or 293, 300 (2009).

The draft results statements provide:

“Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; alternative fuel cost, availability limit permissible requirements.

“No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

Mr. Blosser respectfully submits that the result of yes statement is flawed for the reasons set forth above. The result of yes statement should emphasize to voters that the Initiative: (a) severely limits the alternative fuels that are available to meet the low carbon fuel standards; and (b) allows for litigation and attorneys’ fees. The result of yes statement also does not inform voters that the Initiative removes the cost containment provisions in the 2015 Clean Fuels law.

Mr. Blosser further submits that the phrase “liquid, non-liquid transportation fuels” in the result of no statement is a potentially inaccurate and misleading way to describe the wide range of fuels that may be used to meet the current low carbon fuel standards. Under existing law, “*all* types of low carbon fuels” may be used “to meet the low carbon fuel standards.” Or Laws 2015, ch 4, § 3(2)(b)(C) (emphasis added). “Liquid, non-liquid” could confuse voters into drawing the “erroneous inference” that there are alternative fuels that fall outside the artificial “liquid, non-liquid” classification that are not covered by current law.

Results statements that comply with the statutory requirements would provide:

"Yes" vote provides low carbon fuel standards only require liquid fuel blends, disallows alternative fuels; limits cost containment; authorizes lawsuits, attorney fees to fuel importers.

"No" vote retains law requiring low carbon fuel standards for variety of transportation fuels that reduce greenhouse gas emissions, requiring rules controlling costs of standards.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The summary is flawed for the reasons set forth above. Mr. Blosser respectfully submits that the summary is flawed for the following additional reason:

- The summary should specify the alternative fuels that cannot be included in meeting the low carbon fuel standards if the Initiative passes. As was discussed above, current law sets forth that *all* alternative low-carbon fuels may be used to meet the low carbon fuel standards, and the Initiative limits the standards to only liquid blends "available in commercial quantities." Voters should be informed of the options that are being eliminated from consideration, including "natural gas, liquefied petroleum gas and electricity."

Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

—Steven C. Berman

SCB:jjjs
cc: client



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

August 21, 2015

RECEIVED
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SECRETARY OF STATE

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Restricts Low Carbon Fuel Standards to Requiring Blends of Gasoline/Diesel with Commercially Available Fuels
DOJ File #BT-46-15; Elections Division #2016-046

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 46 (2016) (IP 46) from Nik Blosser (through counsel, Steven Berman), and Paul Romain (through counsel, The Romain Group, LLC). Both commenters object to all parts of the ballot title. In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

A. The caption

The ballot title must include "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." ORS 250.035(2)(a). The draft caption provides:

Provides that low carbon fuel standards can only require liquid fuel blends. Limits permissible standards

1. Comments

Commenter Blosser submits that the caption accurately describes the subject matter of IP 46 with two exceptions: (1) it does not convey that IP 46 "drastically limits the fuels that may be used to meet low carbon fuel standards by *eliminating* a series of

alternative fuels, including liquid fuels, from consideration in meeting the low carbon fuel standards[.]” (Berman, 6, emphasis in original); and (2) it fails to inform voters that IP 46 authorizes litigation—lawsuits by gasoline or diesel importers to challenge any finding of “commercial availability.” (*Id.*). He proposes the caption should read: “Low carbon fuel standards can only require liquid blends; limits permissible standards, alternatives; authorizes lawsuits.” (*Id.*).

Commenter Romain objects that the caption is deficient in one respect. He contends that the caption incorrectly states that IP 46 “limits permissible standards” because it still requires a 10 percent reduction in carbon content and only eliminates compliance with the low carbon fuel standards by buying or selling credits. (Romain Group Letter, 2).

2. Our response to the comments.

After reviewing the comments, and after our own review, we agree that the caption should be revised. We agree that the caption may be improved to better identify that IP 46 eliminates alternative fuels from meeting existing low carbon fuel standards, but disagree that the caption should use the term “alternative fuels” in doing so. We disagree that the caption should specify that IP 46 authorizes litigation. We disagree that the statement “limits permissible standards” is inaccurate but in light of other revisions we have made, that objection has been resolved.

In light of the comments above, we modify the caption to read as follows:

Restricts low carbon fuel standards to requiring blends of gasoline/diesel with commercially available fuels

B. The “yes” and “no” vote result statements

We next consider the draft “yes” and “no” vote result statements. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The ballot title also must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(c). “The ‘yes’ and ‘no’ vote result statements should be read together.” *Rasmussen v. Kroger*, 351 Or 358, 365, 266 P3d 87 (2011) (citing *Potter v. Kulongoski*, 322 Or 575, 582, 910 P2d 377 (1996)). The draft “yes” and “no” vote result statements are as follows:

Result of “Yes” Vote: “Yes” vote provides low carbon fuel standards for reducing greenhouse gas emissions can only require liquid fuel blends; alternative fuel cost, availability limit permissible requirements.

Result of “No” Vote: “No” vote retains law requiring low carbon fuel standards for liquid, non-liquid transportation fuels to reduce greenhouse gas emissions, requiring rules controlling costs of standards.

1. Comments

Commenter Blosser objects that the vote result statements do not comply with ORS 250.035(2)(b) for several reasons. First, he argues that the vote result statements suffer the same deficiencies as in the caption: (1) they do not convey that IP 46 “drastically limits the fuels that may be used to meet low carbon fuel standards” and (2) they fail to inform voters that IP 46 authorizes litigation. (Berman, 6). Second, he argues that the “yes” vote result statement should emphasize (1) that IP 46 “severely limits” the alternative fuels that are available to meet existing low carbon fuel standards; and (2) that IP 46 allows for litigation and the recovery of attorney fees. (*Id.*). Last, he argues that the phrase “liquid, non-liquid transportation fuels” in the “no” vote result statement “is a potentially inaccurate and misleading way to describe the wide range of fuels that may be used to meet the current low carbon fuel standards” and that a voter may conclude that there are alternative fuels that are neither “liquid” nor “non-liquid” that are not covered by the existing law. (*Id.*).

Commenter Romain objects that the “yes” and “no” vote result statements are deficient. With respect to the “yes” vote result statement, he claims that the phrase “alternative fuel cost, availability limit permissible requirements” is misleading because those requirements “are not limited by anything in the proposed measure”; rather, “[c]ompliance is simply limited to using liquid fuel that is available and not cost prohibitive.” (Romain Group, 3). With respect to the “no” vote result statement, he submits that the phrase “requiring rules controlling costs of standards” is misleading because it (1) incorrectly implies that there are existing rules that control costs, and (2) implies that IP 46 “will not control costs.” (*Id.*).

2. Our response to the comments

After reviewing the comments, and after our own review, we believe that the vote result statements should be modified. We agree that the “yes” vote result statement may be improved to better identify the alternative fuels IP 46 would exclude from the low carbon fuel standards, but disagree that the statement should use the term “alternative fuels” in doing so. We also agree that both vote result statements should discuss the availability of fuel credits under existing law, and the elimination of those credits under IP 46.

With respect to the remaining comments, we decline to modify the “yes” vote result statement. We disagree that the phrase “liquid, non-liquid transportation fuels” is inaccurate or misleading. We disagree that the “yes” vote result statement should explain

that IP 46 authorizes lawsuits and authorizes the recovery of attorney fees. We also disagree that IP 46 does not limit permissible low carbon fuel standards by cost or availability—as IP 46 prohibits rules allowing blending fuels that are not “available in commercial quantities” or that are more expensive than the gasoline or diesel fuel into which they are blended. IP 46, § 6(2)(c). And we disagree that the phrase “requiring rules controlling costs of standards” is inaccurate or misleading, although we have slightly modified that phrase.

In light of our discussion above, we certify the following vote result statements:

Result of “Yes” Vote: “Yes” vote restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels; eliminates fuel credit system for satisfying standards.

Result of “No” Vote: “No” vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

C. The summary

We next consider the draft summary. A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary reads:

Summary: Currently, Environmental Quality Commission must set low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and substitute transportation fuels, including non-liquid fuels; rules for controlling costs of compliance are required. Measure limits scope of low carbon fuel standards to apply only to liquid fuels, and limits potential greenhouse gas emission reductions to those reductions that are achievable by blending low carbon intensity fuels with gasoline, diesel and liquid substitutes. Measure further provides that adopted standards cannot require carbon reductions unless necessary low carbon fuel costs no more than the fuel into which it is blended, and is available in sufficient quantities for all fuel importers in Oregon to meet the standards. Measure requires modifying existing Oregon Clean Fuels Program. Other provisions.

1. Comments

Commenter Blosser contends that the summary is deficient in several respects. First, he reincorporates the same objections he makes with respect to the caption and vote result statements. (Berman, 8). Second, he argues that the summary should specify the alternative fuels that cannot be included in meeting the low carbon fuel standards if IP 46 passes, including “natural gas, liquefied petroleum gas and electricity.” (*Id.*).

Commenter Romain also contends that the summary is deficient in several respects. First, he contends that the statement “[m]easure requires modifying existing Oregon Clean Fuels Program” is a non-neutral term not contained within or referenced in existing law. (Romain Group, 4). Second, he argues that the summary should explain that under existing law, gas or diesel importers must purchase credits if it cannot satisfy low carbon fuel standards—a subsidy for alternative fuels, and that IP 46 would: (1) require carbon reduction when the alternative fuel exists, and (2) remove “the mandated subsidization of other alternative fuels by those who produce and use gasoline and diesel.” (*Id.*).

2. Our response to the comments

After a review of the comments, and our own review, we believe that the summary should be revised. We agree that the summary may be improved to better identify the alternative fuels IP 46 would exclude from the low carbon fuel standards, but disagree that the statement should use the term “alternative fuels” in doing so. We agree that the sentence “[m]easure requires modifying existing Oregon Clean Fuels Program” should be removed. We also agree that the summary should discuss the availability of fuel credits under existing law, and the elimination of those credits under IP 46. We disagree that the summary should discuss whether IP 46 would increase greenhouse gas or carbon emissions, as that requires impermissible speculation. Similarly, we disagree that the summary must explain that IP 46 “severely limits” the cost containment provisions in current law. We also disagree that the summary would mislead voters into concluding that existing law omits certain alternative fuels that are neither “liquid” nor “non-liquid.” Last, we disagree that the summary need identify specific types of alternative fuels eliminated from consideration in meeting low carbon fuel standards, including “natural gas, liquefied petroleum gas and electricity.”

Accordingly, we certify the following summary:

Summary: Currently, the Environmental Quality Commission sets low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and other transportation fuels, including non-liquid fuels. Commission currently must adopt rules to control costs, must allow fuel distributors to meet standards by purchasing credits from others whose products exceed required standards. Measure restricts low carbon fuel standards to apply only to blending gasoline and diesel with other liquid fuels, making standards inapplicable to other types of fuels and eliminating

the credit system. Measure further provides that adopted standards cannot require carbon reductions unless low carbon fuel needed to meet the blending requirements is "available in commercial quantities" (defined) and costs no more than the gasoline or diesel into which it is blended. Other provisions.

E. Conclusion

We certify the attached ballot title.

Matthew J. Lysne
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

MJL:af/6746309

Enclosure

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BALLOT TITLE

Restricts low carbon fuel standards to requiring blends of gasoline/diesel with commercially available fuels

Result of “Yes” Vote: “Yes” vote restricts low carbon fuel standards to requiring blending gasoline or diesel with commercially available liquid fuels; eliminates fuel credit system for satisfying standards.

Result of “No” Vote: “No” vote retains low carbon fuel standards for liquid, non-liquid transportation fuels; standards allow obtaining fuel credits to satisfy standards, require rules to control costs.

Summary: Currently, the Environmental Quality Commission sets low carbon fuel standards for reducing average greenhouse gas emissions from gasoline, diesel, and other transportation fuels, including non-liquid fuels. Commission currently must adopt rules to control costs, must allow fuel distributors to meet standards by purchasing credits from others whose products exceed required standards. Measure restricts low carbon fuel standards to apply only to blending gasoline and diesel with other liquid fuels, making standards inapplicable to other types of fuels and eliminating the credit system. Measure further provides that adopted standards cannot require carbon reductions unless low carbon fuel needed to meet the blending requirements is “available in commercial quantities” (defined) and costs no more than the gasoline or diesel into which it is blended. Other provisions.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 25, 2015, I directed the original Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for petitioner Nicholas Blosser; and served upon Paul R. Romain, attorney for petitioner; by using the court's electronic filing system.

I further certify that on September 25, 2015, I directed the Respondent's Answering Memorandum to Petitions to review Ballot Title Re: Initiative Petition No. 45 to be served upon Lila Leathers-Fitz and Charles Ireland, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

Lila Leathers-Fitz
255 Depot Street
Fairview, OR 97024

Charles Ireland
P.O. Box 815
Myrtle Creek, OR 97457

/s/ Matthew J. Lysne

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