

IN THE SUPREME COURT OF THE STATE OF OREGON

Kristina McNitt,

Petitioner,

v.

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

Respondent.

Case No.

PETITION TO REVIEW BALLOT
TITLE CERTIFIED BY THE
ATTORNEY GENERAL

Initiative Petition 78 (2016)

BALLOT TITLE CERTIFIED

May 6, 2016

Initiative Petition 78

Chief Petitioners: Shawn Donnille, Kate Taylor, Steve Pedery

Jill Gibson, OSB #973581
Gibson Law Firm, LLC
1500 SW Taylor St.
Portland, OR 97223
jill@gibsonlawfirm.org
P: 503.686.0486
F: 866.511.2585

Attorneys for Petitioner

Ellen F. Rosenblum, OSB #753239
Attorney General
Keith L. Kutler
Senior Assistant Attorney General
keith.kutler@doj.state.or.us
1162 Court St., NE
Salem, OR 97301-4096
P: 503.378.4402
F: 503.378.3997

Attorneys for Respondent

I. PETITION TO REVIEW BALLOT TITLE

Petitioner Kristina McNitt is an elector of this State, a person dissatisfied with the ballot title that is the subject of this action, and adversely affected by Respondent's actions. Petitioner timely submitted written comments concerning the draft ballot title and has standing to seek review pursuant to ORS 250.085(2).¹

II. ARGUMENTS AND AUTHORITIES

A. Introduction

IP 78 would amend the Oregon Forest Practices Act, which sets standards for all commercial activities involving the harvesting of trees in Oregon forests. *See* ORS ch 527. Among other requirements, the Act requires replanting trees within two years of a harvest and these new trees must be “free to grow” within six 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

¹ A copy of IP 78 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; the Attorney General's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

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% of all pesticides used every year in Oregon. Oregon Department of Forestry, Forest Facts, May 2013 (Exhibit 6). Among all pesticides used in Oregon for any purpose, the forest sector generally uses only herbicides.

Oregon law prohibits aerially spraying pesticides² 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, all pesticide use must comply with Oregon’s Pesticide Control

² Under Oregon law, “pesticide” has a broad definition and includes fungicides, herbicides, and insecticides. ORS 634.006(8); ORS 527.310(9).

Act which prohibits applying pesticides in a manner “inconsistent with its labeling” or in a “faulty, careless, or negligent manner.” ORS 634.372(2) and (4), respectively. 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. For example, the label for an herbicide called Oust XP ® prohibits aerial application within 75 feet of water and aquatic vegetation. Thus, a forest landowner would have to comply with the stricter 75 foot buffer zone rather than the state’s 60 foot buffer zone.

In addition to state laws and regulations regarding forest practices and pesticide use, the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”) governs the use of all pesticides according to federally-approved labels and provides that pesticide labels carry the full force of federal law. 7 U.S.C. § 136 *et seq.* FIFRA is administered and enforced by the U.S. Environmental Protection Agency and the Oregon Department of Agriculture.

B. IP 78

IP 78 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 ban 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.” Attached as Exhibit 7 is an Oregon Water Resources Department map of the 18 major drainage basins in Oregon, each of which would amount to a “watershed.” It is exceedingly likely that all of these contain at least a single source of drinking water. 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 would also be prohibited.

Significantly, the measure provides that its regulations and 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, landowners would not be compensated for any decrease in their land’s value that results from the measure.

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.*

C. IP 78's Ballot Title

1. The Caption

ORS 250.035(2)(a) requires a ballot title to 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 P3d 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).

The fundamental flaw with the caption is that it will cause voters to mistakenly believe that current law does not already prohibit forestry-related aerial pesticide spraying on or near drinking water sources, schools, and homes. ORS 527.672 clearly prohibits aerially spraying herbicides "on" and within 60 feet of

schools and homes. Because the measure does not define “near,” it is unknown whether the measure would change the current prohibition of spraying within 60 feet of a school or home. In other words, if “near” is defined as within 60 feet, then the measure does not propose a change in the context of existing law regarding spraying herbicides around schools and homes. Regarding the protection of drinking water, existing law clearly prohibits spraying certain pesticides “on” or within 300 feet of streams and wetlands that provide water for domestic use, and it prohibits spraying all pesticides “on” or within 60 feet of these domestic water sources. OAR 629-620-0400(7); OAR 629-620-0400(4), respectively. As such, the caption does not identify the actual major effects of the measure. Rather the subject matter of the measure is to require *additional* restrictions on pesticide use on or near watersheds, schools, and homes.

The other subject matter of IP 78 is an effective ban on forestry-related aerially sprayed pesticides, and the measure understates this actual major effect. *See Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006) (a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant). As discussed above, the protection of watersheds is what results in the expansive reach of the measure, because virtually all of Oregon is in a drinking water watershed. In preparing a ballot title a “certain amount of basic interpretation” is allowed; thus, the caption should identify IP 78’s

actual major effect of banning most aerial pesticide spraying even though the measure does not use those words. *Wolf v. Myers*, 343 Or 494, 500, 173 P3d 812 (2007) (citation omitted).

Petitioner respectfully suggests the following caption:

Bans most forestry-related aerial pesticide use; requires additional restrictions on pesticide use “near” watersheds

2. The Results Statements

ORS 250.035(2) (b) requires a ballot title to contain “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The statement must inform voters of the “outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public.” *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). IP 78’s “yes” statement is noncompliant for the reasons stated above. In fact, the “yes” statement is even more misleading than the caption because the word “watershed” is absent, which results in the statement describing current law rather than changes proposed by the measure.

The “yes” statement must also identify the significant change regarding landowners’ right to receive just compensation when land use restrictions reduce their land’s value. Although it is unclear the extent to which IP 78 may cause property values to decrease, it is clear and certain that if such decrease occurs affected landowners would not be entitled to receive just compensation.

ORS 250.035(2)(c) requires that a ballot title contain a “simple and understandable statement,” of not more than 25 words, explaining what will happen if voters reject the measure. The “no” statement is noncompliant because the Attorney General states that ORS 257.672 only “limits” aerial herbicide spraying near schools and dwellings, when it actually *prohibits* such spraying near - within 60 feet of - schools and dwellings. Thus, the word “limits” should be replaced with “prohibits.” The statement should also explain that if the measure fails landowners would retain the right to receive just compensation for reduced land values.

Petitioner respectfully suggests the following results statements:

Result of “Yes” Vote: “Yes” vote bans most forestry-related aerial pesticide use; requires additional restrictions on pesticide use “near” watersheds; landowners not compensated for reduction in land value.

Result of “No” Vote: “No” vote retains current law prohibiting aerial pesticide use within 60-300 feet of drinking water, schools, homes; retains landowner compensation for reduced land value.

3. The 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,

777 P2d 406 (1989)).

The summary is noncompliant because it fails to inform voters that landowners would not 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 word “near” is not defined by the measure. This word is key to the application and enforcement of IP 78 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).

Petitioner respectfully suggests the following summary:

Summary: Oregon Forest Practices Act currently encourages maintenance of forestland “consistent with sound management of soil, air, water, fish and wildlife resources, and scenic resources,” prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within “60 feet adjacent” to a dwelling or school. Measure prohibits “aerial application of pesticides, herbicides or fungicides for forestry purposes on or near [undefined] any watershed that is a source of drinking water, any school, or any home” and amends public policy to manage forestland “consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources, and scenic resources.” Landowners not paid just compensation for reduction in fair market value of their land due to new prohibitions.

III. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title back to the Attorney General for modification.

DATED this 20th day of May, 2016.

Respectfully submitted,

/s/ Jill Gibson

Jill Gibson, OSB #973581

jill@gibsonlawfirm.org

GIBSON LAW FIRM, LLC

Attorneys for Petitioner

RECEIVED

2015 DEC 22 PM 12:13

SECRETARY OF STATE

Findings:

Forestlands in Oregon provide a broad range of important services to the citizens of the State, including clean drinking water, habitat for fish and wildlife, clean air and economic and recreational opportunities.

Sustainable economic growth in Oregon's rural communities depends upon protecting and enhancing these values to maintain public health and safety, as well as attract new investment, new industries and new jobs.

Oregon's Forest Practices Act is out-of-date and does not do enough to protect clean drinking water. The standards and regulations that apply to logging and associated activities have fallen far behind the best available science, standards set by other jurisdictions, and the evolving social and economic needs of the State. Furthermore, the State's weak regulation of aerial pesticide spraying has failed to protect public health by allowing Oregon families to be exposed to cancer-causing chemicals and allowing the contamination of drinking water sources.

BE IT ENACTED BY THE PEOPLE OF OREGON:

Section 1. ORS 527.630 is amended as follows:

(1) Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of **protection of public health**, soil, air, **drinking water**, ~~fish~~-**aquatic** and wildlife resources and scenic resources within visually sensitive corridors as provided in ORS 527.755 and to ensure that continuous benefits of those resources for future generations of Oregonians.

(2) It is recognized that operations on forestland are already subject to other laws and to regulations of other agencies which deal primarily with consequences of such operations rather than the manner in which operations are conducted. It is further recognized that it is essential to avoid uncertainty and confusion in enforcement and implementation of such laws and regulations and in planning and carrying out operations on forestlands.

(3) To encourage forest practices implementing the policy of ORS 527.610 to 527.770 and 527.990 and 527.992, it is declared to be in the public interest to vest in the State Board of Forestry exclusive authority to develop and enforce statewide and regional rules pursuant to ORS 527.710 and to coordinate with other state agencies and local governments which are concerned with the forest environment.

(4) The board may adopt and enforce rules addressing scenic considerations only in accordance with ORS 527.755.

(5) The board shall adopt and enforce forest practice rules to reduce the risk of serious bodily injury or death from a rapidly moving landslide only in accordance with ORS 527.710 (10). As used in this subsection, “rapidly moving landslide” has the meaning given in ORS 195.250.

(6) The State of Oregon should provide a stable regulatory environment to encourage investment in private forestlands.

Section 2. Sections 3, 4 and 5 are added to and made a part of ORS Chapter 527.

Section 3. It shall be unlawful for any person, operator, timber owner, landowner, or agency to authorize, to carry out, to allow to be carried out, or to participate in 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 4. Notwithstanding the provisions of ORS 527.714, within 12 months of the date of enactment, the Board of Forestry shall issue regulations implementing the prohibition of section 3 based on the best available science. Any act taken in violation of section 3 or the regulations issued under this section is declared to be a per se nuisance and ultra hazardous activity. The primary purpose of this Act and all regulations implemented under this Act is the protection of public health and safety and thus are not subject to the requirements of ORS 195.305.

Section 5. (1) Notwithstanding any other provision of this chapter and ORS 30.930 to 30.947, any person may commence a civil action in a circuit court in any county where a violation has occurred to enforce the requirements of section 3 and regulations issued under section 4 against the Board, the Department of Forestry, or any other person, landowner, operator or timber owner. In any action against the Board or Department for failure to issue regulations, the court shall order the Board to take such actions as are required under by law.

(2) The validity of any regulation implementing the provisions of sections 3 and 4 may be determined upon a petition by any person to the Court of Appeals. In reviewing the rule, the court shall review the whole record that was before the agency at the time of its decision. The reviewing court shall hold unlawful and set aside any rule found to be:

- (a) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
- (b) contrary to constitutional right, power, privilege or immunity;
- (c) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; or
- (d) without observance of procedure required by law.

(3) If a person seeking enforcement of this Act or review of a regulation under subsections (a) or (b) of this section prevails in the suit in whole or in part, the person shall be awarded reasonable attorney fees along with costs and disbursements at trial and on appeal.

Section 6. If any provision of this 2016 Act is held invalid for any reason, all remaining provisions of this Act shall remain in place and be given full force and effect.

JEANNE P. ATKINS

SECRETARY OF STATE

ROBERT TAYLOR

DEPUTY SECRETARY OF STATE



JIM WILLIAMS

DIRECTOR

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

(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: April 7, 2016

SUBJECT: Initiative Petition **2016-078** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on April 7, 2016, for Initiative Petition **2016-078**, proposed for the November 8, 2016, General Election.

Caption

Prohibits forestry-related aerial spraying of pesticides on or near drinking water, schools, or homes

Chief Petitioners

Shawn Donille 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

Comments

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

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

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

| Comments Due | How to Submit | Where to Submit |
|----------------|----------------|-------------------------------------------|
| April 21, 2016 | Scan and Email | irrlistnotifier.sos@state.or.us |
| | Fax | 503.373.7414 |
| | Mail | 255 Capitol St NE Ste 501, Salem OR 97310 |



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

April 7, 2016

RECEIVED
2016 APR 7 PM 4 52
SECRETARY OF STATE

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 Spraying of Pesticides
On or Near Drinking Water, Schools, or Homes
DOJ File #BT-78-16; Elections Division #2016-078

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 a ban on aerial spraying of pesticides for forestry-related purposes.

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/7292054

Enclosure

Shawn Donille
771 W 52nd Avenue
Eugene, OR 97405

Kate Taylor
P.O. Box 152
Rockaway Beach, OR 97136

Steve Pedery
7644 SE Taggart Court
Portland, OR 97206

DRAFT BALLOT TITLE

Prohibits forestry-related aerial spraying of pesticides on or near drinking water, schools, or homes

Result of “Yes” Vote: “Yes” vote prohibits aerial spraying of pesticides, herbicides, fungicides for forestry purposes on or near watersheds that are drinking water sources, schools, or homes.

Result of “No” Vote: “No” vote retains current law, which does not prohibit aerial spraying of pesticides, herbicides, fungicides; limits aerial spraying of herbicides on forestland near schools, dwellings.

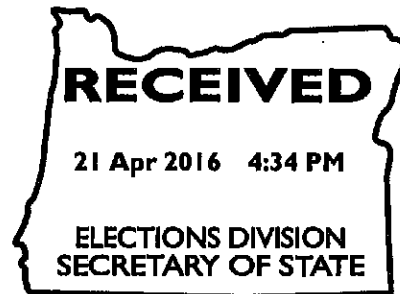
Summary: Oregon Forest Practices Act currently encourages maintenance of forestland “consistent with sound management of soil, air, water, fish and wildlife resources, and scenic resources” and requires operator applying herbicides by aircraft to leave “unsprayed strip of at least 60 feet adjacent” to a dwelling or school. Measure prohibits “aerial application of pesticides, herbicides or fungicides for forestry purposes on or near any watershed that is a source of drinking water, any school, or any home” and amends public policy to manage forestland “consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources, and scenic resources.” Requires Board of Forestry to issue regulations; specifies grounds and procedures for challenging rules. Authorizes civil enforcement suits to enforce prohibition, attorney fees.

RECEIVED
2016 APR 7 PM 4 52
SECRETARY OF STATE

April 21, 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 78 (2016)

Dear Secretary Atkins,

I represent Kristina McNitt, who is an elector in the State of Oregon and wishes to comment on the draft ballot title for IP 78 (2016) (“the measure”). This measure would amend the Oregon Forest Practices Act, ORS chapter 527, and require the Oregon Board of Forestry (“the Board”) to 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.” Section 3.

COMMENTS ON PROCEDURAL REQUIREMENTS

IP 78 fails to comply with 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 constitutional requirement to set forth the entire text of a proposed law 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.

If IP 78 passed, ORS 527.672- which prohibits aerially spraying herbicides within 60 feet of homes and schools- would be amended by the additional prohibitions required by the measure. However, voters are not given the full text of ORS 527.672 as it would be amended and are not even told that ORS 527.672 would be amended by the measure. To comply with the full text requirement, IP 78 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. INTRODUCTION

The Oregon Forest Practices Act requires replanting new trees within two years of a forest 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.

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, and in those situations the stricter label requirements trumps state law.

These laws already make it unlawful to aerially spray pesticides within 60-300 feet of drinking water, homes, and schools, depending on the situation. Regarding the protection of water, 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

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 of these comments, when “pesticide” is used it refers also to fungicides, herbicides, and insecticides.

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 feet buffer zone.

II. IP 78

IP 78 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.

Significantly, the measure would exempt this ban on aerially sprayed pesticides 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, landowners would not be compensated for any decrease in their land’s value. 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 78:

**Prohibits forestry-related aerial spraying of pesticides
on or near drinking water, schools, or homes**

Result of “Yes” Vote: “Yes” vote prohibits aerial spraying of pesticides, herbicides, fungicides for forestry purposes on or near watersheds that are drinking water sources, schools, or homes.

Result of “No” Vote: “No” vote retains current law, which does not prohibit aerial spraying of pesticides, herbicides, fungicides; limits aerial spraying of herbicides on forestland near schools, dwellings.

Summary: Oregon Forest Practices Act currently encourages maintenance of forestland “consistent with sound management of soil, air, water, fish and wildlife resources, and scenic resources” and requires operator applying herbicides by aircraft to leave “unsprayed strip of at least 60 feet adjacent” to a dwelling or school. Measure prohibits “aerial application of pesticides, herbicides or fungicides for forestry purposes on or near any watershed that is a source of drinking water, any school, or any home” and amends public policy to manage forestland “consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources, and scenic resources.” Requires Board of Forestry to issue regulations; specifies grounds and procedures for challenging rules. Authorizes civil enforcement suits to enforce prohibition, 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).

Our fundamental concern with the caption, and all parts of the ballot title, is that it understates the existing regulatory protection for water, schools, and homes from aerially sprayed pesticides and grossly understates the actual major effect of the measure. *See Towers v.*

Myers, 341 Or 357, 362, 142 P3d 1040 (2006) (a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant). IP 78's draft caption will simultaneously cause voters to mistakenly believe (1) that Oregon law currently permits aerial spraying, for forestry purposes, of drinking water, schools, and homes (a practice that is expressly prohibited) and (2) that the measure only applies to the application of pesticides directly to or near water, as opposed to watersheds that are drinking water sources, which includes most of Oregon. While "prohibit[ing] forestry-related aerial spraying of pesticides on or near drinking water, schools, or homes" 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 of 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, while conveying that this ban would be an *additional* protection.

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 will schools and homes be protected from aerial spraying, but most all buildings and locations would be protected. Focusing on "schools and homes" 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. As such, "near" is a key word, and because it is not defined, it should be placed in quotation marks to indicate such to voters. *See, e.g., Morgan v. Myers*, 342 Or 165, 169, 149 P3d 1160 (2006) (adding quotation marks around words "conduct" and "personal behavior" in ballot title involving free speech rights when terms were undefined in measure itself); *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). Additionally, without quotation marks voters may believe that the Attorney General has chosen the word "near" to describe the distance between prohibited spraying and the watershed, school, or home. *See Crabtree v. Paulus*, 296 Or 325, 675 P2d 488 (1984) (use of the word "reliable" "not unfair, if set off in quotation marks to show that the proposed amendment, rather than respondent or this court uses this word").

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

Bans most forestry-related aerial pesticide use; requires additional restrictions on pesticide use "near" watersheds

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).

The draft “yes” statement suffers from the same deficiencies as the draft caption because (1) it does not put “near” in quotation marks to indicate that the word is used in the measure but undefined by the measure, (2) it will lead voters to mistakenly believe that Oregon law currently does not protect drinking water, schools, and homes from aerially sprayed pesticides, and (3) it 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. Although the “yes” statement uses the words of the measure, the words of the measure are misleading because Oregon law already prohibits aerial spraying of pesticides on or near drinking water, schools, and homes and those prohibitions would continue even if the measure failed to pass. What distinguishes IP 78 from current law is the protection of all *watersheds* that serve as a source of drinking water. The “yes” statement, therefore, should focus on the protection of watersheds.

The “yes” statement must also mention the significant change regarding landowner rights and Oregon public policy regarding just compensation. Moreover, to understand the results of IP 78, voters must know that the financial “cost” of the additional protections provided by the measure would be borne by forest landowners.

We suggest the following statement:

Result of “Yes” Vote: “Yes” vote bans most forestry-related aerial pesticide use; requires additional restrictions on pesticide use “near” watersheds; landowners not compensated for reduction in land value.

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 does not comply with these requirements for all the reasons stated above. Additionally, more than just being misleading, the statement is clearly incorrect because it is not true that “current law [] does not prohibit aerial spraying of pesticides, herbicides, fungicides.” To recap, existing federal and state law prohibits the following:

- Aerially spraying fungicides and non-biological insecticides 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))
- Aerially spraying pesticides (which includes herbicides and fungicides) within 60 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(4))

- Aerially spraying herbicides within 60 feet of a home or school (ORS 527.672)
- Aerially spraying any pesticide (which includes herbicides and fungicides) in violation of the product's label (ORS 634.372); FIFRA, 7 USC § 136).

We suggest the following "no" statement:

Result of "No" Vote: "No" vote retains current law prohibiting aerial pesticide use within 60-300 feet of drinking water, schools, homes; retains 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 accurately summarize current prohibitions of aerially spraying pesticides around water; however, it does discuss current law regarding protection of schools and homes. Additionally, 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.

To address these issues, we suggest the following summary:

Summary: Oregon Forest Practices Act currently encourages maintenance of forestland "consistent with sound management of soil, air, water, fish and wildlife resources;" prohibits aerially sprayed fungicides within 300 feet of wetlands/streams, pesticides/herbicides/fungicides within 60 feet of wetlands/streams, herbicides within 60 feet of schools/homes. Measure requires Board of Forestry to issue additional prohibitions of aerial application of pesticides, herbicides or fungicides on or "near" (undefined) watersheds that are sources of drinking water, schools, or homes; landowners not paid just compensation for reduction in fair market value of their land due to new prohibitions; amends public policy to manage forestland "consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources." Authorizes civil enforcement suits to enforce prohibition, attorney fees.

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

Bill 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 9, 2016

SUBJECT: Initiative Petition 2016-078 Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on May 6, 2016, for Initiative Petition 2016-078, proposed for the November 8, 2016, General Election.

Caption

Prohibits forestry-related aerial pesticide spraying on/"near" watersheds that provide drinking water, schools, homes

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

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

May 20, 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

DIRECTOR

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

(503) 986-1518

CONSTITUTIONAL REQUIREMENT RULING

| Initiative Petition No. | Date Filed | Comment Deadline | Certified Ballot Title Due |
|----------------------------|-------------------|------------------|-------------------------------|
| 2016-078 | December 22, 2015 | April 21, 2016 | May 6, 2016 |

Draft Ballot Title Caption

Prohibits forestry-related aerial spraying of pesticides on or near drinking water, schools, or homes

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

4/28/16
 Dated



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

May 6, 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
On/“Near” Watersheds that Provide Drinking Water, Schools, Homes
DOJ File #BT-78-16; Elections Division #2016-078

Dear Mr. Williams:

We received comments on the Attorney General’s draft ballot title for Initiative Petition 78 (2016) (BT-78-16) from co-chief petitioner Shawn Donnille (through counsel, Steven C. Berman) and Kristina McNitt (through counsel, Jill Gibson). Mr. Donnille does not object to the draft ballot title. Ms. McNitt objects 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 spraying of pesticides on or near drinking water,
schools, or homes**

We address the comments and objections below.

1. Comments from Ms. McNitt

Ms. McNitt objects that the caption “understates the existing regulatory protection for water, schools and homes from aerially sprayed pesticides and grossly understates the actual effect of the measure.” (McNitt Letter, 4). In her view, the caption will cause voters to mistakenly believe that Oregon law currently permits aerial spraying of drinking water, schools and homes and that the measure applies only to application of pesticides directly to or near water. She argues that the major effect of the measure is “a ban on the aerial spraying of watersheds” and that a ban on such spraying “near” watersheds would have the effect of banning spraying in “most of Oregon.” (*Id.* at 5). She also suggests that “near” should be placed in quotation marks because it is a key word and is not defined in the measure. (*Id.* at 5).

2. Our response to the comments

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

Ms. McNitt’s argument that existing law prohibits aerial spraying of drinking water, schools and homes for forestry purposes is only partly correct. 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 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.¹ Thus, Ms. McNitt is correct that current law does not permit “direct application” of pesticides within prescribed distances of certain drinking water sources, including the aquatic areas of Type D and F streams.²

¹ 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).

² “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

Footnote continued...

However, those rules do not prohibit application of pesticides near schools or homes, unless the schools or homes happen to be within 60 or 300 feet, as applicable, of an area described in the rules. Nor does ORS 527.672 prohibit aerial application of all pesticides. It requires only that an operator aerially applying herbicides—and not other pesticides—as part of a forest operation must leave an unsprayed strip of at least 60 feet adjacent to a dwelling or school. Thus, the draft caption correctly describes that the measure, if enacted, would prohibit forestry-related aerial application of pesticides on or near schools or homes.

However, we agree with Ms. McNitt that the reference to “water sources” in the caption may be misleading. Ms. McNitt is correct that current law prohibits forestry-related, direct application of pesticides within specified distances of Type D or F streams and certain lakes and other areas of standing water. The measure prohibits forestry-related aerial application of pesticides “on or near watersheds that are drinking water sources.” By definition, “watersheds” are “land areas.” (See McNitt Letter, 3). 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.

Thus, the major effects of the proposed measure are prohibitions on forestry-related aerial spraying of all pesticides on or near schools, homes, and land areas that drain into Type F or D streams or other drinking water sources. We agree that the reference in the caption to “drinking water” does not capture a portion of the measure’s major effect, which is to prohibit forestry-related aerial application of pesticides on land areas that drain to drinking water sources.

Finally, Ms. McNitt suggests that “near” be placed in quotation marks because the scope of the proposed prohibition on forestry-related aerial application of pesticides depends on how far “near” extends the prohibition beyond a “watershed that serves as a source of drinking water.” We agree.

In light of all Ms. McNitt’s comments concerning the draft caption, we modify the caption to read as follows:

**Prohibits forestry-related aerial pesticide spraying on/“near” watersheds
that provide drinking water, schools, homes**

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

(...continued)

“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).

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 spraying of pesticides, herbicides, fungicides for forestry purposes on or near watersheds that are drinking water sources, schools, or homes.

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 law, which does not prohibit aerial spraying of pesticides, herbicides, fungicides; limits aerial spraying of herbicides on forestland near schools, dwellings.

We address the comments and objections below.

1. Comments from Ms. McNitt

Ms. McNitt contends the “yes” statement contains the same deficiencies as the draft caption—it fails to put “near” in quotation marks, will lead voters to mistakenly believe current law does not protect drinking water, schools and homes from aurally sprayed pesticides, and fails to inform voters that the measure will result in a ban on aurally sprayed pesticides for forestry purposes in most of Oregon. In addition, Ms. McNitt claims the measure significantly changes landowner rights by providing that landowners will not be compensated for any loss of value resulting from the prohibition on aerial spraying of pesticides for forestry purposes. (McNitt Letter 6).

2. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the draft “yes” and “no” vote result statements should be revised. We agree that the “yes” result statement should put “near” in quotation marks. However, unlike the original caption that used the broad phrase “drinking water” and did not refer to watersheds, our draft “yes” statement includes the phrase “watersheds that are drinking water sources.” And, for the reasons discussed above, we do not agree that current law protects schools and homes from forestry-related aerial spraying of all pesticides, because ORS 527.672 applies only to herbicides.

We also disagree with Ms. McNitt that the last sentence of Section 4 of the proposed measure, which provides that the proposed Act and regulations implemented under it are not

subject to ORS 195.305, is “one of the most significant and immediate” effects of the measure.³ *Novick/Crew*, 337 Or at 574. We agree with Ms. McNitt as to the effect of that portion of Section 4—that a landowner would not be entitled to just compensation for a reduction in fair market value resulting from the change in the prohibition on aerial spraying of pesticides resulting from the proposed measure—but disagree that it is either “one of the most significant” effects or that it is an immediate effect. There is no certainty that there will be any diminution in property value. As Ms. McNitt points out, current law already prohibits aerial spraying of pesticides in many locations. (McNitt Letter 2). Consequently, the proposed measure cannot cause a diminution in value of properties subject to the existing prohibition. As for the measure’s effect on other property, it cannot be known whether the measure will affect property values at all, including whether any effect will be negative or positive, until the scope of the measure and its actual effects are known. Thus, the effect of the last sentence of Section 4, if any, is not “immediate.”

As discussed above, we agree that Ms. McNitt is partially correct when she says that current law prohibits aerial application of pesticides. Current law, however, limits forestry-related aerial pesticide spraying only of herbicides, and not other pesticides, within 60 feet of schools and homes, and the prohibition on direct application of pesticides near drinking water sources under current law is described in Terms of Type F and D streams and other bodies of water, not watersheds.

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

Result of “Yes” Vote: “Yes” vote prohibits aerial spraying of pesticides, herbicides, fungicides for forestry purposes on or “near” watersheds that are drinking water sources, schools, or homes.

Result of “No” Vote: “No” vote retains current law prohibiting aerial pesticide spraying near specified streams/lakes/drinking water supplies; limits aerial herbicide spraying on forestland near schools, dwellings.

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:

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.”

Summary: Oregon Forest Practices Act currently encourages maintenance of forestland “consistent with sound management of soil, air, water, fish and wildlife resources, and scenic resources” and requires operator applying herbicides by aircraft to leave “unsprayed strip of at least 60 feet adjacent” to a dwelling or school. Measure prohibits “aerial application of pesticides, herbicides or fungicides for forestry purposes on or near any watershed that is a source of drinking water, any school, or any home” and amends public policy to manage forestland “consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources, and scenic resources.” Requires Board of Forestry to issue regulations; specifies grounds and procedures for challenging rules. Authorizes civil enforcement suits to enforce prohibition, attorney fees.

We address the comments and objections below.

1. Comments from Ms. McNitt

Ms. McNitt urges changes to the draft summary for the same reasons she suggests changes to the caption, “yes” and “no” statements. In her view, the draft summary does not accurately summarize current prohibitions on aerially spraying pesticides around water and does not inform voters that landowners would not be subject to just compensation if their land loses value as a result of regulations promulgated under the measure, but she agrees with the discussion in the draft summary of current law regarding protection of schools and homes. (McNitt Letter 7).

2. Our response to the comments

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

Summary: Oregon Forest Practices Act currently encourages maintenance of forestland “consistent with sound management of soil, air, water, fish and wildlife resources, and scenic resources,” prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within “60 feet adjacent” to a dwelling or school. Measure prohibits “aerial application of pesticides, herbicides or fungicides for forestry purposes on or near any watershed that is a source of drinking water, any school, or any home” and amends public policy to manage forestland “consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources, and scenic resources.” Requires forestry board to issue regulations; specifies grounds and procedures for challenging rules. Authorizes civil enforcement suits, attorney fees.

May 6, 2016

Page 7

E. Conclusion

We certify the attached ballot title.

Sincerely,

/s/ Keith L. Kuther

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

KLK:aft/7364899

Enclosure

Shawn Donnille
771 W 52nd Avenue
Eugene, OR 97405

Kate Taylor
P.O. Box 152
Rockaway Beach, OR 97136

Steve Pedery
7644 SE Taggart Court
Portland, OR 97206

Steven Berman
Stoll Berne PC
209 SW Oak St., Ste. 500
Portland, OR 97204

Jill Gibson
Gibson Law Firm LLC
1500 SW Taylor St.
Portland, OR 97205

BALLOT TITLE

Prohibits forestry-related aerial pesticide spraying on/“near” watersheds that provide drinking water, schools, homes

Result of “Yes” Vote: “Yes” vote prohibits aerial spraying of pesticides, herbicides, fungicides for forestry purposes on or “near” watersheds that are drinking water sources, schools, or homes.

Result of “No” Vote: “No” vote retains current law prohibiting aerial pesticide spraying near specified streams/lakes/drinking water supplies; limits aerial herbicide spraying on forestland near schools, dwellings.

Summary: Oregon Forest Practices Act currently encourages maintenance of forestland “consistent with sound management of soil, air, water, fish and wildlife resources, and scenic resources,” prohibits aerial pesticide spraying within specified distances of streams supplying drinking water, other bodies of water, prohibits aerial herbicide application within “60 feet adjacent” to a dwelling or school. Measure prohibits “aerial application of pesticides, herbicides or fungicides for forestry purposes on or near any watershed that is a source of drinking water, any school, or any home” and amends public policy to manage forestland “consistent with protection of public health, soil, air, drinking water, aquatic and wildlife resources, and scenic resources.” Requires forestry board to issue regulations; specifies grounds and procedures for challenging rules. Authorizes civil enforcement suits, attorney fees.



Forest Facts

HERBICIDE USE AND FORESTRY

May 2013

What are “herbicides”?

Herbicides are a class of pesticides used to control unwanted plants. Herbicides are used in agriculture, residential and urban areas, forestry, industrial sites, railroads, and other settings.

How are herbicides used in forestry?

Oregon’s Forest Practices Act requires planting of tree seedlings within two years after a timber harvest. To meet this objective, both families with small properties and large industrial companies use herbicides to control unwanted vegetation so tree seedlings can receive adequate water, nutrients and light. Herbicides are also used by many forest landowners to control damaging, invasive plants such as knotweed, which can take over streamside areas and destroy native plants.

Some landowners see herbicides as the most cost-effective means of achieving reforestation goals after logging or fire, and for converting brushy land to forested land; other landowners choose to meet their goals without using herbicides. Other tools available to control unwanted vegetation include cutting brush by hand or with power tools, grubbing grass sod from around individual trees, mowing, and placing mulch mats around individual trees.

How often are herbicides used in forestry?

Forest landowners are responsible for only 4 percent of all pesticides (including herbicides) used every year in Oregon. In Western Oregon forests, herbicides are typically applied in the first two or three years after harvest. Because of different management methods on the slower-growing forests in eastern Oregon, herbicides are used much less in that region of the state.

What laws regulate forest herbicide use?

All pesticides used in the United States must be registered with the U.S. Environmental Protection Agency (EPA) and must carry federally approved labels describing permitted uses and appropriate protection measures. To be registered, pesticides must be tested for effects on humans and the environment. In Oregon, pesticide sellers and applicators must also comply with the state's Pesticide Control law (Oregon Revised Statute Chapter 634) which requires state product registration and applicator licensing, and prohibits faulty, careless or negligent applications.

Users of pesticides on forest land must follow an extra layer natural resource protection laws in the Oregon Forest Practices Act, administered by the Oregon Department of Forestry. The Forest Practices Act

requires operators to protect soil, air, fish, wildlife, and water quality through measures that include:

- Preventing leaks and spills
- Avoiding aerial herbicide applications within 60 feet of fish-use streams or drinking water streams, and avoiding ground-based applications within 10 feet of those streams.
- Leaving and protecting trees and plants along streams following logging.

The Department of Forestry works with landowners, loggers, and pesticide applicators to help them comply with forest practice rules; in most cases, compliance is achieved voluntarily. In a few instances, enforcement is needed. Under rules administered by the Departments of Forestry and Environmental Quality, if a spill occurs on forestland, those responsible are required to report the incident and take any necessary action to contain and clean up the chemical.

Measures protect water quality

Forestry laws and rules have had demonstrated success in protecting streams [2000 State of the Environment Report for the Oregon Progress Board; produced by Oregon State University].

The Department has conducted monitoring efforts on pesticides since the 1970's, including:

- Frequent sampling downstream of spray operations between 1980-1987.
- Specific monitoring of projects occurring in 1992, 1993, and 2000.
- A pesticides best management practice (BMP) compliance element within a larger 2002 best management practice study.

In nearly all cases, either there were no detectable residues or the residues were below levels expected to be harmful to humans, fish, wildlife, or riparian vegetation.

How can I get information on planned herbicide applications?

Before doing a pesticide application on forestland, the applicator must file a notification of operations with the Oregon Department of Forestry. The notification describes the who, what, when, where, and how of the planned application. The department maintains a database of the notification information from this system available to the public upon request. To find out what forest chemical applications, or other forest operations, are planned in your area, sign up for ODF's subscription service (there is a fee for this service).

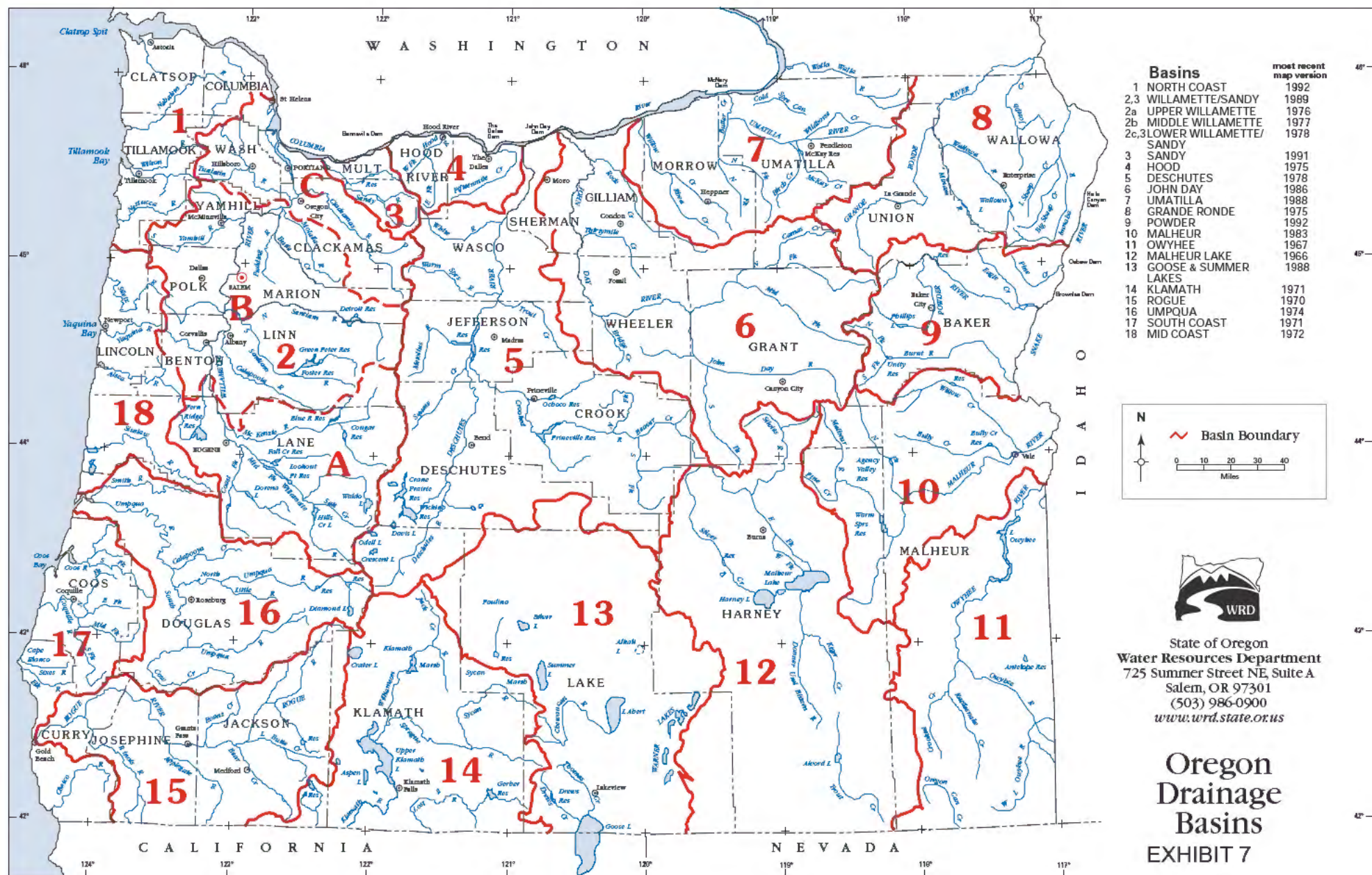
To sign up, call or visit your nearest ODF office or ODF's Salem headquarters (503-945-7200). You can also find the subscription form and more information about the FACTS subscription service by visiting the department Website at <http://egov.oregon.gov/ODF/> (Click on "Private Forests" then select "Forest Operations" in the upper right corner of the screen, and then "FACTS Data").

What if I think a violation of the law has occurred?

If you think a violation of the law has occurred, please contact the local Oregon Department of Forestry office. Staff there will investigate your report and provide information back to you on their findings.

For additional information:

- Oregon Department of Agriculture (Oregon's lead agency for pesticide use), <http://www.oregon.gov/ODA/PEST/www.oregon.gov/ODA/PEST/>
- U.S. Department of Environmental Quality, <http://www.epa.gov/pesticides/> www.epa.gov/pesticides/
- The Pesticide Analytical and Response Center, <http://www.oregon.gov/ODA/PEST/pare.shtml> www.oregon.gov/ODA/PEST/pare.shtml
- Oregon Department of Environmental Quality, <http://www.oregon.gov/DEQ/> www.oregon.gov/DEQ/



CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 78) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on May 20, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 78) upon the following individuals on May 20, 2016, by delivering a true, full, and exact copy thereof via U.S. Mail to:

Keith L. Kuther
Senior Assistant Attorney General
Office of the Solicitor General
400 Justice Building
1162 Court St., NE
Salem, OR 97301-4096

Shawn Donnille
771 W. 52nd Avenue
Eugene, OR 97405

Steven C. Berman
Stoll Berne PC
209 SW Oak St., Ste. 500
Portland, OR 97204

Kate Taylor
P.O. Box 152
Rockaway Beach, OR 97136

Steven Pedery
7644 SE Taggart Court
Portland, OR 97206

And upon the following individual via email (irrlstnotifier@sos.state.or.us):

Jeanne Atkins, Secretary of State
Elections Division
255 Capitol St. NE, Ste. 501
Salem, OR 97310-0722
Fax: (503) 373-7414

DATED this 20th day of May, 2016.

GIBSON LAW FIRM, LLC

s/ Jill Gibson

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner