

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL S. COSGROVE, *an individual Oregon
elector* and **TOM HAMMER**, *an individual
Oregon elector*

Petitioner.

v.

ELLEN F. ROSENBLUM, *in her official
capacity as Oregon Attorney General*

Respondent.

Case No. S060909

**AMENDED PETITION TO REVIEW
BALLOT TITLE CERTIFIED BY
ATTORNEY GENERAL**

Ballot Title Certified November 28, 2012
(2014 Initiative Petition #3)

Chief Petitioners: Paul S. Cosgrove and Tom Hammer

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December 2012

PETITION TO REVIEW BALLOT TITLE

Petitioners Paul S. Cosgrove and Tom Hammer, electors dissatisfied with the ballot title certified by the Attorney General for 2014 Initiative Petition #3 (“IP 3”), respectfully petition the court to review the certified ballot title pursuant to ORS 250.085. Petitioners ask that the proposed ballot title set forth in this submission be certified in lieu of the ballot title certified by the Attorney General.

1. Petitioner’s Interest

Petitioners are Oregon electors dissatisfied with Attorney General’s certified ballot title for IP 3 who timely submitted written comments on the draft ballot title.

2. Certified Ballot Title Does Not Substantially Comply With ORS 250.035

The subject proposal for a statewide initiative to be placed upon the November 2014 general election ballot was filed with the Secretary of State on October 18, 2012. Exhibit A. The Secretary of State issued a draft ballot title on October 26, 2012. Exhibit B. Petitioners submitted timely comments to the Secretary of State on November 9, 2012. Exhibit C. The Attorney General certified a ballot title to the Secretary of State on November 28, 2012. Exhibit D.

a. The Certified Ballot Title

The Attorney General certified the following ballot title for IP 42:

Removes existing limitations on utilities’ use of hydroelectric power to meet statutory renewable portfolio standards

Result of “Yes” Vote: “Yes” vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

Result of “No” Vote: “No” vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility’s age, environmental impact, ownership, location in protected areas.

Summary: Existing law establishes renewable portfolio standards which require utilities to supply a certain percentage of their electricity from qualifying “renewable energy resources.” Qualifying renewable energy sources include biomass, geothermal, hydroelectric power, solar, tidal, wave, wind, and hydrogen. Statute imposes conditional limitations on use of hydroelectric power to satisfy renewable portfolio standards, based on factors including: the age of the generating facility, the facility’s designation as “low impact,” the facility’s ownership, and the facility’s location with certain state, federal or NW Power & Conservation Council protected water areas. Measure removes those restrictions, allowing utilities to satisfy renewable portfolio standards using hydroelectricity from any hydroelectric facility, without regard to location in protected water areas, certification as “low-impact,” the facility’s age, other currently limiting factors. Other provisions.

b. Proposed Ballot Title

Petitioners seek certification of the alternative ballot title set forth below:

**Recognizes all hydroelectric energy as qualifying “renewable energy source”
under Oregon’s renewable portfolio standards**

Result of “Yes” Vote: “Yes” vote recognizes all hydroelectric energy as qualifying toward state requirement that utilities supply a certain percentage of their electricity from qualifying renewable energy sources.

Result of “No” Vote: No vote retains current law’s conditions on hydroelectric energy qualifying toward state requirement that utilities supply certain percentage of electricity from qualifying renewable energy sources.

Summary: Existing law establishes renewable portfolio standards (RPS), which require utilities to supply a certain percentage of their electricity from qualifying “renewable energy sources.” The proposed measure recognizes all hydroelectric energy as a qualifying “renewable energy source” that utilities may use to comply with RPS requirements and thereby reduces wholesale power costs. Currently, hydroelectric energy is only recognized as a qualifying “renewable energy source” if the facility meets requirements relating to ownership of the facility, age of the facility, location of the facility within certain state, federal, or NW Power & Conservation Council protected water areas, amount of hydroelectric energy produced, and designation as “low impact” by a national certification organization recognized by the State Department of Energy by rule, in addition to other requirements.

3. Argument and Authorities

a. The Caption

ORS 250.035(2)(a) requires a ballot title caption to “reasonably” identify the subject matter of the measure in 15 words or less. 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.” *Whitsett v. Kroger*, 348 Or. 243, 247 (2010). The inquiry should not be one of conjecture upon the proponents’ motivation but, instead, identification of legal effect. *Kane v. Roberts*, 310 Or. 423, 427 (1990). “When the major effect of a proposed measure would be a substantive change in existing law, the ballot title should inform the reader of the scope of the change.” *Rasmussen v. Kroger*, 351 Or. 358, 361 (2011).

The certified caption fails to reasonably identify the measure’s major effect because it does not inform voters of the scope of the substantive legal changes the measure would make. Consequently, the certified caption does not substantially comply with ORS 250.035(2).

The major legal effect of IP 3 is to affirmatively recognize all hydroelectric energy as a “renewable energy source” that may be used to provide “qualifying electricity” under Oregon’s renewable portfolio standards. *See*, ORS 469A.010(9)-(10). IP 3 makes this change by amending ORS 469A.025 to include affirmative new provisions specifically recognizing all hydroelectric energy as a renewable energy source. The measure then conforms existing law to the new provisions by repealing conflicting language in ORS 469A.020 and ORS 469A.025, which currently allow some hydroelectric energy to qualify as a “renewable energy source” when certain conditions are satisfied.

The certified caption does not inform voters that IP 3 has the actual major effect of affirmatively recognizing all hydroelectric energy as a qualifying “renewable energy source” for purposes of Oregon’s renewable portfolio

standards. Instead, the caption inaccurately and misleadingly suggests that IP 3 is simply a repealing measure that removes “existing limitations” on otherwise allowed use of hydroelectric power to comply with renewable portfolio standards. In focusing exclusively upon the provisions of existing law that IP 3 will repeal instead of the new policy IP 3 creates, the Attorney General has created a caption where the measure’s conforming amendments appear to be the subject and the measure’s affirmative new provisions and policy are ignored.

The caption should directly inform voters that IP 3 has the actual major effect of creating a new policy that allows all hydroelectric energy to qualify toward renewable portfolio standards. Instead, the caption simply informs voters that IP 3 will remove existing limitations. Voters are left to make their own inferences as to what the major effect of removing existing limitations will be. In such manner, the certified caption describes the means by which IP 3 accomplishes its end, rather than reasonably identifying the end itself. The net result is that voters are left without an accurate sense of the measure’s scope and the actual major effect of the measure is not reasonably identified.

b. “Yes” Vote Statement

ORS 250.035(2)(b) requires that a ballot title contain a “*simple and understandable*” statement of not more than 25 words that describes the result if the state measure is approved.” The “yes” vote result statement is to be parallel to the “no” vote result statement to the extent practical. The purpose of the “yes” vote statement is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or. 568, 574 (2004). “[T]o comply with...the statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure.” *Caruthers v. Myers*, 344 Or. 596, 601 (2008). A result

statement is not sufficient if it is incomplete or understates the scope of the changes the measure would enact. *Greenberg v. Myers*, 240 Or. 65, 70 (2006).

The certified “yes” vote statement certified by the Attorney General is very different from the draft “yes” vote statement. For no discernable reason other than word count considerations associated with other modifications, the Attorney General removed the following provisions included of the draft statement from the certified statement: “ ‘Yes’ vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility...” The removal of these provisions and insertion of new language has resulted in statement that is not understandable due to its overall grammatical structure. In addition, the revisions have produced a other more specific deficiencies that were not present in the draft statement.

As rewritten, the certified statement informs voters that IP 3 “removes age, ownership, environmental impact, location, and other restrictions on hydroelectric facilities.” This phrase inaccurately and misleadingly leaves voters with the impression that IP 3 removes “restrictions on hydroelectric facilities” relating to “age, ownership, environmental impact, and location” of such facilities.

IP 3 solely relates to the subject of renewable portfolio standards and the extent to which hydroelectric energy may qualify toward meeting such standards. The measure does not remove any of the myriad state and federal environmental, siting, and other “restrictions on hydroelectric facilities.” If IP 3 is enacted, the strenuous environmental and siting restrictions hydroelectric facilities are currently subject to will remain fully intact in accordance with the policy expressed in ORS 469.310 and other related state and federal statutes. In this regard, ORS 469.310 states in relevant part:

[I]t is the declared public policy of this state that the siting, construction and operation of energy facilities shall be accomplished in a manner consistent with protection of the public health and safety

and in compliance with the energy policy and air, water, solid waste, land use and other environmental protection policies of this state. It is, therefore, the purpose of ORS 469.300 to 469.563, 469.590 to 469.619, 469.930 and 469.992 to exercise the jurisdiction of the State of Oregon to the maximum extent permitted by the United States Constitution and to establish in cooperation with the federal government a comprehensive system for the siting, monitoring and regulating of the location, construction and operation of all energy facilities in this state.

Beyond the above, petitioners take specific and particular exception to the use of the terms “environmental impact” and “location” because they are overly broad, inaccurate, and misleading in this context. The environmental regulations applicable to hydroelectric facilities will be exactly the same irrespective of whether IP 3 passes or fails. Similarly, IP 3 will not change existing laws limiting where hydroelectric facilities may be located. However, any statement suggesting that IP 3 removes or repeals regulations relating to “environmental impact” or “location” suggests to voters that IP 3 will result in the repeal of environmental laws or allow for the location of hydroelectric facilities in places where they currently may not be sited.

The certified “yes” vote statement is also deficient because it does not simply and understandably inform voters that IP 3 recognizes all hydroelectric energy as qualifying toward renewable portfolio standards. Unlike the certified ballot title, the Attorney General’s draft ballot title contained the phrase: “ ‘Yes’ vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility...” Although petitioners objected to the “yes” vote statement on other grounds, petitioners did not object to the foregoing phrase insofar as it informed voters that IP 3 would have the result of allowing all hydroelectric energy to qualify toward Oregon’s renewable portfolio standards. In fact, as indicated in reference to the caption, it is this very result that is the major effect of

the measure. However, unlike the Attorney General's draft statement, the certified statement omits a simple and understandable description of this major result.

The Attorney General erred in rejecting petitioners' objections to the use of the term "renewable portfolio standards" to describe the result of enactment. The term "renewable portfolio standards" is unfamiliar to many voters, as are the actual requirements the term is used to describe. The use of this unfamiliar terminology to describe the result of enactment produces a statement that is not simple and understandable.

In responding to petitioners' comments upon this point, the Attorney General did not dispute that many voters are likely to be wholly unfamiliar with the concept of "renewable portfolio standards."¹ However, the Attorney General nevertheless rejected petitioners' argument that a "yes" vote statement fails to comply with the statutory standard if the statement describes the results of enactment in terms voters are unlikely to understand. In the Attorney General's view, the meaning of the term "renewable portfolio standard" is explained in the summary, and therefore, it is unnecessary to describe renewable portfolio standards in simple and understandable terms in the "yes" vote statement itself. Exhibit D, Pg 3.

Petitioners disagree with the Attorney General's assertion that a "yes" vote statement meets the "simple and understandable" requirement of ORS 250.035(2)(b) if a voter can understand the statement by cross-referencing the measure summary. In petitioners' view, a "yes" vote statement must be capable of standing alone and the Court should find that a statement requiring voters to resort

¹ In fact, the Attorney General stated: "[w]e agree that it would be helpful to voters to explain that a 'renewable portfolio standard' is a statutory requirement that utilities supply certain percentages of their electricity from qualifying renewable energy sources." Exhibit D, Pg 3.

to the measure summary to ascertain the result of enactment is not “simple and understandable” as a matter of law.

Moreover, this Court has recognized that “merely using terms taken from the measure itself does not necessarily meet the statutory requirements for a ballot title, and the Attorney General is required to draft a ballot title that accurately describes...the result if the measure were to pass.” *Caruthers v. Myers*, 344 Or. 596, 602-03, 189 P.3d 1, 4 (2008)(internal citations/quotations omitted). Since the term “renewable portfolio standard” is a technical statutory term unknown to most voters, IP 3 presents the type situation the Court was referring to in *Caruthers*.

a. “No” Vote Statement

ORS 250.035(2)(c) requires that a ballot title contain a simple and understandable statement of not more than 25 words that explains what will happen if voters reject the measure. This means the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, or the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or. 219, 223 (2003). As the Oregon Supreme Court has also stated, “[t]he ‘no’ vote result statement needs to include a description of the law that a ‘no’ vote would leave in place. *Whitsett v. Kroger*, 348 Or. 243, 251-252 (2010).

The “no” vote statement attempts to describe the result of a “no” vote using the term “renewable portfolio standards.” Petitioners’ object to the use of this term for the reasons stated in reference to the “yes” vote statement. Similarly, the term “environmental impact” is overly broad, inaccurate, and misleading for the reasons stated in relation to the “yes” vote statement and petitioners comments to the Attorney General.

Additionally, the “no” vote statement is overly broad, inaccurate, and misleading insofar as it suggests that existing law precludes hydroelectric energy from being used to comply with renewable portfolio standards if the facility is located outside a “protected area.” Existing law allows hydroelectric energy from certain facilities to qualify toward renewable portfolio requirements if located outside “any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the Federal Wild and Scenic Rivers Act, Public Law 90-542, or the Oregon Scenic Waterways Act, ORS 390.805 to 390.925.” ORS 469A.020(4). The certified “no” vote statement misleadingly and inaccurately implies that existing law more broadly precludes hydroelectric energy derived from facilities in other “protected areas” from qualifying toward renewable portfolio standards.

d. Summary Statement

ORS 250.035(2)(d) requires a ballot title to contain a 125-word statement, which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or. 169, 175 (1989).

The Attorney General’s certified summary does not summarize the measure and its major effects in a concise and impartial manner. The summary’s laundry list of other renewable energy sources does not aid in summarizing the measure or its major effect. In addition, the last sentence of the certified summary describes the major effect of the measure by more or less restating the immediately preceding sentence in an unhelpful and redundant manner.

The summary’s description of the measure’s major effect is also underinclusive and deficient for reasons stated in relation to other portions of the ballot title. The major effect of IP 3 is to allow all hydroelectric energy to qualify

toward Oregon's renewable portfolio standards. Yet neither the summary nor any other portion of the certified ballot title directly informs voters that this is the actual major effect of the measure. Deleting the unhelpful and redundant provisions of the certified statement would allow this essential information to be included within available word limits.

In addition, the summary fails to acknowledge that IP 3 has the actual major effect of allowing renewable portfolio standards to be met with lower-cost energy, which in turn, reduces wholesale power costs. The Oregon Supreme Court has recognized that "[t]he fiscal consequences of a measure may be its major effect..." *Straube v. Myers*, 340 Or. 253, 263 (2006). In this case, it is clear that reducing the cost of energy is a major effect of IP 3, and in fact, that is why the measure is entitled as the Affordable Renewable Energy Act. Therefore the measure summary must include some reference the measure's major effect of reducing power rates and the cost of complying with renewable portfolio standards.

4. Conclusion

The ballot title certified by the Attorney General fails to substantially comply with ORS 250.035(2) for the reasons herein stated. Petitioners respectfully ask the Court to certify their proposed alternative ballot title or modify the Attorney General's proposed ballot title as appropriate, or refer the ballot title to the Attorney General for modification in accordance with ORS 250.085(8).

DATED this 12th day of December 2012.

Respectfully submitted,

//s Nathan R. Rietmann

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KATE BROWN
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT
DIRECTOR

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

(503) 986-1518

October 19, 2012

To All Interested Parties:

Secretary of State Kate Brown is responsible for the pre-election review of proposed initiative petitions for compliance with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. This review will be completed before approving the form of the cover and signature sheets for the purpose of circulating the proposed initiative petition to gather signatures.

The Secretary of State is seeking public input on whether proposed initiative petition (#3), satisfies the procedural constitutional requirements for circulation as a proposed initiative petition. Petition #3 was filed in our office on October 18, 2012, by Paul S. Cosgrove and Tom Hammer, for the General Election of November 4, 2014.

A copy of the text of this proposed initiative petition is on the second page of the letter. If you are interested in providing comments on whether the proposed initiative petition meets the procedural constitutional requirements, please write to the secretary at the Elections Division. Your comments, if any, must be received by the Elections Division no later than October 26, 2012, in order for them to be considered in the review.

KATE BROWN
Secretary of State

BY:

Lydia Plukchi
Compliance Specialist

The Affordable Renewable Energy Act

Be it enacted by the people of the state of Oregon:

SECTION 1. The people of Oregon find that:

- (1) Hydroelectric power has played an important part in the development of Oregon and should play an important role in the energy future of Oregon.
- (2) Hydroelectric power is a renewable, sustainable and affordable energy source.
- (3) Hydroelectric power helps keep power costs lower for commercial, industrial, agricultural and, residential energy users in Oregon.
- (4) Hydroelectric power is one of Oregon's natural advantages and should figure prominently in the state's efforts to recruit businesses and jobs from outside Oregon.
- (5) Hydroelectric power is an important replacement source for power generated by the burning of fossil fuels
- (6) Hydroelectric power should be a key part of Oregon's "green" economy.
- (7) Hydroelectric power can help make more wind and solar power possible in Oregon.
- (8) Hydroelectric power should be included in the state's renewable energy standard.

SECTION 2. ORS 469A.020 is amended to read:

469A.020. (1) Except as provided in this section, electricity may be used to comply with a renewable portfolio standard only if the electricity is generated by a facility that becomes operational on or after January 1, 1995.

(2) Electricity from a generating facility[*other than a hydroelectric facility,*] that became operational before January 1, 1995, may be used to comply with a renewable portfolio standard if the electricity is attributable to capacity or efficiency upgrades made on or after January 1, 1995.

(3) Electricity from a hydroelectric facility that became operational before January 1, 1995, may be used to comply with a renewable portfolio standard. [*if the electricity is attributable to efficiency upgrades made on or after January 1, 1995. If an efficiency upgrade is made to a Bonneville Power Administration facility, only that portion of the electricity generation attributable to Oregon's share of the electricity may be used to comply with a renewable portfolio standard.*]

[(4) Subject to the limit imposed by ORS 469A.025 (5), electricity from a hydroelectric facility that became operational before January 1, 1995, may be used to comply with a renewable portfolio standard if the facility is certified as a low-impact hydroelectric facility on or after January 1, 1995, by a national certification organization recognized by the State Department of Energy by rule, and if the facility is either:]

[(a) Owned by an electric utility; or]

[(b) Not owned by an electric utility and located in Oregon and licensed by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. 791a et seq., or exempt from such license.]

[(5)(a)] (4)(a) Electricity from a generating facility located in this state that uses biomass and that became operational before January 1, 1995, may be used to comply with a renewable

portfolio standard if the facility meets the requirements of the federal Public Utility Regulatory Policies Act of 1978 (P.L. 95-617) on March 4, 2010, regardless of whether the facility qualifies under the requirements of the Public Utility Commission.

(b) Renewable energy certificates derived from electricity generated by a facility that qualifies under paragraph (a) of this subsection may not be used to comply with a renewable portfolio standard before January 1, 2026. However, renewable energy certificates issued before January 1, 2026, may be banked pursuant to ORS 469A.005 to 469A.210 for use on or after January 1, 2026.

[(6)] (5) A facility in this state that generates electricity from direct combustion of municipal solid waste and that became operational before January 1, 1995, may be used to comply with a renewable portfolio standard for up to 11 average megawatts of electricity generated per calendar year. Renewable energy certificates derived from electricity generated by a facility described in this subsection may not be used to comply with a renewable portfolio standard before January 1, 2026. However, renewable energy certificates issued before January 1, 2026, may be banked pursuant to ORS 469A.005 to 469A.210 for use on or after January 1, 2026.

SECTION 3. ORS 469A.025 is amended to read:

469A.025. (1) Electricity generated utilizing the following types of energy may be used to comply with a renewable portfolio standard:

- (a) Wind energy.
- (b) Solar photovoltaic and solar thermal energy.
- (c) Wave, tidal and ocean thermal energy.
- (d) Geothermal energy.
- (e) Hydroelectric energy.**

(2) Except as provided in subsection (3) of this section, electricity generated from biomass and biomass by-products may be used to comply with a renewable portfolio standard, including but not limited to electricity generated from:

- (a) Organic human or animal waste;
- (b) Spent pulping liquor;
- (c) Forest or rangeland woody debris from harvesting or thinning conducted to improve forest or rangeland ecological health and to reduce uncharacteristic stand replacing wildfire risk;
- (d) Wood material from hardwood timber grown on land described in ORS 321.267 (3);
- (e) Agricultural residues;
- (f) Dedicated energy crops; and
- (g) Landfill gas or biogas produced from organic matter, wastewater, anaerobic digesters or municipal solid waste.

(3) Electricity generated from the direct combustion of biomass may not be used to comply with a renewable portfolio standard if any of the biomass combusted to generate the electricity includes wood that has been treated with chemical preservatives such as creosote, pentachlorophenol or chromated copper arsenate.

[(4) *Electricity generated by a hydroelectric facility may be used to comply with a renewable portfolio standard only if:*]

[(a) *The facility is located outside any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected*

under the federal Wild and Scenic Rivers Act, P.L. 90-542, or the Oregon Scenic Waterways Act, ORS 390.805 to 390.925; or]

[(b) The electricity is attributable to efficiency upgrades made to the facility on or after January 1, 1995.]

[(5)(a) Up to 50 average megawatts of electricity per year generated by an electric utility from certified low-impact hydroelectric facilities described in ORS 469A.020 (4)(a) may be used to comply with a renewable portfolio standard, without regard to the number of certified facilities operated by the electric utility or the generating capacity of those facilities. A hydroelectric facility described in this paragraph is not subject to the requirements of subsection (4) of this section.]

[(b) Up to 40 average megawatts of electricity per year generated by certified low-impact hydroelectric facilities described in ORS 469A.020 (4)(b) may be used to comply with a renewable portfolio standard, without regard to the number of certified facilities or the generating capacity of those facilities. A hydroelectric facility described in this paragraph is not subject to the requirements of subsection (4) of this section.]

[(6)(a)] (4)(a) Direct combustion of municipal solid waste in a generating facility located in this state may be used to comply with a renewable portfolio standard. The qualification of a municipal solid waste facility for use in compliance with a renewable portfolio standard has no effect on the qualification of the facility for a tax credit under ORS 469B.130 to 469B.169.

(b) The total amount of electricity generated in this state by direct combustion of municipal solid waste by generating facilities that became operational in this state on or after January 1, 1995, may not exceed nine average megawatts per year for the purpose of complying with a renewable portfolio standard.

[(7)] (5) Electricity generated from hydrogen gas, including electricity generated by hydrogen power stations using anhydrous ammonia as a fuel source, may be used to comply with a renewable portfolio standard if:

(a) The electricity is derived from[:]

[(A)] any source of energy described in subsection (1) or (2) of this section; [or]

[(B) A hydroelectric facility that complies with subsection (4) of this section and that is certified as a low-impact hydroelectric facility as described in ORS 469A.020 (4);] and

(b) The output of the original source of energy is not also used to comply with a renewable portfolio standard.

[(8)] (6) If electricity generation employs multiple energy sources, that portion of the electricity generated that is attributable to energy sources described in this section may be used to comply with a renewable portfolio standard.

[(9)] (7) The State Department of Energy by rule may approve energy sources other than those described in this section that may be used to comply with a renewable portfolio standard. The department may not approve petroleum, natural gas, coal or nuclear fission as an energy source that may be used to comply with a renewable portfolio standard.

KATE BROWN
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
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(503) 986-1518

For Immediate Release:
October 26, 2012

Contact: Lydia Plukchi
Elections Division
(503) 986-1518

The Office of the Secretary of State received a draft ballot title from the Attorney General on October 26, 2012, for initiative petition #3, proposing a statutory amendment, for the General Election of November 4, 2014.

The draft ballot title is as follows:

**Removes conditional limitations on use of hydroelectric power to comply with
utilities' renewable portfolio standards**

Result of "Yes" Vote: "Yes" vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas.

Result of "No" Vote: "No" vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility's age, environmental impact, and location in protected areas.

Summary: Under existing law, renewable portfolio standards require Oregon utilities to deliver a percentage of their electricity from eligible renewable resources by 2025. Eligible resources include biomass, geothermal, hydropower, solar, tidal, wave, wind, and hydrogen. Use of biomass and hydropower have conditional limitations. Conditional limitations on use of hydropower to satisfy renewable portfolio standards relate to the age of the generating facility, the facility's designation as "low-impact," and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. The proposed measure would remove those restrictions, allowing Oregon utilities to satisfy renewable portfolio standards by supplying hydroelectricity from facilities that are in protected water areas, are not certified as "low-impact," and without regard to the age of the facilities.

Chief Petitioner(s): Paul S. Cosgrove, NW Skyline Blvd., Portland, OR 97210 and Tom Hammer, Wallace Rd. NW, Salem, OR 97304.

Copies of the text of this initiative are available at Suite 501, 255 Capital St NE for \$.25. Written requests for copies with your remittance of \$1.00 prepaid, should be addressed to: Elections Division, 255 Capital St NE Ste 501, Salem, OR 97310.

There now follows a comment period of 10 business days during which any member of the public may submit written comments which address the specific legal standards a ballot title must meet to the Secretary of State's office. This period ends November 9, 2012. Comments must be addressed to: Elections Division, 255 Capital St NE Ste 501, Salem, OR 97310; fax (503) 373-7414.

The Secretary of State will deliver all written comments to the Attorney General. If comments are received, the Attorney General shall issue the certified ballot title not later than the 10th business day after receiving the comments from the Secretary of State. If no comments are received, the Attorney General shall issue the certified ballot title not later than the 10th business day after the deadline for submitting comments.

In addition, during this ballot title comment period, the Secretary of State will also seek statements from interested persons regarding whether or not a proposed initiative petition complies with procedural constitutional requirements for submission of proposed initiative petitions. The Secretary will consider the information provided in the statements received from interested persons. If you wish to comment, this period ends November 9, 2012. Comments must be addressed to: Elections Division, 255 Capitol St NE, Suite 501, Salem, OR 97310; fax (503) 373-7414.

Any elector who is dissatisfied with the ballot title certified by the Attorney General, and who timely submitted written comments which addressed the specific legal standards a ballot title must meet, may petition the Oregon Supreme Court seeking a different title. This appeal must be filed not later than the 10th business day after the Attorney General certifies a ballot title to the Secretary of State.

The required number of signatures for placement on the 2014 General Election ballot is 87,213. These signatures shall be filed in this office not later than July 3, 2014.



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

October 26, 2012

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Removes Conditional Limitations On Use Of
Hydroelectric Power To Comply With Utilities' Renewable Portfolio Standards
DOJ File #BT-3-12; Elections Division #3

Dear Mr. Trout:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to conditions imposed on utility companies' use of hydroelectric power to comply with statutory renewable portfolio 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.

LS1:mlk/3723956

Enclosure

Lynn Rosik, General Counsel Division

Paul Cosgrove
NW Skyline Blvd
Portland, Oregon 97210

Tom Hammer
Wallace Road NW
Salem, Oregon 97304

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KATE BROWN
SECRETARY OF THE STATE

DRAFT BALLOT TITLE

Removes conditional limitations on use of hydroelectric power to comply with utilities' renewable portfolio standards

Result of "Yes" Vote: "Yes" vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas.

Result of "No" Vote: "No" vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility's age, environmental impact, and location in protected areas.

Summary: Under existing law, renewable portfolio standards require Oregon utilities to deliver a percentage of their electricity from eligible renewable resources by 2025. Eligible resources include biomass, geothermal, hydropower, solar, tidal, wave, wind, and hydrogen. Use of biomass and hydropower have conditional limitations. Conditional limitations on use of hydropower to satisfy renewable portfolio standards relate to the age of the generating facility, the facility's designation as "low-impact," and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. The proposed measure would remove those restrictions, allowing Oregon utilities to satisfy renewable portfolio standards by supplying hydroelectricity from facilities that are in protected water areas, are not certified as "low-impact," and without regard to the age of the facilities.

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KATE BROWN
SECRETARY OF THE STATE

Nathan R. Rietmann
Attorney at Law

November 9, 2012

Honorable Kate Brown
Oregon Secretary of State
Elections Division
225 Capitol Street NE, Ste 501
Salem, Oregon 97310

RECEIVED
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KATE BROWN
SECRETARY OF THE STATE

Re: Initiative Petition #3 (2014) –Draft Ballot Title Comments

Secretary Brown:

My office represents Paul Cosgrove and Tom Hammer who are the Chief Petitioners upon 2014 Initiative Petition #3 (IP 3). As electors and persons dissatisfied with the Attorney General's draft ballot title, Chief Petitioners respectfully submit the draft ballot title does not substantially comply with ORS 250.035(2)(a)-(d). For this reason, Chief Petitioners ask that the alternative ballot title set forth in this submission to be certified in lieu of the Attorney General's draft ballot title.¹

CAPTION

ORS 250.035(2)(a) requires a ballot title caption to "reasonably" identify the subject matter of the measure in 15 words or less. 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." *Whitsett v. Kroger*, 348 Or. 243, 247 (2010). The inquiry should not be one of conjecture upon the proponents' motivation but, instead, identification of legal effect. *Kane v. Roberts*, 310 Or. 423, 427 (1990). "When the major effect of a proposed measure would be a substantive change in existing law, the ballot title should inform the reader of the scope of the change." *Rasmussen v. Kroger*, 351 Or. 358, 361 (2011).

The Attorney General has proposed the following caption:

**Removes conditional limitations on use of hydroelectric power to
comply with utilities' renewable portfolio standards.**

¹ For purpose of discussion, Petitioners object to each discrete portion of the draft ballot title separately. However, any specific objection Petitioners raise in relation to a particular component of the draft ballot title is applicable to all other portions of the draft ballot title insofar as other portions of the ballot title present same or similar issues.

The draft caption does not substantially comply with ORS 250.035(2) because it does not inform voters of the scope of the substantive legal changes the measure would make and thereby fails to inform voters of the measure's major legal effect.

The major legal effect of IP 3 is to affirmatively recognize all hydroelectric energy as a "renewable energy source" that may be used to provide "qualifying electricity" under Oregon's renewable portfolio standards. *See*, ORS 469A.010(9)-(10). IP 3 makes this change by amending ORS 469A.025 to include affirmative new provisions specifically recognizing all hydroelectric energy as a renewable energy source. The measure then conforms existing law to the new provisions by repealing conflicting language in ORS 469A.020 and ORS 469A.025, which currently allow some hydroelectric energy to qualify as a "renewable energy source" when certain conditions are satisfied.

The draft caption does not inform voters that IP 3 has the actual major effect of affirmatively recognizing all hydroelectric energy as a qualifying "renewable energy source" for purposes of Oregon's renewable portfolio standards. Instead, the caption inaccurately and misleadingly suggests that IP 3 is simply a repealing measure that removes certain "conditional limitations" on otherwise allowed use of hydroelectric power to comply with renewable portfolio standards. However, in fact, IP 3 is a measure affirmatively establishing a new policy of allowing all hydroelectric energy to be a qualifying renewable energy source for purpose of Oregon's renewable portfolio standards, not merely a repealing measure that removes limiting aspects of a preexisting policy.

In summary, the actual major effect of IP 3 is to create a new policy wherein all hydroelectric energy is recognized as being a qualifying "renewable energy source" for purposes of Oregon's renewable portfolio standards. In focusing exclusively upon the provisions of existing law that IP 3 will repeal, the Attorney General has created a caption where the measure's conforming amendments appear to be the subject and the measure's affirmative new provisions and policy are ignored. As a result, voters are left without an accurate sense of the measure's scope, or any basis for understanding the measure's thrust from either a practical or legal standpoint.

In addition to the fundamental objection stated above, Chief Petitioners object to the phrase "removes conditional limitations" on the grounds that it is entirely unclear and confusing. The law requires the caption to identify the subject matter of a measure in terms that will not confuse or mislead potential signers and voters. *See e.g., Mabon v. Myers*, 332 Or. 633, 637 (2001). In addition, the Oregon Supreme Court has recognized that "unfamiliar or technical terms" should not be used in a ballot title. *Terhune v. Myers*, 342 Or. 136, 141, (2006). The phrase "removes conditional limitations" is not one of common usage and has no plain meaning. The phrase is an obscure term of legal art if it can even be characterized as such. Moreover, voters will not be able to obtain a clear

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definition of the phrase by resorting to a dictionary or conducting an Internet search. In short, Chief Petitioners respectfully submit that voters will find the phrase “removes conditional limitation” to be completely unintelligible in the context of the caption. A caption that cannot be readily understood by voters does not reasonably identify the subject of the measure, as the statute requires.

Chief Petitioners also object to the use of the phrase “utilities’ renewable portfolio standards.” The possessive use of the term “utilities’ before the phrase “renewable portfolio standard” suggests that renewable portfolio standards are utility created or otherwise represent utilities own standards. The possessive use of the term “utilities” also misleadingly communicates that renewable portfolio standards are established, set, or otherwise controlled by utilities. This obscures the fact that renewable portfolio standards are state law requirements externally imposed upon utilities by force of law.

Finally, Chief Petitioners object to the use of the term “hydroelectric power” instead of the term “hydroelectric energy” that is actually used in the text of the measure. “In general—and absent a compelling reason to the contrary—the Attorney General should use the actual language of the measure in the Summary. *See e.g., Sampson v. Roberts*, 309 Or. 335, 340, (1990). Here, there is no compelling reason for the caption to use a term that is different than the term provided for in the text of the measure. Consequently, the caption and all other portions of the ballot title should be modified accordingly.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief petitioners respectfully request the following caption be certified in lieu of the Attorney General’s draft caption:

Recognizes all hydroelectric energy as qualifying “renewable energy source” under Oregon’s renewable portfolio standards (RPS)

“Yes” Vote Statement:

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The “yes” vote result statement is to be parallel to the “no” vote result statement to the extent practical. The purpose of the “yes” vote statement is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or. 568, 574 (2004). “[T]o comply with...the statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure.” *Caruthers v. Myers*, 344 Or. 596, 601 (2008). A result statement is not sufficient if it is incomplete or understates the scope of the changes the measure would enact. *Greenberg v. Myers*, 240 Or. 65, 70 (2006).

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The Attorney General's draft "yes" vote statement provides as follows:

Result of "Yes" Vote: "Yes" vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas.

The Attorney General's draft statement does not substantially comply with ORS 250.035(2)(b) because it does not adequately inform voters of the results of enactment in simple and understandable terms. One of the overarching difficulties in preparing a ballot title for this particular measure is that it pertains to the specialized subject of "renewable portfolio standards." The term "renewable portfolio standards" is unfamiliar to many voters, as are the actual requirements the term is used to describe. Consequently, the meaning of the term "renewable portfolio standard" is not simple and understandable and the results statement must, in one fashion or other, illuminate what a renewable portfolio standard is or does so that voters can understand the results of enactment. The draft "yes" vote statement does not do this and is deficient for such reason.

The Attorney General's draft "yes" vote statement is also underinclusive and contains information that is not "accurate and neutral" as the statute requires. These particular deficiencies arise from the provisions of the "yes" vote statement informing voters that IP 3 will allow utilities to satisfy renewable portfolio standards from "any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas."

As an initial matter, the list of factors that IP 3 will supposedly allow utilities to satisfy renewable portfolio standards "regardless of" is underinclusive. To the extent it may be said that IP 3 has the result of allowing utilities to satisfy renewable portfolio standards "regardless of" a facility's age, environmental impact, or location in protected areas, it is equally true that IP 3 allows utilities to satisfy renewable portfolio standards "regardless of" innumerable other factors (e.g. ownership, cost, impact on wholesale price, availability alternative electricity sources, generation capacity, location outside protected areas, etc etc). As the list of factors IP 3 would allow utilities to satisfy renewable portfolio standards "regardless of" is likely unlimited, and certainly more extensive than the three factors identified in the draft "yes" vote statement, the result statement does not substantially comply with the statutory standard.

Secondly, it is inaccurate for the results statement to assert that IP 3 would allow utilities to satisfy renewable portfolio standards from "any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas." An array of laws and regulations exist to determine whether a hydroelectric facility may appropriately operate in light of its age, environmental impact, or location in a protected area. IP 3 would not have the result of allowing utilities to satisfy renewable portfolio standards from any facility "regardless of" the facility's age, environmental impact, or

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location in protected areas. Nevertheless, this is exactly what is misleadingly and inaccurately stated in the draft "yes" vote statement. In addition, the description of the factors listed in the draft "yes" vote statement are inaccurate, misleading, and overly broad for the reasons stated in the subsequent discussion of the "no" vote statement.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief petitioners respectfully request the following caption be certified in lieu of the Attorney General's draft "yes" vote results statement:

Result of "Yes" Vote: "Yes" vote recognizes all hydroelectric energy as qualifying under (RPS) requirement that utilities supply a certain percentage of their electricity from qualifying renewable energy sources.

"No" Vote Result Statement

ORS 250.035(2)(c) requires that a ballot title contain a simple and understandable statement of not more than 25 words that explains what will happen if voters reject the measure. This means the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, or the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or. 219, 223 (2003). As the Oregon Supreme Court has also stated, "[t]he 'no' vote result statement needs to include a description of the law that a 'no' vote would leave in place. *Whitsett v. Kroger*, 348 Or. 243, 251-252 (2010).

The Attorney General's draft "no" vote statement provides:

Result of "No" Vote: "No" vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility's age, environmental impact, and location in protected areas.

Like the "yes" vote statement, the "no" vote statement attempts to describe the result of a "no" vote using the specialized term "renewable portfolio standards." The term "renewable portfolio standard" is not familiar to voters and attempting to explain the result of a "no" vote without additional clarification as to the meaning of this term produces a statement that is not simple and understandable as the statute requires.

In addition, the "no" vote statement's description of the law a "no" vote would leave in place is overbroad, inaccurate, and misleading. The statutes IP 3 seeks to modify do not broadly preclude the use of hydroelectric energy to comply with a renewable portfolio standard if the hydroelectric facility has an "environmental impact." Rather, the relevant statutes specifically require certain facilities to be certified as "low impact....on or after January 1, 1995, by a national certification organization recognized by the State Department of Energy by rule." ORS 469A.420(4).

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Similarly, the laws that IP 3 would leave in place do not broadly and generally preclude hydroelectric energy from being used to comply with renewable portfolio standards if the facility is located in a "protected area" as the draft statement suggests. Instead, existing law more narrowly disqualifies hydroelectric facilities in "any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the Federal Wild and Scenic Rivers Act, Public Law 90-542, or the Oregon Scenic Waterways Act, ORS 390.805 to 390.925." ORS 469A.020(4). In addition, IP 3 does not seek to authorize the location of hydroelectric facilities in any protected areas as the "location in protected areas" language may inaccurately indicate to voters.

While the "no" vote statement is overinclusive in certain respects, it is underinclusive in others. In particular, the statement is underinclusive because its list of limiting factors in existing law is incomplete. For example, existing law contains limitations based on the amount of electricity generated per year (ORS 469A.025(5)), whether the facility is located in Oregon (ORS 469A.020(4)(b)), ownership of the facility (ORS 469A.020(4)(a)-(b)), efficiency upgrades to the facility (ORS 469A.020(3)), whether or not the facility is FERC licensed (ORS 469A.020(4)(b)), and other limitations. Listing particular limitations and excluding other limitations makes the "no" vote statement underinclusive, as well as inaccurate and misleading.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief Petitioners respectfully request the following caption be certified in lieu of the Attorney General's draft "yes" vote results statement:

Result of "No" Vote: No vote retains current law's conditions on hydroelectric energy qualifying under (RPS) requirement that utilities supply certain percentage of electricity from qualifying renewable energy sources.

Summary Statement:

ORS 250.035(2)(d) requires a ballot title to contain a 125-word statement, which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or. 169, 175 (1989).

The Attorney General's draft summary is as follows:

Summary: Under existing law, renewable portfolio standards require Oregon utilities to deliver a percentage of their electricity from eligible renewable resources by 2025. Eligible resources include biomass,

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geothermal, hydropower, solar, tidal, wave, wind, and hydrogen. Use of biomass and hydropower have conditional limitations. Conditional limitations on use of hydropower to satisfy renewable portfolio standards relate to the age of the generating facility, the facility's designation as "low-impact," and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. The proposed measure would remove those restrictions, allowing Oregon utilities to satisfy renewable portfolio standards by supplying hydroelectricity from facilities that are in protected water areas, are not certified as "low-impact," and without regard to the age of the facilities.

The Attorney General's draft summary does not summarize the measure and its major effects in a concise and impartial manner. The summary's laundry list of other renewable energy sources and discussion of biomass do not aid in summarizing the measure or its major affect. In addition, the last sentence of the draft summary describes the major effect of the measure by more or less restating the immediately preceding sentence in an unhelpful and redundant manner. Beyond the above, the summary's description of the measure's major effect is underinclusive for reasons stated in relation to other portions of the ballot title.

In addition, the summary fails to acknowledge that IP 3 has the actual major effect of allowing renewable portfolio standards to be met with lower-cost energy, which in turn, reduces wholesale power costs. The Oregon Supreme Court has recognized that "[t]he fiscal consequences of a measure may be its major effect..." *Straube v. Myers*, 340 Or. 253, 263 (2006). In this case, it is clear that reducing the cost of energy is a major effect of IP 3, and in fact, that is why the measure is entitled as the Affordable Renewable Energy Act. Therefore the measure summary must include some reference the measure's major effect of reducing power rates and the cost of complying with renewable portfolio standards.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief Petitioners respectfully request the following caption be certified in lieu of the Attorney General's draft "yes" vote results statement:

Summary: Existing law establishes renewable portfolio standards (RPS), which require utilities to supply a certain percentage of their electricity from qualifying "renewable energy sources." The proposed measure recognizes all hydroelectric energy as a qualifying "renewable energy source" that utilities may use to comply with RPS requirements and thereby reduces wholesale power costs. Currently, hydroelectric energy is only recognized as a qualifying "renewable energy source" if the facility meets requirements relating to ownership of the facility, age of the facility, location of the facility within certain state, federal, or NW Power & Conservation Council protected water areas, amount of hydroelectric

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energy produced, and designation as "low impact" by a national certification organization recognized by the State Department of Energy by rule, in addition to other requirements.

Chief Petitioners appreciate the opportunity to provide comments and respectfully request that the alternative ballot title set forth herein be certified in lieu of the draft ballot title.

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KATE BROWN
SECRETARY OF STATE



STEPHEN N. TROUT
DIRECTOR

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

(503) 986-1518

For Immediate Release:
November 29, 2012

Contact: Lydia Plukchi
Elections Division
(503) 986-1518

The Office of the Secretary of State received a certified ballot title from the Attorney General on November 28, 2012, for initiative petition #3, proposing a statutory amendment, for the General Election of November 4, 2014.

In addition, Secretary of State Kate Brown determined that the proposed initiative petition was in compliance with the procedural requirements established in the Oregon Constitution for initiative petitions.

The certified ballot title is as follows:

Removes existing limitations on utilities' use of hydroelectric power to meet statutory renewable portfolio standards

Result of "Yes" Vote: "Yes" vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

Result of "No" Vote: "No" vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility's age, environmental impact, ownership, location in protected areas.

Summary: Existing law establishes renewable portfolio standards which require utilities to supply a certain percentage of their electricity from qualifying "renewable energy sources." Qualifying renewable energy sources include biomass, geothermal, hydroelectric power, solar, tidal, wave, wind, and hydrogen. Statute imposes conditional limitations on use of hydroelectric power to satisfy renewable portfolio standards, based on factors including: the age of the generating facility, the facility's designation as "low-impact," the facility's ownership, and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. Measure removes those restrictions, allowing utilities to satisfy renewable portfolio standards using hydroelectricity from any hydroelectric facility, without regard to location in protected water areas, certification as "low-impact," the facility's age, other currently limiting factors. Other provisions.

Copies of the text of this initiative are available at Suite 501, 255 Capital St NE, for \$.25. Written requests for copies with your remittance of \$1.00 prepaid, should be addressed to: Elections Division, 255 Capitol St NE, Ste 501, Salem, OR 97310.

There now follows an appeal period of 10 business days. Any elector dissatisfied with the ballot title certified by the Attorney General, who also submitted in a timely manner written comments which addressed the specific legal standards a ballot title must meet, may petition the Supreme Court for a different title. The appeal period ends at 5:00 p.m. on December 12, 2012. The appeal procedures are outlined in ORS 250.085.

The required number of signatures for placement on the 2014 General Election ballot is 87,213. These signatures shall be filed in this office not later than July 3, 2014.

#



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 28, 2012

Stephen N. Trout
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

RECEIVED
2012 NOV 28 PM 3 10
KATE BROWN
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Removes Existing Limitations On Utilities' Use Of
Hydroelectric Power To Meet Statutory Renewable Portfolio Standards
DOJ File #BT-3-12; Elections Division #3

Dear Mr. Trout:

We have reviewed the comments submitted in response to the draft ballot title for the above-referenced prospective initiative petition. We provide the enclosed certified ballot title. We have changed the draft caption, the "yes" and "no" statements, and the summary in response to the comments.

This letter summarizes the comments we received, our response to those comments, and the reasons we made changes or declined to make some of the changes suggested by the commenters. Under ORAP 11.30(7), this letter must be included in the record in the event the Oregon Supreme Court is asked to review this ballot title.

We received comments from Nathan R. Rietmann on behalf of chief petitioners Paul Cosgrove and Tom Hammer. We address below those commenters' objections to the various sections of the draft ballot title.

A. Caption

The draft caption prepared by this office is as follows:

**Removes conditional limitations on use of hydroelectric power to comply
with utilities' renewable portfolio standards**

Commenters Cosgrove and Hammer posit that the caption fails to comply with ORS 250.035(2)(a) in four respects. First, they contend that the caption fails to identify the measure's major legal effect, which, in their view, is to "affirmatively recognize[e] all hydroelectric energy as a qualifying 'renewable energy source' for purposes of Oregon's renewable portfolio standards." Second, they object to the use of the phrase "removes conditional limitations" because it is not a phrase of common usage and it has no plain meaning. Rietmann 2. Third, they object to the possessive use of the term "utilities" because it suggests that the renewable

portfolio standards are established by the utilities themselves. Finally, the commenters contend that the reference to "hydroelectric power" should be changed to "hydroelectric energy." Rietmann 3.

We disagree with the commenters' first suggestion. While it is true that the measure includes a general policy statement in support of hydroelectric power, the primary legal effect of the measure is to repeal certain provisions of existing law that place restrictions on a utility company's ability to use hydroelectric power to comply with its renewable portfolio standard. To suggest that the measure does nothing more than affirmatively recognize all hydroelectric power as a qualifying renewable energy source implies that the measure does not alter any aspect of existing law.

We agree that the phrase "removes conditional limitations" is a somewhat "obscure term of legal art" that could confuse some voters. We also agree that using the possessive version of "utilities" in conjunction with "standards" could mislead some voters into believing that the renewable portfolio standards are created or otherwise managed by the utility companies, as opposed to the legislature. We have modified the caption accordingly.

Finally, the commenters suggest that the reference to "hydroelectric power" should be changed to "hydroelectric energy" because that is the phrase that is used in the text of the measure. Rietmann 3. The commenters, however, are mistaken; the measure uses both phrases without distinction. *Nesbitt v. Myers*, 335 Or 424, 428, 71 P3d 530 (2003) ("Certainly, we cannot say that the choice of one permissible choice of phrase over another permissible choice means that the Attorney General's modified caption fails to comply substantially with ORS 250.035(2)(a).").

Consistent with our responses to the comments, we certify the following caption:

Removes existing limitations on utilities' use of hydroelectric power to meet statutory renewable portfolio standards

B. Result Statements

The draft "yes" and "no" result statements prepared by this office are as follows:

Result of "Yes" Vote: "Yes" vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas.

Result of "No" Vote: "No" vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility's age, environmental impact, and location in protected areas.

The commenters assert that both the "yes" statement and the "no" statement fail to comply with statutory requirements for a variety of reasons. Rietmann 3-6. With respect to both statements, the commenters suggest that use of the phrase "renewable portfolio standards" might

be unfamiliar to many voters and therefore should be avoided. Yet the measure itself contains extensive references to “renewable portfolio standards,” and the commenters’ proposed alternative for both the “yes” and the “no” statement merely uses an abbreviation—“(RPS)”—in lieu of the full phrase. We believe that attempting to abbreviate the phrase “renewable portfolio standards” would confuse voters, rather than inform voters in simple and understandable terms. Nevertheless, we agree that it would be helpful to voters to explain that a “renewable portfolio standard” is a statutory requirement that utilities supply certain percentages of their electricity from qualifying renewable energy sources. That information, however, is provided elsewhere in the ballot title.

The commenters also assert that both the “yes” and “no” statements are inaccurate and therefore potentially misleading to voters. The draft “yes” statement states that the measure, if passed, would allow utility companies to satisfy their renewable portfolio standards with power from any hydroelectric facility, “regardless of the facility’s age, environmental impact, or location in protected areas.” Rietman 4-6. The commenters posit that the “yes” statement is underinclusive because it is equally true that a utility company could satisfy its renewable portfolio standards “regardless of” innumerable other factors, such as ownership, cost, or impact on wholesale price.

The draft “no” statement provides that a “no” vote would retain current restrictions on the use of hydroelectric power to satisfy renewable portfolio standards “based on facility’s age, environmental impact, and location in protected areas.” Rietmann 4-6. The commenters suggest that the “no” statement is overbroad, and therefore inaccurate, because the existing law narrowly defines what constitutes “low impact” and “protected areas.” The commenters also suggest that the list in the “no” statement is incomplete because existing law contains additional limitations based on the facility’s location, efficiency upgrades, among others. Rietmann 5-6.

We disagree that the “yes” and “no” statements are misleading in the way the commenters assert. The primary restrictions on utilities’ use of hydroelectric power to satisfy renewable portfolio standards relate to the hydroelectric facility’s age, location, and environmental impact. We believe those factors are “the most significant and immediate,” and carry “the greatest consequence, for the general public.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). Therefore, elimination of those restrictions is the major effect of a “yes” vote, and retaining them is the major effect of a “no” vote. Nevertheless, there is room in the “yes” result statement to clarify that the measure removes other limitations, as well.

Consistently with our responses to the comments, we certify the following “yes” and “no” statements:

Result of “Yes” Vote: “Yes” vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

Result of “No” Vote: “No” vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility’s age, environmental impact, ownership, location in protected areas.

C. Summary

Finally, the chief petitioners assert that, for most of the reasons set forth above, the draft summary does not summarize the measure and its major effects in a concise and impartial manner. Rietmann 7. For the reasons already explained above, we disagree that the summary is misleading in the way the commenters assert. The commenters also do not identify any way in which the summary is not impartial except, perhaps, to suggest that the "laundry list of other renewable energy sources and discussion of biomass" is not helpful in summarizing the measure or its major effect. Rietmann 7. We disagree. In explaining how a proposed measure will change existing law, it is often helpful to explain the current state of the law. *See Peppers v. Myers*, 325 Or 611, 616, 942 P2d 273 (1997). Existing law specifically defines qualifying renewable energy sources, including hydroelectric power, but places limitations on the use of hydroelectric power to satisfy utility companies' renewable portfolio standards. The primary effect of the measure is the remove the statutory limitations on such use of hydroelectric power, placing it on equal footing with the other, statutorily listed renewable energy sources. We thus believe including those renewable energy sources helps the voter understand the legal context of this measure. Nevertheless, we agree that the reference to limitations on use of biomass could confuse some voters, and we have modified the summary accordingly.

The chief petitioners also assert that, because the measure has the actual major effect of allowing renewable portfolio standards to be met with lower-cost energy, the summary must include some reference to the fact that the measure will reduce power rates. Rietmann 7. Nothing in the measure itself purports to lower energy rates, and we decline to speculate about any potential secondary effects the measure may have on energy rates. *Bauman v. Roberts*, 309 Or 490, 495, 789 P2d 258 (1990) ("Speculation about potential secondary effects has no place in any part of [a] ballot title.").

Consistently with our responses to the comments above, however, we have modified the summary, and we certify the summary in the attached ballot title.

Conclusion

We have modified the caption, the "yes" statement, the "no" statement, and the summary in response to the comments we received. We certify the attached ballot title pursuant to ORS 250.067(2).

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November 28, 2012
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Enclosure

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Assistant Attorney General

BALLOT TITLE

Removes existing limitations on utilities' use of hydroelectric power to meet statutory renewable portfolio standards

Result of "Yes" Vote: "Yes" vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

Result of "No" Vote: "No" vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility's age, environmental impact, ownership, location in protected areas.

Summary: Existing law establishes renewable portfolio standards which require utilities to supply a certain percentage of their electricity from qualifying "renewable energy sources." Qualifying renewable energy sources include biomass, geothermal, hydroelectric power, solar, tidal, wave, wind, and hydrogen. Statute imposes conditional limitations on use of hydroelectric power to satisfy renewable portfolio standards, based on factors including: the age of the generating facility, the facility's designation as "low-impact," the facility's ownership, and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. Measure removes those restrictions, allowing utilities to satisfy renewable portfolio standards using hydroelectricity from any hydroelectric facility, without regard to location in protected water areas, certification as "low-impact," the facility's age, other currently limiting factors. Other provisions.

CERTIFICATE OF FILING

I certify that I directed the original and seven copies of the AMENDED PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #3 (2014)) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on December 19, 2012:

State Court Administrator
Records Section, Supreme Court Building
1163 State Street
Salem, Oregon 97310

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #3 (2014)) upon the following individuals on December 19, 2012, upon the following using the court's electronic filing system:

Ellen F. Rosenblum, OSB #75239
Leigh A. Salmon
Department of Justice
1162 Court St. NE
Salem, Oregon 97310-4096

And by hand delivery to:

Kate Brown, Secretary of State
Elections Division
255 Capitol St. NE, Ste. 501
Salem, Oregon 97310-0722

And by U.S. Mail to:

Paul S. Cosgrove
NW Skyline Blvd
Portland, OR 97210

Tom Hammer
Wallace Rd. NW
Salem, OR 97304

DATED this 19th day of December, 2012

//s Nathan R. Rietmann

Nathan R. Rietmann, OSB #053630
Attorney for Petitioners