

IN THE SUPREME COURT OF THE STATE OF OREGON

KRISTINA MCNITT,

Petitioner,

v.

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

Respondent.

Case No. S064128

PETITIONER MCNITT'S REPLY
TO RESPONDENT'S ANSWER

Initiative Petition 79 (2016)
Ballot Title Certified
on May 25, 2016

I. Current law prohibits spraying all types of pesticides in specified locations.

The caption is flawed because it states, “Prohibits forestry-related aerial pesticide spraying in specified locations;” however, current law already does that. Indeed, OAR 629-620-0400(4) states, in part:

[W]hen applying chemicals by aircraft, operators shall not directly apply chemicals within 60 feet of:

- (a) Significant wetlands;
- (b) The aquatic areas of Type F and Type D streams;
- (c) The aquatic areas of large lakes;
- (d) The aquatic areas of other lakes with fish use; or
- (e) Other areas of standing open water larger than one-quarter acre at the time of the application.

Id. As used in this rule, “chemicals” includes “all classes of pesticides.” ORS 629-600-0100(10). Thus, Oregon law already “prohibits forestry-related aerial pesticide spraying in specified locations,” *e.g.*, the locations listed in OAR 629-

620-0400(4). The flawed caption will cause voters to mistakenly believe that existing law does not do so because the caption does not identify an actual major effect in the context of existing law.

In her response to this argument, Respondent focuses on ORS 527.672, which prohibits aerially spraying herbicides within 60 feet of an inhabited dwelling or school, and argues “[t]hat is not a prohibition on aerial spraying of all pesticides near schools or dwellings.” Respondent’s Answer at 4. Petitioner agrees with that specific statement, but, as recognized by Respondent in footnote 2, OAR 629-620-0400(4) *does* prohibit *all* pesticide spraying on or near numerous specified locations. Thus, the portion of the caption that implies Oregon law does not protect certain locations from forestry-related aerial pesticide spraying is grossly misleading and must be modified so voters understand that the measure’s proposed prohibition is an additional protection, not a new protection.

Respondent also states that the existing rules promulgated under the Forest Practices Act apply to “direct application” of pesticides. Respondent’s Answer at 4. It is unclear if Respondent is suggesting that “direct application” does not include aerial spraying, but to be clear, OAR 629-620-0400(1) applies to operators “[w]hen applying chemicals aerially or from the ground” and subsection (4) states “when applying chemicals by aircraft, operators shall not directly apply chemicals within 60 feet of” Thus, aerial application is

“direct application.” Because the measure would prohibit aerial application of pesticides “on or near” watersheds that serve as a source of drinking water, it would apply to every drainage basin (reflected in Exhibit 7 to the petition) that contains at least one source of drinking water.

II. Voters should be told the measure would terminate forest landowners’ existing right to receive just compensation if the measure reduces their land’s value.

Respondent argues that the ballot title need not alert voters that the measure would terminate landowners’ right to receive just compensation if the measure’s land use restrictions reduce the fair market value of their forestland. Respondent’s Answer at 6-7. According to Respondent, voters need not know about this result because whether the measure will affect property values – and by how much - “is a matter of speculation.” *Id.* at 7. This argument is without merit because Petitioner is not claiming that the ballot title must tell voters that IP 79 would decrease property values; Petitioner is claiming that voters need to know that IP 79 would terminate the right to just compensation. That result is not speculative; rather, forest landowners’ loss of this existing right would be immediate and certain.

Pursuant to Respondent’s reasoning, many of the measure’s effects would be “speculative.” For example, the summary alerts voters that the measure “specifies grounds and procedures for challenging regulations. . . . Authorizes enforcement lawsuits, attorney fees.” These are direct results of the

measure even if no one ever challenges a regulation or seeks attorney fees under the measure. In the same way, the termination of the right to receive just compensation is a direct and immediate effect of the measure.

Although Respondent cautions against speculation, she does so herself by arguing that “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 the use of pesticides on those products” Respondent’s Answer at 7-8, note 4. Respondent offers no support for these statements or rationale for how she arrived at such conclusions. Clearly, the value of forestland is tied to the land’s ability to be economically profitable. It is undisputed that when replanting trees, as required by law after harvests, tree seedlings compete with weeds and invasive species for water, sunlight, space, and nutrients; thus, forest landowners use herbicides to control these unwanted plants. The measure’s prohibition of such herbicide use will make it more difficult to protect new tree seedlings and grow timber, which will have an economic impact on forestland and its fair market value. Thus, the distinction drawn by Respondent between IP 79 and IP 80 does not exist and Respondent should include references to “just compensation” as did the ballot title for IP 80.

III. Conclusion

The Court should refer the ballot title back to Respondent with directions to correct these insufficiencies.

DATED this 29th day of June, 2016.

Respectfully submitted,

By /s/ Jill Gibson
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CERTIFICATE OF FILING AND SERVICE

I certify that on June 29, 2016, I filed the original PETITIONER MCNITT'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-079) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system and electronically served it upon Keith L. Kutler, attorney for Respondent and Steven C. Berman, attorney for Shawn Donnille, Kate Taylor, and Steve Pedery.

Dated: June 29, 2016

/s/Jill Gibson

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