



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

June 22, 2016

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

Re: *Kristina McNitt v. Ellen F. Rosenblum*
SC S064128

Dear Chief Justice Balmer:

Petitioner Kristina McNitt has filed a ballot title challenge in the above-referenced matter. 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/ Keith L. Kutler

Keith L. Kutler
Senior Assistant Attorney General
keith.kutler @doj.state.or.us

KLK:aft/7475896

cc: Jill Odell Gibson
Shawn Donnille/without encl.
Kate Taylor/without encl.
Steve Pedery/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

KRISTINA MCNITT,

Petitioner,

v.

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

Respondent.

Supreme Court No. S064128

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITION TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 79

Petitioner seeks review of the Attorney General's ballot title for Initiative Petition 79 (2016) (IP 79), arguing that it does not substantially comply with ORS 250.035(2). She challenges the caption, "Yes" and "No" result statements, 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 substantially complies with ORS 250.035.

A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).

Petitioners challenge the caption for IP 79, which reads:

Prohibits forestry-related aerial pesticide spraying in specified locations; expands landslide-related rulemaking requirements

The caption for the ballot title of a state measure must contain no more than 15 words and reasonably identify the "subject matter" of the measure,

which is "its 'actual major effect' or, if more than one major effect, all effects

that can be described within the available word limit.” *Blosser/Romain v. Rosenblum* (IP 45), 358 Or 295, 300, 365 P3d 525 (2015) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)); ORS 250.035(2)(a).

1. The caption reasonably identifies the actual major effects of IP 79.

The Attorney General correctly and reasonably identified the “actual major effects” of IP 79. The measure would expand landslide-related rulemaking requirements and make unlawful “the aerial application of any pesticide, herbicide or fungicide for forestry purposes on or near any watershed that serves as a source of drinking water, any school or any home.” IP 79, §§ 1(5), 3. Petitioner challenges only the portion of the caption pertaining to aerial pesticide spraying. The caption reasonably identifies the “actual major effects” of IP 79 and substantially complies with ORS 250.035(2)(a).

2. Petitioners’ contrary arguments lack merit.

Petitioner contends that the “caption does not identify a major effect of the measure because current law already ‘prohibits forestry-related aerial pesticide spraying in specified locations.’”¹ (Petition, 7). Petitioner argues that the

¹ Initiative Petition 78 (under review in Case No. S064090) includes the same restrictions on aerial pesticide spraying as IP 79 but not the proposed expansion of landslide-related rulemaking requirements. The Attorney General’s certified ballot title for IP 78 includes the phrase “on/near” watersheds that provide drinking water, schools, homes.” In preparing the

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measure would ban most forestry-related aerial pesticide spraying in Oregon because most of Oregon is in a watershed that serves as a source of drinking water. She suggests that the first part of the caption be modified accordingly. (*Id.* at 7-8). Petitioner’s arguments fail to demonstrate that the prepared caption does not satisfy the requirements of ORS 250.035(2)(a).

To ascertain the subject matter of a measure, this court typically considers the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011); *see also Rasmussen v. Kroger*, 351 Or 358, 361, 266 P3d 87 (2011) (when major effect would substantively change existing law, ballot title should inform voters of scope of change). The proposed measure prohibits aerial spraying of pesticides, herbicides and fungicides in specified locations—on or near watersheds that are drinking water sources, schools and homes. “Pesticide” is not defined in the measure or in the Forest Practices Act, ORS 527.610 to 527.770. In common usage, a “pesticide” is “an agent (as a chemical) used to destroy a pest” and “pest” includes “a plant or animal detrimental to man or his interests.” *Webster’s Third New Int’l Dictionary* 1689 (unabridged ed 2002).

(...continued)

certified ballot title for IP 79, the Attorney General truncated that phrase in order to describe the other major effect of IP 79 within the word limit.

Thus, the term “pesticide” may include herbicides and fungicides, but not *vice versa*.

The Forest Practices Act currently requires a person aerially applying herbicides as part of a forest operation to leave an unsprayed 60-foot strip near an inhabited dwelling or school. ORS 527.672. That is not a prohibition on aerial spraying of all pesticides near schools or dwellings. The measure would prohibit all pesticide spraying for forestry purposes on or near homes or schools. The caption identifies that major effect of the measure.

Petitioner relies on a map issued by the Water Resources Department to support her argument that the measure would ban virtually all aerial pesticide spraying in Oregon. That map shows that Oregon consists of 18 drainage basins. In petitioner’s view, the measure would “ban all pesticide spraying in Oregon except for a few isolated areas.” (Petition, 4-5).

Rules promulgated under the Forest Practices Act contain limitations on “direct application” of pesticides within specified distances of streams that have domestic water use and some other bodies of water.² There undoubtedly is

² OAR 629-620-0400(4) and (7) provide, respectively, that pesticides shall not be directly applied within 60 feet, and fungicides and non-biological insecticides shall not be directly applied within 300 feet, of the following areas: significant wetlands; the aquatic areas of Type F and D streams, large lakes and other lakes with fish use; or areas of standing open

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some overlap between those limitations and the prohibition proposed by the measure, but the issue of whether all of Oregon is a “watershed that serves as a source of drinking water” is not a settled question. For that reason, the caption should not address whether the measure would ban most aerial pesticide spraying in Oregon. *See Nearman/Miller v. Rosenblum*, 358 Or 818, 827, 829, ___ P3d ___ (2016) (Attorney General required to do “a certain amount of basic interpretation” but when issue uncertain a “ballot title proceeding does not furnish an appropriate opportunity to answer it”) (citations omitted).

The prepared caption reasonably identifies the major effects of IP

79. This court should approve the caption for IP 79 without modification.

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

Petitioner also challenges the “yes” and “no” vote result statements of the ballot title for IP 79. Those statements read:

Result of “Yes” Vote: “Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” schools, homes, or

(...continued)

water larger than one-quarter acre. Subsection (7) also provides that fungicides and non-biological insecticides shall not be directly applied within 60 feet of the aquatic areas of Type N streams.

Type D streams have domestic water use but no fish. Type F streams have either fish use or fish and domestic water use. Type N streams have neither fish nor domestic water use. OAR 629-600-0100 (84) – (86).

watersheds that provide drinking water; expands landslide-related rulemaking requirements.

Result of “No” Vote: “No” vote retains current laws limiting aerial pesticide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing bodily injury/death risks.

The “yes” and “no” vote result statements “must include simple and understandable statements, of no more than 25 words each, which describe the result if the measure is approved and the result if the measure is rejected.” *Milne v. Rosenblum*, 354 Or 808, 813, 323 P3d 260 (2014) (citing ORS 250.035(2)(b) and (2)(c)). With respect to the “yes” vote result statement, petitioner first raises the same arguments she raised with respect to the caption. (Petition 8). For the same reasons discussed above with respect to the caption, the “yes” statement simply and understandably describes the prohibition on aerial pesticide spraying that would result if the measure is approved.

Petitioner also argues that the “yes” statement must identify that landowners will not be compensated for any loss of value resulting from the prohibition on aerial spraying of pesticides for forestry purposes. (Petition, 8-9). That argument is based on the last sentence of Section 4 of the measure,

which provides that the Act and regulations enacted under it “are not subject to the requirements of ORS 195.305.”³

The “yes” statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). Current law already imposes some prohibitions on aerial pesticide spraying, so the measure will not affect the value of any property where spraying already is prohibited. Whether it will affect any other property values, and whether that effect will be positive or negative, is a matter of speculation. Consequently, if the last sentence of Section 4 will have some effect, that effect is not immediate and, for that reason alone, need not be addressed in the “yes” statement. Moreover, it is not permissible to “speculate about the possible effects of a proposed measure.”⁴ *Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007).

³ ORS 195.305(1) provides: “If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation or regulations as provided in ORS 195.310 to 195.314.”

⁴ Initiative Petition 80 (under review in Case No. S064129 but subsequently withdrawn) also provides that the restrictions in it “are not subject to the requirements of ORS 195.305.” IP 80 includes the same restrictions on aerial pesticide spraying and the same proposal on landslide-related rulemaking as IP 79, and IP 80 adds a proposal on “clear-cuts.” The “yes” result and

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Petitioner next argues that “prohibits” should be used instead of “limits” in the last clause of the “no” statement because ORS 527.672 prohibits aerial herbicide spraying on forestland within 60 feet of inhabited dwellings and schools. But the use of “limits” adequately captures that meaning, because “limits” means to bound, constrain or confine. *Webster’s* at 1312. ORS 527.672 constrains aerial spraying of herbicides—thus does not prohibit all pesticides—for forest purposes near schools and dwellings, and the “no” statement adequately describes that existing limitation.

Accordingly, this court should conclude that the “yes” and “no” vote result statements satisfy ORS 250.035(2)(b) and (2)(c).

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

Petitioner also challenges the summary of the ballot title for IP 79, which reads:

(...continued)

summary in the Attorney General’s certified ballot title for IP 80 include references to the “just compensation” issue. The reason for the distinction is that the prohibition against clear-cuts goes directly to permissible economic uses of property. Individuals and businesses may own property for the purpose of harvesting timber in a way that would violate IP 80’s proposed ban against clear-cuts. Thus, the provision making ORS 195.305 inoperative would be a “major effect” of IP 80. But individuals and businesses do not own property for the purpose of spraying pesticides on it, the value of forestry and agricultural products is not intrinsically tied to pesticide use and, as described above, the effect on property values of a restriction on pesticide use is speculative.

Summary: Oregon Forest Practices Act currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of bodily injury/death from certain landslides. Measure prohibits forestry-related aerial pesticide application on/“near” schools, homes, watersheds supplying drinking water; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue spraying regulations; specifies grounds and procedures for challenging regulations. Requires forestry board to adopt rules “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides. Authorizes enforcement lawsuits, attorney fees.

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 v. Kroger*, 347 Or 660, 670, 227 P3d 723 (2010). 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 and must not “speculate about the possible effects of a proposed measure.” *Pelikan/Tauman*, 342 Or at 389.

Petitioner contends that the summary should inform voters that “landowners will not receive just compensation if their land loses value due to regulations promulgated under the measure.” (Petition, 9). For the same reasons discussed above with respect to including the “just compensation” issue in the “yes” statement, the summary provides voters enough information to understand the major effect of the measure, as required by *Caruthers*.

The summary sufficiently explains the measure and its major effects, and enables voters to understand what will happen if the measure is approved. Accordingly, this court should conclude that the summary satisfies ORS 250.035(2)(d).

D. Conclusion

The Attorney General’s ballot title should be certified without modification.

Respectfully submitted,

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Attorney General
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/s/ Keith L. Kutler

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June 10, 2016

The Hon. Ellen Rosenblum, Attorney General
Paul Smith, Deputy Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Mr. Smith:

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 Jill Gibson on Initiative Petition **2016-079**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lydia", is positioned above the typed name.

Lydia Plukchi
Compliance Specialist



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

April 26, 2016

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Suite 501
Salem, OR 97310

Re: Proposed Initiative Petition — Prohibits Forestry-Related Aerial Pesticide Spraying in Specified Locations; Amends Landslide-Related Rulemaking Requirements
DOJ File #BT-79-16; Elections Division #2016-079

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 prohibiting aerial spraying of pesticides for forestry-related purposes, and prohibiting and regulating timber harvest, gravel pit and rock quarry operations that pose risks by impacting certain landslides.

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.

Sincerely,

/s/ Alicia Thomas

Alicia Thomas
Legal Secretary

AFT/7331484

Enclosure

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DRAFT BALLOT TITLE

Prohibits forestry-related aerial pesticide spraying in specified locations; amends landslide-related rulemaking requirements

Result of “Yes” Vote: “Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” watersheds that provide drinking water, schools, or homes; amends landslide-related rulemaking requirements.

Result of “No” Vote: “No” vote retains current laws limiting forestland aerial pesticide/herbicide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing injury/death risks.

Summary: Oregon Forest Practices Act currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of injury/death from certain landslides. Measure prohibits forestry-related aerial pesticide application on/“near” watersheds supplying drinking water, schools, homes; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue spraying regulations; specifies grounds and procedures for challenging regulations. Requires forestry board to adopt rules “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides. Authorizes civil enforcement suits, attorney fees.

Stoll Berne

Exceptional lawyers | Extraordinary results

Steven C. Berman
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May 10, 2016

VIA EMAIL

Jeanne P. Atkins
Secretary of State
255 Capitol ST NE, Suite 501
Salem, OR 97301

Re: Initiative Petition No. 79 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Shawn Donnille regarding the ballot title for Initiative Petition No. 79 for the General Election of November 8, 2016 (the "Initiative"). Mr. Donnille is an elector in the State of Oregon, and a co-chief petitioner of the Initiative. This letter is written in response to your office's public notice, dated April 27, 2016, which invites comments on the draft ballot title for the Initiative.

Mr. Donnille respectfully submits that the caption, results statement and summary for the draft ballot title do not meet the requirements of ORS 250.035(2). Mr. Donnille 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. 79

The Initiative strengthens Oregon's Forest Practices Act. The Initiative contains a series of findings, and six substantive sections.

Section 1 makes two changes to ORS 527.630. First, section 1 amends ORS 527.630(1) to provide that Oregon's public policy includes encouraging forest practices that ensure the "protection of public health," "drinking water" and "aquatic resources." Second, section 1 amends ORS 527.630(5) to make much more specific and detailed the rules the State Board of Forestry shall adopt to prevent landslides. Specifically, the amendments to ORS 527.630(5) would require the Board of Forestry to adopt rules "prohibiting and regulating" timber harvests, road maintenance and construction, operation of gravel pits and rock quarries "that pose risks to public health and safety, drinking water or aquatic habitat" that would impact "rapidly moving landslides" and "deep-seated landslides." In contrast, current law merely requires the Board of

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Forestry to adopt rules “to reduce the risk of serious bodily injury or death caused by a rapidly moving landslide directly related to forest practices.” See ORS 527.710(10) (so providing). In other words, the Initiative mandates more protective rules for public health and safety. Section 1 amends ORS 527.630(5) to *strengthen* rules preventing landslides.

Section 3 prohibits aerial spraying of any pesticides, herbicides or fungicides on or near drinking water, schools or homes. Section 4 requires the Board of Forestry to adopt regulations to implement Section 3 within 12 months of the Initiative’s passage. Section 5 provides a private right of action to enforce Section 3 and the regulations issued under section 4.

Section 6 is a severability clause.

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 caption for the draft ballot title provides:

Prohibits forestry-related aerial pesticide spraying in specified locations; amends landslide-related rulemaking requirements

Mr. Donnille respectfully submits that the phrase “amends landslide-related rulemaking requirements” is insufficiently descriptive to comply with the requirements of ORS 250.035(2)(a). As was set forth above, section 1 of the Initiative *strengthens* existing law regarding landslide-related rulemaking requirements by mandating rules prohibiting and regulating delineated activities “that pose risks to public health and safety, drinking water or aquatic habitat” impacting both rapidly moving and deep-seated landslides. This is a broad expansion of both the activities that are regulated and the interests protected. The phrase “amends landslide-related rulemaking requirements” is written “in terms so broad that they convey only one highly generalized aspect of” the Initiative’s subject matter and “does not comply with the requirements of ORS 250.035(2).” *McCann v. Rosenblum*, 354 Or 701, 707 (2014). The phrase fails to inform voters and potential petition signers as to *how* the Initiative

amends “landslide-related rulemaking requirements.” The phrase must be revised, to reflect that the Initiative mandates stricter rules to prevent landslides to protect public health and safety, drinking water and aquatic habitat.

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 results statements in the draft ballot title provide:

“Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” watersheds that provide drinking water, schools or homes; amends landslide-related rulemaking requirements.

“No” vote retains current laws limiting forestland aerial pesticide/herbicide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing injury/death risks.

Mr. Donnille respectfully submits that the result of yes statement is flawed for the reasons set forth above. Specifically, the result of yes statement repeats the uninformative phrase: “amends landslide-related rulemaking requirements.” That phrase is particularly unhelpful, and potentially misleading, when read in conjunction with the (inaccurate) description of current law in the result of no statement. *See Rasmussen v. Kroger*, 350 Or 533, 538 (2011) (results statements should be read together). When read together, a voter or potential petition signer erroneously would conclude that the Initiative somehow *reduces* or *eases* the rulemaking requirements to prevent landslides to protect the public welfare. However, quite to the contrary, the Initiative dramatically *increases* protections for the public by mandating stricter rules to prevent landslides to protect health and safety, drinking water and aquatic habitat.

The result of no statement is flawed for the additional reason that it misstates current law. The result of no statement must accurately describe existing law. *McCann*, 354 Or at 707-708. Under existing law, the Board of Forestry’s authority to adopt landslide prevention rules is exceedingly limited. The Board may adopt such rules “*only* in accordance with ORS 527.710(10).” *See* ORS 527.630(5) (so providing) (emphasis added). That power is limited to adopting rules to “reduce the risk of *serious bodily injury* or death.” ORS 527.710(10) (emphasis added). The description of current law in the result of no statement – “requiring landslide-related rules reducing injury/death risks” – erroneously implies that Board’s authority is broader.

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." Mr. Donnille respectfully submits that the summary is flawed for the reasons set forth above.

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

Very truly yours,



Steven C. Berman

SCB:gs
cc: Client



May 10, 2016

VIA EMAIL – irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State
Elections Division
255 Capitol Street NE, Ste. 501
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition 79 (2016)

Dear Secretary Atkins,

I represent Kristina McNitt, an elector in the State of Oregon who wishes to comment on the draft ballot title for IP 79 (2016). This measure would amend the Oregon Forest Practices Act, ORS chapter 527, and require the Oregon Board of Forestry (“the Board”) to issue regulations prohibiting “aerial application of any pesticide, herbicide or fungicide for forestry purposes on or near any watershed that serves as a source of drinking water, any school, or any home.” Section 3. The measure also would amend the Board’s rulemaking requirements regarding harvesting in landslide areas.

COMMENTS ON PROCEDURAL REQUIREMENTS

IP 79 fails to comply the full text requirement of Article IV, Section 1(2)(d), of the Oregon Constitution. Pursuant to this procedural constitutional requirement, measures which propose to amend existing law must set forth the full text of the law as amended if the measure were to pass. *Kerr v. Bradbury*, 193 Or App 304, 325, 89 P3d 1227 (2004). The full text requirement applies to both initiative petitions to be voted upon by the electorate and to acts to be voted upon by the Oregon Legislative Assembly. *Id.* Article IV, Section 1(2)(d), applies to the people and Article IV, Section 22, applies to the Legislature.

On August 12, 2015, the Governor signed HB 3549, codified at ORS 527.672, which prohibits forestry-related aerially sprayed herbicides within 60 feet of dwellings and schools. IP 79 was filed with the Secretary of State on December 22, 2015, and if it passes, it would amend ORS 527.672 by replacing the current 60 foot buffer around dwellings and schools with a prohibition of aerially spraying “near” such locations. It is unclear how the Board will define “near,” but it is clear that the restrictions in ORS 527.672 would be amended by the restrictions the Board promulgates under the measure. However, IP 79 neither mentions this recently passed statute nor gives the full text of the statute as amended if IP 79 passes. This is a textbook example of what Article IV, Section 1(2)(d), of the Oregon Constitution disallows.

To comply with the full text requirement, IP 79 must contain a provision similar to the following:

527.672 Aerial herbicide applications. When a forest operation involves applying herbicides by aircraft near an inhabited dwelling or school, the operator **must comply with Board regulations that prohibit aerial application of any pesticide, herbicide or fungicide for forestry purposes on or near any watershed that serves as a source of drinking water, any school, or any home** *[is responsible for leaving an unsprayed strip of at least 60 feet adjacent to the dwelling or school.]* The responsibility of the operator under this section is in addition to any responsibility of the aerial pesticide applicator under ORS chapter 634.

COMMENTS ON THE BALLOT TITLE

I. CURRENT LAW

The Oregon Forest Practices Act sets standards for all commercial activities involving the harvesting of trees in Oregon forests. Among other requirements, the Act requires replanting trees within two years of a harvest and these new trees must be “free to grow” within 6 years. ORS 527.745; OAR 629-610-0040. Tree seedlings compete with weeds and invasive species for water, sunlight, space, and nutrients; thus forest landowners sometimes use herbicides to control these unwanted plants while a new forest is being planted and established. Without herbicides, these new trees may not survive and, by law, landowners must replant trees until they grow successfully. Once new trees are strong enough to survive on their own, herbicides are seldom used again. While homeowners often use herbicides on lawns yearly, forest landowners may only use them for two years in an area and then not for another 40-80 years. According to the Oregon Department of Agriculture, forest landowners are responsible for only 4.2 percent of all pesticides used every year in Oregon. Oregon Department of Forestry, Forest Facts, May 2013. Among all pesticides used in Oregon for any purpose, the forest sector generally uses only herbicides.

In addition to state laws and regulations regarding pesticide use, The Federal Insecticide Fungicide and Rodenticide Act (FIFRA) governs the use of all herbicides according to federally-approved labels and provides that herbicide labels carry the full force of federal law. 7 USC § 136 *et seq.* FIFRA is administered and enforced by the U.S. Environmental Protection Agency and the Oregon Department of Agriculture. Additionally, all herbicide use must comply with Oregon’s Pesticide Control Act (ORS chapter 634) and applications in forests must be conducted in accordance with the Oregon Forest Practices Act (ORS chapter 527) and the Oregon Department of Forestry chemical rules (OAR chapter 629). Oregon law also prohibits applying pesticides¹ in a “faulty, careless, or negligent manner” or in a manner “inconsistent with its labeling.” ORS 634.372. This essentially gives all pesticide labels the force of state law, which is a significant additional protection because some pesticide labels provide stricter requirements than existing law, and in those situations the stricter label requirements trumps state law.

¹ Under Oregon law, “pesticide” has a broad definition and includes fungicides, herbicides, and insecticides. ORS 634.006(8); ORS 527.310(9). For purposes on these comments, when “pesticide” is used it refers also to fungicides, herbicides, and insecticides.

Oregon law already makes it unlawful to aerially spray pesticides within 60-300 feet of drinking water. Specifically, existing law prohibits spraying fungicides or non-biological insecticides from an aircraft within 300 feet of significant wetlands, streams that contain fish and supply water for domestic use, large lakes, and open standing water larger than one-quarter acre. OAR 629-620-0400(7). Spraying any “chemical” (which includes all classes of pesticides) within 60 feet of these water sources is also prohibited. OAR 629-620-0400(4). Regarding the protection of homes and schools, it is illegal to aerially spray herbicides within 60 feet of an “inhabited dwelling or school.” ORS 527.672. Additionally, these required buffer zones are often enlarged by federal law via FIFRA, product labels, and EPA regulations. For example, the label for an herbicide called Oust XP ® prohibits aerial application within 75 feet of water and aquatic vegetation. Thus, the forest landowner would have to comply with the stricter 75 foot buffer zone rather than a 60 foot buffer zone.

Regarding the prevention of landslides, The Oregon Forest Practices Act has special rules regarding harvesting trees and constructing roads in areas at risk for landslides. Specifically, harvesting and road construction is prohibited in high landslide hazard locations that pose a substantial risk to public safety from a rapidly moving landslide. ORS 527.630(5); OAR 629-623-0400(1); OAR 629-623-0450(1).

II. IP 79

IP 79 proposes to amend ORS 527.630 by repealing Oregon’s public policy of encouraging forestry practices that are “consistent with sound management of soil, air, water, fish and wildlife . . .” and replacing it with the policy of encouraging forestry practices that are “consistent with protection of public health, soil, drinking water, aquatic and wildlife . . .” Section 1.

The measure would prohibit the “aerial application of any pesticide, herbicide or fungicide for forestry purposes on or near any watershed that serves as a source of drinking water, any school, or any home.” Section 3. This provision would amend ORS 527.672, which imposes a 60 foot buffer zone around schools and homes, and replace it with an almost complete ban on aerially sprayed pesticides. This is a direct effect of the measure because nearly all of Oregon is included in a “*watershed* that serves as a source of drinking water,” except for a few small coastal watersheds and isolated basins in southeast Oregon. Under Oregon law, “[w]atershed’ means the entire land area drained by a stream or system of connected streams such that all streamflow originating in the area is discharged through a single outlet.” ORS 541.890(14). This definition comports with the common understanding of the word. *See Webster’s Third New International Dictionary*, unabridged, p. 2584 (“watershed” is defined as “a region or area bounded peripherally by a water parting and draining ultimately to a particular water course or body of water; the catchment area or drainage basin from which the waters of a stream or stream system are drawn”). Thus, the proposed prohibition of aerially spraying pesticides on or near watersheds that provide drinking water will ban all pesticide spraying in Oregon except for a few isolated areas. Because the measure does not define “near,” it is unknown if spraying in these isolated areas will also be prohibited.

The measure also would amend ORS 527.630 and require the Board to adopt rules prohibiting and regulating timber harvests, construction, and gravel pits “that pose risks to public health and safety, drinking water or aquatic habitat by impacting” certain landslides. Section 1(5). The effect of this provision is unclear because the word “impact” is undefined. Additionally, the measure contains no standards for determining what constitutes a “risk” to drinking water or aquatic habitat. Landslides are typically natural geologic events that can have both good and bad consequences for streams and aquatic life. For example, in the short term, fine sediment from landslides entering a stream can suffocate fish eggs and young fry. However, in the long term, coarse gravel entering a stream from landslides is beneficial because it is necessary to create future spawning beds and pools for rearing habitat. Thus, landslides provide some natural benefits to streams and fish; yet the measure portrays all landslides as harmful.

Significantly, all regulations implementing the measure’s prohibitions would be exempt from ORS 195.305, which requires public entities to pay just compensation to property owners when their property loses fair market value because of land use regulations. Section 4. Thus, if a landowner’s land decreased in value as a result of IP 79, the landowner would not be entitled to compensation. This is a significant change to property owners’ rights and to Oregon’s public policy to “provide just compensation for unfair burdens caused by land use regulations.” ORS 195.301. The measure also would allow any person to bring a private right of action to enforce the prohibition on aerially sprayed pesticides. Section 5. In such lawsuits, prevailing plaintiffs “shall be” awarded reasonable attorney fees. *Id.*

III. THE DRAFT BALLOT TITLE.

The Attorney General has proposed the following ballot title for IP 79:

**Prohibits forestry-related aerial pesticide spraying in specified locations;
amends landslide-related rulemaking requirements**

Result of “Yes” Vote: “Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” watersheds that provide drinking water, schools, or homes; amends landslide-related rulemaking requirements.

Result of “No” Vote: “No” vote retains current laws limiting forestland aerial pesticide/herbicide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing injury/death risks.

Summary: Oregon Forest Practices Act currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of injury/death from certain landslides. Measure prohibits forestry- related aerial pesticide application

on/“near” watersheds supplying drinking water, schools, homes; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue spraying regulations; specifies grounds and procedures for challenging regulations. Requires forestry board to adopt rules “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides. Authorizes civil enforcement suits, attorney fees.

A. 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 “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).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P.3d 1194 (2011) (citation omitted). To identify the “actual major effect” of a measure, we consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P.3d 1031 (2011).

Because Oregon law already “[p]rohibits forestry-related aerial pesticide spraying in specified locations,” such as within 300 feet of streams that contain fish and supply water for domestic use, the caption does not identify a proposed *change* to the law. IP 79’s draft caption will simultaneously cause voters to mistakenly believe (1) that Oregon law currently permits forestry-related aerial pesticide spraying in all locations without limitation and (2) that the measure’s prohibition would apply only in “specified locations,” as opposed to most of Oregon. While “prohibit[ing] forestry-related aerial spraying in specified locations” is not a change in the context of existing law and, thus, not an actual major effect of the measure, a ban on aerial spraying in watersheds would be a major effect. Thus, the caption must inform voters that the measure would impose a ban on spraying pesticides “near” watersheds, i.e., most of Oregon.

As discussed above, protection of watersheds is what results in the expansive reach of the measure, because virtually all of Oregon is in a drinking water watershed. As such, not only would “specified locations” be protected from aerial spraying, but most locations would be protected. Focusing on “specified locations” in the caption, thus, understates the actual major effect of the measure. Furthermore, depending on how “near” is defined by the Board, all of Oregon could be included in the measure’s prohibition.

In light of the foregoing, the following suggested caption would comply with statutory standards:

Bans most forestry-related aerial pesticide use; amends landslide-related rulemaking requirements.

B. RESULT OF “YES” VOTE STATEMENT

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement,” no more than 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to “notify petition signers and voters of the results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or 568, 574 (2004).

We agree with putting “near” in quotation marks; however, the statement still fails to tell voters what will happen if the measure is approved: a ban on aerially sprayed pesticides for forestry purposes in most of Oregon. Additionally, although the “yes” statement uses the words of the measure, the words of the measure are misleading because Oregon law already prohibits forestry-related aerial pesticide spraying on or near wetlands and streams that supply water for domestic use. See OAR 629-620-0400(4); OAR 629-620-0400(7). And Oregon law already prohibits such spraying of herbicides within 60 feet of schools and dwellings and these prohibitions would continue even if the measure failed to pass. Indeed, if the measure complied with the full text requirement, it would show voters that Oregon law already contains protections for homes and schools.

The “yes” statement must also mention the significant change regarding landowner rights and Oregon public policy regarding the entitlement to receive just compensation for reduced land value that results from land use restrictions. Although it is unclear the extent to which IP 79 may cause property values to decrease, the text of the measure makes it clear and certain that if such decrease occurs, affected landowners would not be entitled to receive just compensation. To sufficiently understand the results of IP 79, voters must know that any financial “cost” of the measure - large or small - would be borne by forest landowners.

We suggest the following statement:

Result of “Yes” Vote: “Yes” vote bans most forestry-related aerial pesticide use; amends landslide-related rulemaking requirements; landowners not compensated for any reduced land value caused by restrictions.

C. RESULT OF “NO” VOTE STATEMENT

ORS 250.035(2)(c) requires that a ballot title contain a “simple and understandable statement,” no more than 25 words long, explaining what will happen if voters reject the measure. This means that the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, i.e., the status quo. It is essential that the “no” vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003), (original review) 335 Or 424, 431 (2003) (review of modified ballot title).

The draft “no” statement correctly notes that current law protects certain areas from forestry-related aerial pesticide/herbicide spraying; however, “limitations” should be referred to

as “prohibitions” because ORS 527.672 prohibits spraying within 60 feet of a dwelling or school. Moreover, the measure’s limitations are referred to as “prohibitions.” Additionally, the word “forestland” should be removed because it is redundant with “forestry purposes” and some existing forestry-related regulations apply to locations that are not designated as “forestland.”

We suggest the following “no” statement:

Result of “No” Vote: “No” vote retains current law prohibiting certain aerial pesticide use; requiring landslide-related rules reducing injury/death risks; requiring landowner compensation for reduced land value.

D. SUMMARY

ORS 250.035(2)(d) requires that a ballot contain a “concise and impartial statement of not more than 125 words summarizing the measure and its major effects.” The purpose of the summary is to “help voters understand what will happen if the measure is approved” and “the breadth of its impact.” *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

The draft summary does not comply with these standards because it does not inform voters that under the measure landowners would not be entitled to receive just compensation if their land loses value due to the regulations promulgated under the measure. This is a significant change in the context of current law and voters should be made aware of this provision. Also, voters should be informed that the words “near” and “impacting” are not defined by the measure. These words are key to the application and enforcement of IP 79 and voters should be made aware of this ambiguity in the measure. *See Martin/Bendl v. Myers*, 340 Or 569, 572, 135 P3d 315 (2006) (certifying ballot title using phrase from measure identified by quotation marks and modified by word “undefined” in parentheses). To make room for this important information, we have deleted language regarding challenging regulations, which is likely less significant to voters.

We suggest the following summary:

Summary: Oregon law currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of injury/death from certain landslides. Measure prohibits forestry-related aerial pesticide application on/“near” (undefined) watersheds supplying drinking water, schools, homes; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue regulations “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” (undefined) landslides.

Comments on IP 79

May 10, 2016

Page 8

Eliminates just compensation to landowners for reduced land value caused by land use restrictions. Authorizes civil enforcement suits, attorney fees.

Thank you for considering our comments to the draft ballot title.

Very truly yours,



Will Gibson

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

I N I T I A T I V E P E T I T I O N

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: May 25, 2016

SUBJECT: Initiative Petition **2016-079** Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on May 25, 2016, for Initiative Petition **2016-079**, proposed for the November 8, 2016, General Election.

Caption

Prohibits forestry-related aerial pesticide spraying in specified locations; expands landslide-related rulemaking requirements

Chief Petitioners

Shawn Donnille 771 W 52nd Avenue Eugene, OR 97405

Kate Taylor PO Box Rockaway Beach, OR 97136

Steve Pedery 7644 SE Taggart Court Portland, OR 97206

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. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

Appeal Due

June 9, 2016

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

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

More information, including the certified ballot title and the Secretary of State's determination that the proposed initiative petition is in compliance with the procedural requirements established in the Oregon Constitution for initiative petitions, is contained in the IRR Database available at www.oregonvotes.gov.

JEANNE P. ATKINS

SECRETARY OF STATE

ROBERT TAYLOR

DEPUTY SECRETARY OF STATE



JIM WILLIAMS

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CONSTITUTIONAL REQUIREMENT RULING

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2016-080	December 22, 2015	May 10, 2016	May 25, 2016

Draft Ballot Title Caption

Prohibits certain forestry-related pesticide spraying; amends landslide-related regulation; prohibits "clear-cuts," requires reforestation

Chief Petitioners

Shawn Donnille 771 W 52nd Avenue Eugene, OR 97405
Kate Taylor PO Box 152 Rockaway Beach, OR 97136
Steve Pedery 7644 SE Taggart Court Portland, OR 97206

Procedural Constitutional Requirement Commentor

Jill Gibson 1500 SW Taylor Street, Portland, OR 97205

Certification

I have reviewed the above-captioned initiative petition, including any comments submitted regarding constitutional requirements, and find that:

☒ It **complies** with the procedural constitutional requirements.

☐ It **does not comply** with the procedural constitutional requirements.

Jeanne Atkins, Secretary of State

Dated



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

May 25, 2016

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — Prohibits Forestry-Related Aerial Pesticide Spraying in Specified Locations; Expands Landslide-Related Rulemaking Requirements
DOJ File #BT-79-16; Elections Division #2016-079

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 79 (2016) (BT-79-16) from co-chief petitioner Shawn Donnille (through counsel, Steven C. Berman) and Kristina McNitt (through counsel, Jill Gibson). Mr. Donnille and Ms. McNitt both object to all parts of the draft 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.

Procedural constitutional requirements

Ms. McNitt raises the issue of whether the proposed measure fails to comply with the full text requirement of Article IV, Section 1(2)(d), of the Oregon Constitution. That constitutional provision requires the measure to set forth the full text of the law as amended if the measure were to pass. She contends the proposed measure fails to comply with this requirement because it does not include the full text of ORS 527.672 as it would be amended by the measure. That issue is beyond the scope of the ballot title drafting process. *See* OAR 165-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address that issue here.

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 "subject matter" 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)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194

(2011). To identify the “actual major effect” of a measure, the Attorney General must consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

**Prohibits forestry-related aerial pesticide spraying in specified locations;
amends landslide-related rulemaking requirements**

We address the comments and objections below.

1. Comments from Mr. Donnille

Mr. Donnille objects to the portion of the caption that addresses landslide-related rulemaking requirements. He contends that the proposed measure “*strengthens* existing law” (emphasis in original) and that “amends” fails to inform voters how the measure changes the rulemaking requirements. (Donnille Letter, 2-3).

2. Comments from Ms. McNitt

Ms. McNitt objects to the portion of the caption that addresses aerial pesticide spraying.¹ She points out that Oregon law currently prohibits aerial pesticide spraying in specified locations, including within 300 feet of streams that contain fish and supply water for domestic use, and she contends that the major effect of the measure will be to ban such spraying in most of Oregon because “virtually all of Oregon is in a drinking water watershed.” She argues that the caption will cause voters to mistakenly believe that Oregon law currently permits forestry-related spraying in all locations and that the measure would apply only in “specified locations” rather than most of Oregon. (McNitt Letter, 5).

3. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the caption should be revised.

We agree with Mr. Donnille’s comment that the phrase “amends landslide-related rulemaking requirements” does not indicate how those requirements are changed. We disagree, however, with Mr. Donnille’s suggested use of “strengthens,” because that term denotes an increase in power or depth, or perhaps that such rules, if challenged, may be more likely to survive judicial review, but it does not indicate a change in the scope of required rules. Under current law, the Board of Forestry is authorized “to adopt rules to reduce risk of serious bodily injury or death by a rapidly moving landslide directly related to forest practices.” ORS 527.710(10). Section 1(5) of the measure would authorize rules “prohibiting and regulating” specified activities “that pose risks to public health and safety, drinking water or aquatic habitat

¹ Ms. McNitt includes in her overview of the proposed measure a discussion of the portion of the measure that amends the Forestry Board’s landslide-related rulemaking requirements. (McNitt Letter, 4). However, she does not suggest any changes to the portions of the Draft Ballot Title that address those rulemaking requirements.

by impacting” two types of landslides. Thus, the measure proposes to expand the scope of the board’s landslide-related rulemaking requirements.

Ms. McNitt’s comments address language pertaining to aerial pesticide spraying in BT-79-16 that is substantively identical to language in Initiative Petition 78 (2016) (IP 78). She is correct that existing law prohibits forestry-related aerial spraying of pesticides in specified locations. Our Certified Ballot Title for IP 78 uses the phrase “on/‘near’ watersheds that provide drinking water, schools, homes” rather than “in specified locations.” BT-79-16, however, includes a change to landslide-related rulemaking as well as the prohibition on aerial pesticide spraying. Consequently, the phrase we used in our Certified Ballot Title for IP 78 must be truncated.

Current law prohibits “direct application” of pesticides within prescribed distances of certain drinking water sources, including the aquatic areas of Type D and F streams, and direct application of fungicides and non-biological insecticides within prescribed distances of Type N streams.² OAR 629-620-0400(4), (7). In addition, ORS 527.672 requires an operator aerially applying herbicides—and not other pesticides—as part of a forest operation to leave an unsprayed strip of at least 60 feet adjacent to a dwelling or school.³

Section 3 of the measure prohibits aerial application of pesticides for forestry purposes “on or near any watershed that serves as a source of drinking water.” “Watersheds” are “land areas.” (See McNitt Letter, 5). Thus, an effect of the proposed measure is to prohibit aerial application of pesticides for forestry-related purposes on or near land that is drained by a Type F or D stream, as well as land that drains into any other drinking water source, including any land that is beyond the distances specified in the current rules.

Ms. McNitt urges inclusion of the phrase “[b]ans most forestry-related aerial pesticide use” based on her understanding that “virtually all of Oregon is in a drinking water watershed.” (McNitt Letter, 5). Our role in preparing a ballot title is to do “a certain amount of basic interpretation” to identify the subject or major effect of the measure. *Nearman/Miller v. Rosenblum*, 358 Or 818, 827, ___ P3d ___ (2016) (citation omitted). A major effect of the proposed measure is to prohibit aerial pesticide spraying on or near watersheds that are drinking water sources. It is beyond our scope to opine as to whether such a prohibition would result in a ban in most—which could mean just more than 50 percent up to nearly 100 percent—of Oregon.

² Type D streams have domestic water use but no fish. Type F streams have either fish use or fish and domestic water use. Type N streams have neither fish nor domestic water use. OAR 629-600-0100 (84) – (86).

³ “Pesticide” is defined in ORS 634.006(8) to include, among other things, defoliants, fungicides, herbicides and insecticides. But that definition applies to ORS chapter 634, not to the Oregon Forest Practices Act. That Act does not define “pesticide.” In common usage, a “pesticide” is “an agent (as a chemical) used to destroy a pest” and “pest” includes “a plant or animal detrimental to man or his interests”. *Webster’s Third New Int’l Dictionary* 1689 (unabridged ed 2002).

After consideration of all the comments concerning the draft caption, we modify the caption to read as follows:

**Prohibits forestry-related aerial pesticide spraying in specified locations;
expands landslide-related rulemaking requirements**

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 “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft “yes” vote result statement provides:

Result of “Yes” Vote: “Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” watersheds that provide drinking water, schools, or homes; amends landslide-related rulemaking requirements.

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 rejected.” ORS 250.035(2)(b). The “no” vote result statement “should ‘address[] the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize [] the current law accurately.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft “no” vote result statement provides:

Result of “No” Vote: “No” vote retains current laws limiting forestland aerial pesticide/herbicide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing injury/death risks.

We address the comments and objections below.

1. Comments from Mr. Donnille

Mr. Donnille contends the portion of the “yes” statement addressing landslide-related rulemaking is flawed for the same reason as the caption, and that, when read in conjunction with the “no” statement, the result statements suggest that the proposed measure “somehow *reduces* or *eases* the rulemaking requirements.” (Donnille Letter, 3) (emphasis in original). He argues the “no” statement also misstates current law because the omission of “bodily” in the phrase “reducing injury/death risks” implies the board’s current rulemaking is broader than it actually is. (*Id.*)

2. Comments from Ms. McNitt

Ms. McNitt objects to the portion of the “yes” statement addressing aerial pesticide spraying for the same reason she objects to that portion of the caption—that it fails to inform voters that the measure would ban aerial pesticide spraying in most of Oregon. In addition, despite acknowledging that the “yes” statement uses the words of the measure, Ms. McNitt contends that it fails to inform voters that current law prohibits aerial pesticide spraying on or

near wetlands and streams that supply water for domestic use. (McNitt Letter, 6). Ms. McNitt also contends that the “yes” statement should mention that landowners will not be compensated for any loss of value resulting from the prohibition on aerial spraying of pesticides for forestry purposes. (*Id.*)

Ms. McNitt suggests two changes to the “no” statement. She suggests that “‘limitations’ should be referred to as ‘prohibitions’ because ORS 527.672 prohibits spraying within 60 feet of a dwelling or school,” and that “forestland” be deleted because it is redundant.

3. Our response to the comments

After consideration of the comments concerning the draft caption and the “yes” and “no” statements, we agree that the draft “yes” and “no” result statements should be revised. We agree with Mr. Donnille that the portion of the “yes” result statement addressing landslide-related rulemaking should be changed for the same reason as that portion of the caption. But we do not agree with the changes to the “yes” statement suggested by Ms. McNitt. As she recognizes, the “yes” statement includes words of the proposed measure. For the reasons discussed above, we disagree with her suggestion to include in the “yes” statement that the measure “bans most forestry-related pesticide use.” Moreover, because “watersheds” encompass areas within 300 feet of Type F and D streams, the reference to “watersheds” in the “yes” statement covers all areas currently subject to a prohibition on forestry-related aerial pesticide spraying as well as the additional areas that would be subject to the prohibition under the proposed measure.

We also disagree with Ms. McNitt that the provision in the measure that would “change * * * landowner rights * * * to receive just compensation for reduced land value that results from land use restrictions” (McNitt Letter, 6) should be mentioned in the “yes” statement. We agree with Ms. McNitt as to the effect of the last sentence in Section 4—providing that “regulations implemented under “the proposed measure “are not subject to the requirements of ORS 195.305”—but disagree that it is either “one of the most significant” effects or that it is an immediate effect.⁴ *Novick/Crew*, 337 Or at 574. The prohibition in the proposed measure would have no effect on property that is subject to prohibitions on aerial pesticide spraying under current law. As for its effect on other property, it cannot be known whether the measure would have any effect, including whether any effect will be negative or positive, until the scope of the measure and its actual effects are known. Thus, as Ms. McNitt points out, “it is unclear the extent to which IP 79 may cause property values to decrease.” (McNitt Letter 6). Consequently, the effect of the last sentence of Section 4, if any, is not “immediate.”

In the “no” statement, we agree with Mr. Donnille’s suggestion to add “bodily” and with Ms. McNitt’s suggestion to delete “forestland.” However, we disagree with Ms. McNitt that the “no” statement should use “prohibiting” rather than “limiting. Current law does not “prohibit”

⁴ ORS 195.305(1) provides: “If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation or regulations as provided in ORS 195.310 to 195.314.”

all aerial pesticide spraying in the specified locations. For example, ORS 527.672 prohibits aerial spraying of herbicides—and not other pesticides—within 60 feet of a dwelling or school.

In light of our response above, we modify the “yes” and “no” result statements to read as follows:

Result of “Yes” Vote: “Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” schools, homes, or watersheds that provide drinking water; expands landslide-related rulemaking requirements.

Result of “No” Vote: “No” vote retains current laws limiting aerial pesticide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing bodily injury/death risks.

D. 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 provides:

Summary: Oregon Forest Practices Act currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of injury/death from certain landslides. Measure prohibits forestry-related aerial pesticide application on/“near” watersheds supplying drinking water, schools, homes; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue spraying regulations; specifies grounds and procedures for challenging regulations. Requires forestry board to adopt rules “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides. Authorizes civil enforcement suits, attorney fees.

We address the comments and objections below.

1. Comments from Mr. Donnille

Mr. Donnille “submits that the summary is flawed for the reasons set forth” in his comments on the caption and results summaries. (Donnille Letter, 4).

2. Comments from Ms. McNitt

Ms. McNitt urges that the draft summary inform voters that “landowners would not be entitled to just compensation if their land loses value due to regulations promulgated under the measure.” She also suggests that “(undefined)” be added in the summary following the terms

“near” and “impacting,” which are in quotation marks in the summary but are not defined by the measure. (McNitt Letter 7).

3. Our response to the comments

We conclude that Mr. Donnille’s comments do not require any modifications to the summary. Unlike the draft caption and “yes” statements, the draft summary describes the difference between current law—“requires rules reducing risk of injury/death from certain landslides”—and the proposed measure—“[r]equires forestry board to adopt rules ‘prohibiting and regulating’ timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides.” A comparison of those phrases informs the voter that the proposed measure “expands” landslide-related rulemaking requirements. However, we agree with Mr. Donnille’s suggestion to insert “bodily.”

We disagree with Ms. McNitt’s suggested changes to the summary. For the reasons given above, we do not agree that the summary must describe that landowners will not be entitled to compensation for any diminution in the value of their property resulting from the measure. As for adding “(undefined)” after “near” and “impacting,” we agree that doing so would inform voters of a potential ambiguity. However, if we adopt Ms. McNitt’s suggestion, we would have to add “undefined” after three other quoted phrases that are included in the summary. *See Cross v. Rosenblum*, 359 Or 136, 142, ___ P3d ___ (2016) (“The word limits * * * may not permit the Attorney General to annotate both terms as ‘(defined),’ but they do permit the Attorney General to treat the terms equally”). Because the draft summary contains 125 words, we would have to delete five words to add “(undefined)” next to each of quoted words or phrases. On balance, we conclude that the summary, as modified below, better informs the voters what will happen if the measure is adopted than it would if words are deleted in order to add “(undefined)” to each quoted word or phrase.

After consideration of the comments concerning the summary, we modify the summary to read as follows:

Summary: Oregon Forest Practices Act currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of bodily injury/death from certain landslides. Measure prohibits forestry-related aerial pesticide application on/“near” schools, homes, watersheds supplying drinking water; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue spraying regulations; specifies grounds and procedures for challenging regulations. Requires forestry board to adopt rules “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides. Authorizes enforcement lawsuits, attorney fees.

May 25, 2016

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E. Conclusion

We certify the attached ballot title.

Sincerely,

/s/ Keith L. Kutler

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Enclosure

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BALLOT TITLE

Prohibits forestry-related aerial pesticide spraying in specified locations; expands landslide-related rulemaking requirements

Result of “Yes” Vote: “Yes” vote prohibits aerial pesticide spraying for forestry purposes on or “near” schools, homes, or watersheds that provide drinking water; expands landslide-related rulemaking requirements.

Result of “No” Vote: “No” vote retains current laws limiting aerial pesticide spraying for forestry purposes in specified locations; requiring landslide-related rules reducing bodily injury/death risks.

Summary: Oregon Forest Practices Act currently encourages forestland maintenance “consistent with sound management” of resources; prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within 60 feet of dwellings/schools; requires rules reducing risk of bodily injury/death from certain landslides. Measure prohibits forestry-related aerial pesticide application on/“near” schools, homes, watersheds supplying drinking water; amends policy to manage forestland “consistent with protection of public health” and resources. Requires forestry board to issue spraying regulations; specifies grounds and procedures for challenging regulations. Requires forestry board to adopt rules “prohibiting and regulating” timber/rock/gravel operations posing risks to health and safety, drinking water or aquatic habitat by “impacting” landslides. Authorizes enforcement lawsuits, attorney fees.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 22, 2016, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 79 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jill Odell Gibson, attorney for petitioner Kristina McNitt, by using the court's electronic filing system.

I further certify that on June 22, 2016, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 79 to be served upon Shawn Donnille, Kate Taylor, and Steve Pedery, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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/s/ Keith L. Kutler

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