

IN THE SUPREME COURT OF THE STATE OF OREGON

DUANE BERNARD, JEROD  
BROADFOOT, STEVEN CHAPMAN,  
WAYNE ENDICOTT, WENDELL LOCKE,  
BRIAN RICHARDSON, and STAN  
STEELE

Petitioners,

v.

ELLEN ROSENBLUM, Attorney General,  
State of Oregon

Respondent.

SC No. \_\_\_\_\_

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**PETITION TO REVIEW BALLOT TITLE CERTIFIED  
BY THE ATTORNEY GENERAL  
(INITIATIVE PETITION #5 (2014))**

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Ballot title certified February 21<sup>st</sup>, 2013

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Attorney for Respondent

Chief Petitioners: Christopher Baker, Miles Hutchins, Mary Launer

Petitioners Duane Bernard, Jerod Broadfoot, Steven Chapman, Wayne Endicott, Wendell Locke, Brian Richardson, and Stan Steele (herein collectively “Oregon Outdoor Council” or “OOC”) seek review of the ballot title certified by the Attorney General for Proposed Initiative Petition #5 (2014) (“Petition” or “the Petition”) captioned:

**BANS COMMERCIAL, RECREATIONAL TRAPPING; TRADING IN RESULTANT FUR/BODY PARTS; POISONING MAMMALS; BODY-GRIPPING TRAPS**

The full text of the ballot title as certified to and filed with the Secretary of State, in addition to the Attorney General’s supporting memorandum, is set out in Exhibit A. A photocopy of the text of the measure as submitted to the Secretary of State is attached as Exhibit B.

**I. PETITIONERS’ INTEREST IN THE MATTER**

Petitioners are electors who are dissatisfied with the foregoing certified ballot title. Petitioners submitted timely written comments on the certified title to the Secretary of State on February 5<sup>th</sup>, 2013, attached as Exhibit C. Petitioners’ objections to the Caption, Results Statements and Summary certified by the Attorney General relate to the arguments and comments they made during the administrative comment period objecting to the caption.

Petitioners’ objections to the Caption, Results Statements and Summary certified by the Attorney General also relate to new language the Attorney General inserted into the certified Ballot Title after the end of the administrative comment period. Because some of the language the Petitioners object to was inserted into the certified Ballot Title after the expiration of the administrative comment period, Petitioners are entitled to raise these objections for the first time before this Court. *Carley v. Myers*, 340 Or. 222, 232, 132 P.3d 651, 656, (2006).

## **II. REASONS THE CERTIFIED BALLOT TITLE FOR PETITION #5 (2014) DOES NOT SUBSTANTIALLY COMPLY WITH ORS 250.035(2) - (5)<sup>1</sup>**

The certified caption does not comply with the requirements of ORS 250.035(2)-(5) because the certified caption (1) does not accurately state the subject matter of the Petition, and (2) and uses politically charged and emotionally laden terms in violation of this Court's case law.

## **III. ARGUMENTS AND AUTHORITIES**

When reviewing a certified ballot title, the job of this Court is to “decide whether the Attorney General’s certified ballot title is in “substantial compliance” with the statutory requirements.” *Huss v. Kulongoski*, 323 Or 266, 269, 917 P2d 1018 (1996).

### **A. Caption**

ORS 250.035(2)(a) requires that a ballot title contain a “caption of not more than fifteen words which reasonably identify the subject matter of the state measure.” The caption

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<sup>1</sup> ORS 250.035(2)-(5) states:

(2) The ballot title of any state measure to be initiated or referred shall consist of:

(a) A caption of not more than 10 words that reasonably identifies the subject matter of the state measure.

The caption of an initiative or referendum amendment to the constitution shall begin with the phrase, "Amends Constitution," which shall not be counted for purposes of the 10-word caption limit;

(b) A simple and understandable statement of not more than 15 words that describes the result if the state measure is approved. The statement required by this paragraph shall include either the phrase, "I vote" or "vote yes," or a substantially similar phrase, which may be placed at any point within the statement;

(c) A simple and understandable statement of not more than 15 words that describes the result if the state measure is rejected. The statement required by this paragraph shall include either the phrase, "I vote" or "vote no," or a substantially similar phrase, which may be placed at any point within the statement; and

(d) A concise and impartial statement of not more than 85 words summarizing the measure and its major effect.

(3) The statements required by subsection (2)(b) and (c) of this section shall be written so that, to the extent practical, the language of the two statements is parallel.

(4) The statement required by subsection (2)(b) of this section shall be written so that an affirmative response to the statement corresponds to an affirmative vote on the state measure.

(5) The statement required by subsection (2)(c) of this section shall be written so that an affirmative response to the statement corresponds to a negative vote on the state measure.

presented by the Attorney General states:

**BANS COMMERCIAL, RECREATIONAL TRAPPING; TRADING IN  
RESULTANT FUR/BODY PARTS; POISONING MAMMALS; BODY-  
GRIPPING TRAPS**

ORS 250.035(2)(a) directs that the caption of a ballot title to a proposed measure reasonably identify the subject matter of the measure. A ballot title must not give undue influence to one aspect of the proposed measure at the expense of a full description of the general subject of the measure. *Phillips v. Myers*, 321 Or. 221, 936 P.2d 964 (1997).

The caption serves as the "cornerstone for the other portions of the ballot title" and therefore must identify the proposed measure's true subject matter "accurately and in terms that will not confuse or mislead potential petition signers and voters." *Greene v. Kulongoski*, 322 Ore. 169, 174-75, 903 P.2d 366 (1995).

The caption, which is the first information that most potential petition signers and voters will see, is pivotal. *Frazzini v. Myers*, 344 Or. 648, 654, 189 P.3d 1227 (2008). It must "inform potential petition signers and voters of the sweep of the measure." *Id. citing Terhune v. Myers*, 342 Ore. 475, 479, 154 P.3d 1284 (2007). A caption should not "understate or overstate the scope of the legal changes that the proposed measure would enact." *Id. citing Kain/Waller v. Myers*, 337 Ore. 36, 40, 93 P.3d 62 (2004). If a proposed measure has more than one subject, each should be identified in the caption if it is possible to do so within the 15-word limit. *Whitsett v. Kroger*, 348 Or. 243, 247, 230 P.3d 545 (2010). In other words, a caption cannot focus on only one thread of a petition, but instead must focus on the entire blanket, so as to encompass all the subjects covered by the measure. *See Witt v. Myers*, 325 Or. 221, 936 P.2d 964 (1997).

In addition, where the measure's proponents use words or phrases that are intentionally or unintentionally designed to influence the voter, the Attorney General should look past those "politically charged" phrases and describe the full impact of the measure. The requirement that a ballot title be 'impartial' is to prevent argument, misleading

descriptions, or emotionally laden words within the ballot title. *Hamilton v. Myers*, 326 Or. 44, 943 P.2d 214 (1997).

Finally, a caption's terms must not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or. 36, 93 P.3d 62 (2004). In order to draft a proper caption, the Attorney General must examine the text of the measure and the changes the measure would enact in the context of existing law. *Greenburg v. Myers*, 340 Or. 65, 127 P.3d 1192 (2006) citing *Kain/Waller*, 337 Or. at 41 (emphasis added).

The primary purpose, the thread that binds all of the Petition, the true subject matter of the Petition is the complete and total ban of the trapping of predatory animals by private individuals. Importantly, the Petition creates an exception to the ban for trapping activities conducted by the government. This is a fundamental shift from the current law. Under current law, no such distinction exists. This Court has instructed the Attorney General in the past that, when a proposed initiative would make a substantial change in current law, the caption must reflect that change. *Rasmussen v. Kroger*, 351 Or. 195, 262 P.3d 777 (2011).

In addition, this Court has held, in the context of a measure that imposes restrictions on certain activity, the caption should identify against whom the restriction applies. *Terhune v. Myers*, 342 Or. 136, 149 P.3d 1139 (2006). In the case of the Petition, the caption must inform the voter that government trapping is still allowed by the Petition. Otherwise, the caption fails “to reasonably identify the subject matter” of the proposed measure by failing to inform the voter of this important exception. See *Caruthers v. Kroger*, 346 Or. 581, 213 P.3d 1255 (2009)(holding that a caption should inform the voter *who* a restriction would operate).

Further, inclusion of the word “poisoning” violates this Court’s longtime instruction to the Attorney General not to include politically charged or emotionally laden terms within the caption, in order that the caption remains impartial. *Carson v. Kroger*, 351 Or. 508, 270 P.3d 243 (2012). The requirement that a ballot title be ‘impartial’ is to prevent argument,

misleading descriptions, or emotionally laden words within the ballot title. *Hamilton v. Myers*, 326 Or. 44, 943 P.2d 214 (1997); see also *Bernard v. Keisling*, 317 Or. 591, 858 P.2d 1309 (1993)(recognizing that chief petitioners may insert terms to obfuscate the subject of an initiative measure, and therefore the Attorney General should go beyond those terms when writing the ballot title).

The term “poison” appears four times in the text of the Petition. Section 3 of the Petition alone references 5 different governmental agencies that may be exempted from the ban on the use of traps. In fact there are five sections of the Petition that deal with the different governmental exemptions to the ban on the use of traps. Yet the caption certified by the Attorney General still focuses on - and includes - the term “poison”.

However, the certified caption’s use of the term “poisoning” is not even an accurate reflection of the effect of the Petition. The certified caption misleads the voter into thinking the Petition bans the poisoning of all mammals. In fact, the Petition, in section 12, has a specific exception allowing for the poisoning of certain types of mammals. As a matter of law, the certified caption violates the requirement that the caption must identify the proposed measure's true subject matter accurately. *Greene, infra*. That is, the caption misleads signers and voters into thinking the Petition prohibits the poisoning of all mammals.

The summary certified by the Attorney General makes this point clear. Which only adds to the confusion. The summary makes it clear that the ban on the use of poison does not apply to all mammals, while the caption informs the voter that the ban on the use of poison does apply to all mammals. To the extent the component parts of the ballot title are inconsistent, the ballot title as a whole must be referred back to the Attorney General to repair the inconsistencies. *Whitsett v. Kroger*, 348 Or. 243, 230 P.3d 545 (2010).

The caption must be modified to inform signers of the petition, and potential voters, as to the true subject matter of the Petition. Further, the clause in the caption referencing “poisoning mammals” is both inaccurate and inflammatory and must be removed.

B. Resulting Statements

The Oregon Outdoor Council has no objection to the Attorney General's certified results statements.

C. Summary

The Oregon Outdoor Council has no objection to the Attorney General's certified summary.

V. **CONCLUSION**

For the reasons discussed above, the certified ballot title for Proposed Initiative Petition #5 (2014) should be remanded back to the Attorney General for modification.

Respectfully submitted this 7<sup>th</sup> day of March, 2013.

DAY LAW GROUP, P.C.

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*Of Attorneys for Petitioners*

## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **Petition for Review** on the following:

The Honorable Kate Brown  
Oregon Secretary of State  
Attn: Elections Division  
255 Capitol Street NE, Suite 501  
Salem, Oregon 97310

The Honorable Ellen F. Rosenblum  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301

Mary Launer  
64682 Cook Avenue, #124  
Bend, OR 97701  
Chief Petitioner

Miles Hutchins  
3710 SW 30<sup>th</sup> Street  
Redmond, OR 97756  
Chief Petitioner

Christopher Baker  
64682 Cook Avenue, #130  
Bend, OR 97701  
Chief Petitioner

by the following indicated method or methods on the date indicated below:

- X By **Mailing** a full, true and correct copy thereof in a sealed, first class postage-prepaid envelope, addressed as shown above to the last known addresses, and deposited with the United States Mail at Portland, Oregon;
- By **Hand-delivering** a full, true and correct copy thereof to the address as shown above to the last known address;
- By **Faxing** a full, true and correct copy thereof to the fax number above, which is the last known fax number; Confirmation of transmission provided upon request;
- By **Emailing** to the emails listed above, which are the last known email addresses.

Dated this 7th day of March, 2013

DAY LAW GROUP, P.C.

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**BALLOT TITLE**

**Bans commercial, recreational trapping; trading in resultant fur/body parts; poisoning mammals; body-gripping traps**

**Result of "Yes" Vote:** "Yes" vote bans trapping animal for commerce or recreation; trading in trapped animal's raw fur/body parts; body-gripping traps; poisoning mammals (except moles, rodents).

**Result of "No" Vote:** "No" vote retains regulated trapping of furbearing/predatory animals, unprotected mammals; trading in fur/body parts, if documented; trapping, poisoning rodents, predatory animals by landowners.

**Summary:** Department of Fish and Wildlife regulates seasons, places, quantity, and manner of trapping furbearers, predatory animals, and unprotected mammals; restricts trap sizes, baiting; prohibits use of toothed trap; imposes trap-checking requirements; permits buying/selling of furbearer or pelt. Landowner/occupier may kill wildlife causing damage or that is a public nuisance or public health risk; may poison or trap rodents, squirrels, predatory animals infesting property. Measure prohibits trapping animals for commerce in fur or body parts, or for recreation; prohibits buying/selling/trading trapped animal's fur, body part; prohibits using Conibear or body-gripping traps on land (excepts specially permitted government agents, requires posting highly visible warning signs); prohibits poisoning with Compound 1080 or sodium cyanide, poisoning any mammal (except moles, rodents). Other provisions.

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KATE BROWN  
SECRETARY OF THE STATE

EXHIBIT

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DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

February 21, 2013

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

RECEIVED  
2013 FEB 21 PM 1 45  
KATE BROWN  
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Bans Commercial, Recreational Trapping; Trading in Resultant Fur/Body Parts; Poisoning Mammals; Body-Gripping Traps  
DOJ File #BT-5-13; Elections Division #5

Dear Mr. Trout:

We have received the comments submitted in response to the draft ballot title for the prospective Initiative Petition # 5 (2014). We provide the enclosed certified ballot title.

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

**A. The Draft Caption**

The draft caption provides:

**Bans trapping, poisoning animals; trading in fur/body parts of trapped animal; body-gripping traps**

**1. Comments from Oregon Outdoor Council Association members**

We received comments from Ross Day, on behalf of electors who are members of the Oregon Outdoor Council Association ("OCCA"). They comment that the true subject matter of IP # 5 is "the complete and total ban of the trapping of predatory animals by private individuals, yet creating an exception for the government." They assert the draft caption fails to focus on that aspect of the measure. Further, they claim, the caption will lead voters to believe the measure ban all trapping in Oregon, whereas it actually bans all trapping by private individuals only.

We believe the subject matter of the measure is restricting the means by which wildlife can be killed: it prohibits trapping fur-bearing mammals and trading in trapped animals' fur or body parts; it bans the use of Conibear or other body-gripping traps; and it prohibits poisoning

mammals other than moles and non-furbearing rodents. We do not agree that the subject matter is allowing only government agents to trap animals.

The OOCA members also assert that the draft caption “focuses on a politically charged term – ‘poisoning’ – that is designed to influence the voter into supporting” the measure. Further, they assert, using the word “poisoning” before the word “animal” misrepresents the current state of the law, under which poisoning domesticated animals is prohibited. According to these commenters, the draft caption will mislead voters “into thinking it is currently legal to poison domesticated animals and that Petition #5 would make the poisoning of domesticated animals illegal.”

We disagree with the commenters’ assertion that ORS 167.310 *et seq.*, or ORS 498.046 specifically imposes the same prohibition on the use of poison. We further note that ORS 610.105 expressly permits landowners and occupiers to poison predatory animals “infesting” the property. And nothing in the measure suggests that it addresses domesticated animals. We conclude, however, that the phrase “poisoning animals” is not accurate. Further, on our own review, we believe that the phrase “[b]ans trapping, poisoning animals” is too broad and requires revision.

These commenters further assert that the measure defines the terms “animal,” “trap[ping],” and “persons” differently than those terms are currently defined by statute. Therefore, the commenters claim, the caption must indicate that those terms are “(defined)” in the measure.

We reject the OOAC members’ comment that the measure’s definitions of its terms are so different from their ordinary definitions as to require the caption to indicate that they are “(defined)” in the measure.

## **2. Comments from John Fine on behalf of the Oregon Sheep Growers Association**

We received comments from the John Fine on behalf of the Oregon Sheep Growers Association. Mr. Fine comments that the draft caption is “overinclusive, inaccurate and misleading.” Specifically, he asserts that the caption inaccurately informs voters that the measure bans all trapping, poisoning, fur trading, and body gripping traps without exception. As noted above, we agree that the caption is overly broad. We disagree, however, with Mr. Fine’s comment that the caption must indicate that the measure does not impose a categorical ban.

Mr. Fine additionally comments that the caption must inform voters that “poison” and “poisoning” are not defined by the measure. We disagree. Voters are likely to understand that the ordinary, common definitions of those terms apply.

Mr. Fine asserts that, by stating “[n]otwithstanding ORS 610.060, ORS 610.105, and ORS 498.012,” the measure creates exceptions to those statutes. He posits that the caption incorrectly informs voters that the measure’s prohibitions are “broad based restrictions on

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activities that are squarely permitted by other existing statutes.” We disagree with that reading of the measure.

ORS 610.060 provides: “Nothing in the wildlife laws is intended to deny the right of any person to control predatory animals as provided in ORS 610.105,” which, in turn, permits landowners and occupiers to poison, trap, or by other means kill noxious rodents and predatory animals infesting the property. ORS 498.012 allows landowners or occupiers to “tak[e] any wildlife that is causing damage, is a public nuisance or poses a public health risk” on the property, although a permit is required in some instances.

The measure states that certain activities are unlawful *notwithstanding* those statutes. We read “notwithstanding” to mean “despite” or “regardless of.” Thus, the measure *does* impose a broad prohibition on certain activities.

Finally, Mr. Fine comments that the caption must inform voters that “use of Compound 1080 has been effectively banned in Oregon since 1998.” We do not consider that information to be part of the measure’s subject matter. Accordingly, we decline to add it to the caption.

### 3. Comments from Chris Baker

We received comments from Chris Baker. Mr. Baker suggests changing the caption to read:

**Bans trapping for trading in fur/body parts, limits trapping on public land,  
and bans poisoning of animals on public land.**

Mr. Baker’s proposed alternative caption exceeds the 15-word limit in ORS 250.035(2)(a).

What is more, we disagree with Mr. Baker’s reading of the measure and his description of its subject matter. By its terms, the measure makes it unlawful “to trap any animal for commerce in raw fur or body parts, or for recreation.” Thus, the measure applies to trapping for commerce *or* for recreation. In addition, the measure’s restrictions and prohibitions apply on private land (with exceptions) as well as on public land.

### 4. Comments from Walter H. Sykes

We received comments from Walter H. Sykes. Mr. Sykes suggests the following alternative caption:

**Bans trapping for commerce; trading in trapped animals’ fur/body parts;  
poisoning animals; some body-gripping traps**

Mr. Sykes’s proposed caption exceeds the 15-word limit. In addition, the measure bans trapping furbearing animals for recreation, as well as for commerce. The measure also expressly

bans the use of Conibear traps or any body-gripping trap on land, unless authorized by the Director. Therefore, we do not adopt Mr. Sykes's proposed alternative caption.

In view of the comments and our further review, we certify the following caption:

**Bans commercial, recreational trapping; trading in resultant fur/body parts;  
poisoning mammals; body-gripping traps**

**B. The Draft Result Statements**

The draft result statements provide:

**Result of "Yes" Vote:** "Yes" vote bans trapping animal for fur, body parts; trading in raw fur, body parts of trapped animal; poisoning animal; body-gripping traps; some exceptions.

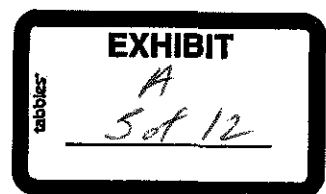
**Result of "No" Vote:** "No" vote retains laws permitting regulated trapping of furbearers, predatory animals, and unprotected mammals; unlicensed trapping by landowner; trading in pelts, body parts, if documented.

**1. Comments from OOCA members**

The OOCA members comment that the draft result statements are flawed in all the same ways as the draft caption. In particular, they assert, the draft result statements ignore the major purpose and effect of the measure, which, they claim, is to ban all trapping for private individuals. These commenters additionally contend that the term "unlicensed" in the "no" result statement is both inaccurate and "inflammatory and intended to influence the voter into supporting" the measure. According to the commenters, current law "that allows landowners to trap animals on their land is an exception to the general rule that all trappers must be licensed." They cite to ORS 497.075(4)(a).

Under ORS 497.075, a license is generally required to hunt, trap, or angle for any state wildlife. Landowners are generally exempted from the license requirement when hunting, trapping, or angling for wildlife on their own property. Under ORS 498.012, any landowner or land occupier may take wildlife that is causing damage, is a public nuisance, or poses a public health risk on the property without a permit, with certain exceptions: a permit is required before taking any game mammal or game bird, or a fur-bearing mammal or nongame wildlife species. No permit is required for taking cougar, bobcat, red fox or bear, with the landowners written permission.

Among other things, the proposed measure prohibits trapping for commerce in raw fur or body parts, or for recreation, and bans the use of a Conibear trap or any body-gripping trap, and bans killing animals with poison. But the measure allows the Director of the Department of Fish and Wildlife to permit government employees or agents to use the prohibited traps for the purpose of protecting people from threats to their health and safety, or to protect threatened or endangered species.



Thus, the major purpose of the measure is not, as the commenters assert, "to ban all trapping for private individuals." The measure prohibits trapping animals for commerce in fur or body parts or recreation. We agree, however, that the measure essentially bans the use of Conibear or body-gripping traps by individuals; but the ban also applies to government employees, without a special permit.

We believe that the result statements, as drafted, accurately reflect the results if the measure is approved and if it is not approved. We disagree that the term "unlicensed trapping by landowner" is either inaccurate or inflammatory. Accordingly, we have not changed the draft result statements as suggested.

## **2. Comments from Mr. Fine for the Oregon Sheep Growers Association**

Mr. Fine comments that the two result statements are not parallel to the extent practicable, as required by ORS 250.035(3), and are not simple and understandable, as required by ORS 250.035(2)(b). He further asserts that the "yes" result statement improperly suggests that a "yes" vote protects "animals" generally, whereas the "no" statement improperly favors a "no" vote by referencing "furbearers," "predatory animals" and "unprotected mammals."

Although we disagree, we have revised the result statements as set out below.

## **3. Comments from Mr. Baker**

Mr. Baker suggests the following alternative result statements:

**Result of "Yes" Vote:** "Yes" vote limits the trapping of, and bans poisoning of, animals on public land and bans trading in fur and body parts of trapped animals. Unlicensed trapping by landowner continues to be allowed.

**Result of "No" Vote:** No change in laws permitting regulating trapping of furbearers, predatory animal, and unprotected mammals; unlicensed trapping by landowner; poisoning wildlife; trading in pelts, body parts, if documented.

Mr. Baker's proposed result statements exceed the 25-word limit in ORS 250.035(2)(b) and (c).

We disagree with Mr. Baker's proposed statement that the measure "limits" trapping of animals on public land. By its terms, the measure prohibits trapping animals for commerce in fur/body parts *or* for recreation, without exception. We also find Mr. Baker's "yes" statement to be underinclusive. Mr. Baker's "no" statement is consistent with the draft "no" result statement.

## **4. Comments from Mr. Sykes**

Mr. Sykes's proposed alternative "yes" result statement omits the measure's ban on trapping *any* animal for recreation, its ban on killing mammals with poison, and its express ban on Conibear and body-gripping traps.



Mr. Sykes's proposed alternative "no" vote statement is substantively equivalent to the draft "no" statement.

For those reasons, we do not adopt Mr. Sykes's proposed alternative result statements.

In light of all the comments, and on our own further review, we certify the following result statements.

**Result of "Yes" vote:** Yes vote bans trapping animal for commerce or recreation; trading in trapped animal's raw fur/body parts; body-gripping traps; poisoning mammals (except moles, rodents).

**Result of "No" Vote:** "No" vote retains regulated trapping of furbearing/predatory animals, unprotected mammals; trading in fur/body parts, if documented; trapping, poisoning rodents, predatory animals by landowners.

## The Summary

### 1. Comments from OOCA members

The OOCA members object to the draft summary for all the same reasons they object to the draft caption and result statements. They further comment that the draft summary incorrectly states the current status of the law, particularly in stating there are currently "no restrictions on killing by poisoning." These commenters point to ORS 498.046, which prohibits "plac[ing] any toxic substance where it is accessible to wildlife unless the substance used and the method of application is approved by the state governmental agencies having authority to prescribe or implement environmental control programs." We agree with the OOCA commenters that ORS 498.046 restricts killing by poisoning. Therefore, we have modified the summary accordingly.

The OOCA members comment that the second full sentence of the draft summary is "unclear as to whether the sentence is referring to the current state of the law, or to the changes proposed" by the measure. We disagree.

The first sentence of the draft summary provides:

Currently, Department of Fish and Wildlife regulates seasons, places, quantity, and manner of trapping furbearers, predatory animals, and unprotected mammals; restricts sizes of traps; restricts baiting; prohibits use of toothed trap; imposes trap-checking requirements; permits buying/selling of furbearer or pelt; no restrictions on killing by poisoning.

The second sentence provides:

Landowner/occupier may kill wildlife that is causing damage or is a public nuisance or public health risk; may poison, trap noxious rodents, ground squirrels, predatory animals infesting property.

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Immediately following that sentence, the draft summary addresses the measure:

Measure prohibits trapping animals for commerce in fur or body parts, or for recreation; prohibits buying/selling/trading fur, body part of trapped animal; prohibits Conibear and body-trapping [*sic*] traps. Prohibits using specified poisons, poisoning any mammal (with exceptions). Director may allow exceptions by special permit. Other provisions.

We believe voters will understand that the second sentence of the draft summary refers to current law.

## **2. Comments from Mr. Fine**

Mr. Fine renews his comment that the measure “is written as an exception to three particular statutes—not as a standalone law that applies ‘notwithstanding any other statute to the contrary.’” As already discussed, we disagree with Mr. Fine’s interpretation of the measure.

Mr. Fine also reiterates that providers need to be informed that “use of Compound 1080 is effectively banned in Oregon.” We do not believe the current use or non-use of Compound 1080 is information that voters. In addition, Mr. Fine has not explained either how Compound 1080 is “effectively banned,” or why the measure’s prohibition on the use of Compound 1080 would have a broad impact.

As already discussed, we do not think voters need to be told that “poison” is not defined in the measure. We agree, however, that voters could be misled by the draft summary’s statement that current law imposes “no restrictions on killing by poison.” We have changed the summary accordingly.

## **3. Comments from Mr. Baker**

Mr. Baker suggests the following changes to the draft summary. In the first sentence, he would omit the reference to the Department’s regulation of the “manner of trapping furbearers, predatory animals, and unprotected mammals.” Mr. Baker would add that, under the measure, “[t]rapping and poisoning [are] allowed on private property,” and that “[t]rapping [is] permitted on public land with ODWF approval if other non-lethal methods are unable to solve animal problems, for health/safety issues, wildlife research, and for protecting endangered species.” He would also include a statement that, under the measure, all traps on public land must have warning signs.

We believe the summary must inform voters that the measure prohibits buying/selling/trading fur and body parts of a trapped animal, and that it specifically prohibits Conibear and body-gripping traps.

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Mr. Baker's assertion that the measure allows certain trapping and poisoning on private property, and on public land with the Department's approval, is really a statement about what current law allows, rather than about the effects of the measure. We believe that information is adequately addressed in the draft summary's description of current law.

It is more important to tell voters that the measure prohibits the use of poison (except to kill moles and rodents), *any* use of certain poisons, and the use of Conibear and body-gripping traps (unless approved by the Director).

We agree the summary should tell voter that legally used Conibear or body-gripping traps on land accessible to the public must have warning signs. We have changed the summary accordingly.

#### 4. Comments from Mr. Sykes

Mr. Sykes comments that the measure "was specifically designed to allow trapping on private land, with certain restrictions on the types of trap and, regarding Conibear traps, where they may be set." He asserts that the draft ballot title incorrectly states that certain traps are banned with exceptions, whereas it should state the measure permits those traps, with restrictions. He makes the same argument with regard to the provisions relating to trapping or poisoning "common nuisance animals." Because the measure expressly makes certain conduct "unlawful," with exceptions, we disagree with Mr. Sykes's comments.

As already noted, we agree that the ballot title must reflect the requirement that the prohibited traps, if used lawfully on land legally accessible to the public, must be marked.

In view of all the comments, and on our own further review, we have revised the summary.

#### Conclusion

We certify the attached ballot title for IP # 5.

Sincerely,

Judy C. Lucas  
Senior Assistant Attorney General  
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JCL:mlk/4005027

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1. Notwithstanding ORS 610.060, ORS 610.105, and ORS 498.012, it shall be unlawful for any person:

- a) To trap any animal for commerce in raw fur or body parts, or for recreation;
- b) To buy, sell, barter, or otherwise exchange, or offer to buy, sell, barter, or otherwise exchange, the raw fur or any other body part of any wild animal that has been trapped;
- c) To poison or attempt to poison any animal using sodium fluoroacetate (also known as Compound 1080) or sodium cyanide.
- d) To kill or attempt to kill any mammal with poison, except as provided in subsection (12) of this section.
- e) To use or authorize the use of any Conibear trap or body-gripping trap.

2. Notwithstanding subsection (1)(e) of this section, a person is permitted to use a Conibear trap in water, a padded leg-hold trap, or a non-strangling foot snare on private land, subject to existing state and federal laws and regulations.

3. Nothing in this section prohibits the Director from granting a special permit to state or federal employees or their agents to use a Conibear trap in water, a padded leg-hold trap, or a non-strangling foot snare on any public land including state owned or state leased land, lands administered by the United States Forest Service, the Federal Bureau of Land Management, The National Park Service, The United States Department of Defense, The State Parks Board and any county or municipality if it is established that there exists on the public land in question an animal problem that has not been and cannot be reasonably abated by the use of nonlethal control tools, including but not limited to changes in livestock management practices, the use of guard animals, barriers, alarm devices, hazing, or human supervision or if such nonlethal means cannot be reasonably applied. Upon making a written finding, freely available to the public, that the animal problem has not been abated by the reasonable use of nonlethal control tools and cannot be reasonably abated by nonlethal control tools or if the tools cannot be reasonably applied, the director may authorize the use, setting, placing, or maintenance of the traps for a period not to exceed thirty days.

4. Nothing in this section prohibits the Director from granting a special permit to federal, state, county, or municipal employees or agents to use any Conibear trap or body-gripping trap for the purpose of protecting people from threats to their health and safety.

5. Nothing in this section prohibits the Director from issuing permits to use padded leghold traps or non-strangling foot snares for the conduct of legitimate wildlife research by credentialed professional biologists.

6. Nothing in this section prohibits the Director from granting a special permit to department employees or agents or other state agencies to use any Conibear trap or body-gripping trap where the use of the traps is the only practical means of protecting threatened or endangered species as designated under ORS 486.182.



7. Nothing in this section prohibits the United States Fish and Wildlife Service, its employees or agents, from using any Conibear trap or body-gripping trap where the Service determines, in consultation with the Director, that the use of such traps is necessary to protect species listed as threatened or endangered under the federal Endangered Species Act (16 U.S.C. § 1531 et seq.).

8. When legally employing any Conibear trap or body-gripping trap, the immediate area where such traps are deployed, on public land or private property legally accessible to the public, shall be prominently marked with highly-visible, durable warning signs.

9. Any legally employed Conibear trap, body-gripping trap, or cage trap shall be checked at intervals not to exceed 24 hours.

10. A violation of this section is a class A misdemeanor.

11. Nothing in this section shall be construed in any manner to affect the taking of wildlife with firearms, with fishing equipment, with archery equipment, or other implements in hand as may be defined or regulated by the Oregon Department of Fish and Wildlife, including the taking of wildlife pursuant to a hunting or fishing license issued by ODFW.

12. Nothing in this section shall be construed in any manner to affect the ability of any person to trap or poison mice, rats, gophers, moles, ground squirrels, or non-furbearing rodents.

13. Definitions:

a) "Trap" for purposes of this section incorporates the definition in ORS 496.004(18). For purposes of this section, this definition and the terms defined in subsection (b), (c) and (d) do not include lariats, head gates, catchpoles, or methods used to temporarily detain livestock.

b) "Conibear trap" means any trap of various manufacturers having design and operational characteristics essentially the same as or like that developed by Frank Conibear and designed and set to kill an animal instantly.

c) "Body-gripping trap" means a trap that grips an animal's body or body part.

d) "Cage trap" means a trap that allows the animal to be lured into an enclosure and closes the entryway to prevent escape and is intended to capture an animal alive.

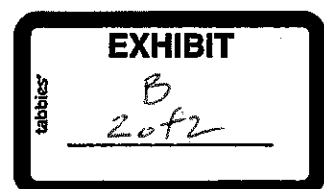
e) "Padded leg-hold trap" means a trap designed and set to grip the foot or limb of an animal, both jaws of which are covered with rubber pads having a minimum thickness of one-eighth inch.

f) "Non-strangling foot snare" means a cable or wire designed and set to encircle and hold an animal's foot or limb without tightening down as the animal's limb moves.

g) "Raw fur" means the hide or pelt of any animal.

h) "Animal" means any nonhuman warm-blooded vertebrate.

i) "Person" as used in this section means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character.





February 5, 2013

*Via Facsimile (503.373.7414) Only*

The Honorable Kate Brown  
Oregon Secretary of State  
Attn: Elections Division  
255 Capitol Street NE, Suite 501  
Salem, Oregon 97310

RECEIVED  
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KATE BROWN  
SECRETARY OF THE STATE

RE: Elector Comments Submitted in Response to Draft Ballot Title for Proposed Initiative  
Petition #5 (2014) (herein "Petition #5")

Secretary Brown:

I offer these comments on behalf of myself (an Oregon Elector) and my clients, Mr. Jerod Broadfoot, an Oregon Elector, Mr. Steven Chapman, an Oregon Elector, Mr. Wayne Endicott, an Oregon Elector, Mr. Duane Bernard, an Oregon Elector, Mr. Wendell Locke, an Oregon Elector, Mr. Stan Steele, an Oregon Elector, and Mr. Brian Richardson, an Oregon Elector, as the term "elector" is defined in ORS 250.005(2). Each of these individuals is a member of the Oregon Outdoor Council Association.

These comments are offered in response to the Secretary of State's request for comments in response to the Draft Ballot Title prepared by the Oregon Attorney General for Petition #5 as well as the Secretary of State's request for comments on whether Petition #5 complies with the procedural requirements of the Oregon Constitution.

We have reviewed the draft ballot title prepared by the Oregon Attorney General for Petition #5 and we are of the opinion the draft ballot title fails to comply with the requirements of ORS 250.035. Accordingly, we offer the following comments in response to your request for comments on the draft ballot title for Petition #5.

I. The Caption

ORS 250.035(2)(a) requires that a ballot title contain a "caption of not more than fifteen words which reasonably identify the subject matter of the state measure." The caption presented by the Attorney General states:

**BANS TRAPPING, POISONING ANIMALS; TRADING IN FUR/BODY  
PARTS OF TRAPPED ANIMAL; BODY GRIPPING TRAPS**

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*Comments on Petition #5*February 5<sup>th</sup>, 2013

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ORS 250.035(2)(a) directs that the caption of a ballot title to a proposed measure reasonably identify the subject matter of the measure.

The caption serves as the "cornerstone for the other portions of the ballot title" and therefore must identify the proposed measure's true subject matter "accurately and in terms that will not confuse or mislead potential petition signers and voters." *Greene v. Kulongoski*, 322 Ore. 169, 174-75, 903 P.2d 366 (1995).

The caption, which is the first information that most potential petition signers and voters will see, is pivotal. *Frazzini v. Myers*, 344 Or. 648, 654, 189 P.3d 1227 (2008). It must "inform potential petition signers and voters of the sweep of the measure." *Id. citing Terhune v. Myers*, 342 Ore. 475, 479, 154 P.3d 1284 (2007). A caption should not "understate or overstate the scope of the legal changes that the proposed measure would enact." *Id. citing Kain/Waller v. Myers*, 337 Ore. 36, 40, 93 P.3d 62 (2004). If a proposed measure has more than one subject, each should be identified in the caption if it is possible to do so within the 15-word limit. *Id. citing Novick/Sager v. Myers*, 329 Ore. 11, 16, 986 P.2d 1 (1999).

In addition, where the measure's proponents use words or phrases that are intentionally or unintentionally designed to influence the voter, the Attorney General should look past those "politically charged" phrases and describe the full impact of the measure. The requirement that a ballot title be 'impartial' is to prevent argument, misleading descriptions, or emotionally laden words within the ballot title. *Hamilton v. Myers*, 326 Or. 44, 943 P.2d 214 (1997).

Finally, a caption's terms must not understate or overstate the scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337 Or. 36, 93 P.3d 62 (2004). In order to draft a proper caption, the Attorney General must examine the text of the measure and the changes the measure would enact in the context of existing law. *Greenburg v. Myers*, 340 Or. 65, 127 P.3d 1192 (2006) *citing Kain/Waller*, 337 Or. at 41 (emphasis added).

The primary purpose, the thread that binds all of Petition #5, the true subject matter of Petition #5, is the complete and total ban of the trapping of predatory animals by private individuals, yet creating an exception for the government. That much is clear by simply reading the text of Petition #5. Therefore, the focus of the draft caption must be on this aspect of Petition #5, otherwise the caption fails "to reasonably identify the subject matter" of the proposed measure. *See Burgin v. Myers*, 340 Or. 171, 176, 131 P.3d 717 (2006).

The caption also focuses on a politically charged term - "poisoning" - that is designed to influence the voter into supporting Petition #5. The term "poisoning" immediately conjures up

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negative images in any reasonable voter. After all, who would support "poisoning" anything other than a mouse, rat, or insects?<sup>1</sup>

Further, the inclusion of the word "poisoning" before the word "animal" in the draft caption misrepresents the current state of the law. The measure defines "animal" as "any nonhuman warm-blooded vertebrate." In addition to wild animals, the definition of the word "animal" includes domesticated animals such as dogs and cats. By using the phrase "poisoning animals" in the draft caption, the voter is misled into thinking it is currently legal to poison domesticated animals and that Petition #5 would make the poisoning of domesticated animals illegal. Of course, Oregon Law currently prohibits the poisoning of domesticated animals. *See* ORS 167.310 *et. seq.* The draft caption misleads the voter as to the effect of Petition #5 in this regard.<sup>2</sup>

Next, the caption leads the voter to believe that Petition #5 bans all trapping in Oregon. In fact, Petition #5 bans all trapping for private individuals, while creating an enormous exception for the government.

Finally, Petition #5 will have a substantial impact on the ability of farmers and other private property owners to protect their livestock, domestic animals, and their own family's safety. Current law allows property owners to control predatory animals such as coyotes through the use of trapping and poisoning. *See* ORS 610.105. Petition #5 limits the methods available to private property owners to protect themselves from predatory animals such as coyotes.

Again, a caption must emphasize the "chief purpose" or "true subject matter" of a petition. *Burbridge v. Paulus*, 289 Or. 3S, 609 P.2d 815 (1980); *Greene v. Kulongoski*, *supra.* The chief purpose of Petition #5 is to prevent private individuals from trapping animals. That is the purpose that must be reflected in the caption.

Accordingly, we suggest the draft caption for the draft ballot title be re-written to read:

**PROHIBITS PRIVATE PERSONS (DEFINED) FROM TRAPPING (DEFINED)  
ANIMALS (DEFINED); TRADING TRAPPED ANIMAL PARTS/FUR**

(15 words)

<sup>1</sup> Further, the draft caption misstates the current state of the law. Currently it is illegal to "poison" animals, *see* ORS 498.046, except in certain limited circumstances. *See* ORS 610.105. Petition #5 will change the law to make it illegal to poison predatory animals when the person's property or home becomes infested with these animals.

<sup>2</sup> In addition, Petition #5 defines terms such as "animal", "trap[ing]" and "persons" in a manner different than those terms are defined in the Oregon Revised Statutes. *See* ORS 167.310 (animal), ORS 174.100(5) (person) and ORS 496.004(18) (trap[ing]). When a petition specially defines a term otherwise defined in the Oregon Revised Statutes, it is appropriate to use the signal "(defined)" to inform the voter that the term has a specially defined meaning. *Carly/Towers v. Myers*, 340 Or. 222, 229, 132 P.3d 651 (2006).

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**II. Results Statements**

The results statements fail for the same reasons as the draft caption, discussed above. The arguments contained in section I. of this letter are hereby incorporated as reasons why the draft results statements also fail to meet the basic statutory requirements of ORS 250.035(2).

ORS 250.035(2) requires the draft results statement be a simple and understandable statement of not more than 25 words that describes the result if the state measure is approved. As with the caption, the Results Statements cannot be inaccurate or misleading, and must accurately identify the subject matter of the measure. *Towers v. Myers*, 341 Or. 487, 145 P.3d 147 (2006).

The Attorney General's draft results statements again ignore the major purpose and effect of Petition #5, which is to ban all trapping for private individuals.

Accordingly, we suggest the following language for the results statements:

**Result of "Yes" Vote:** "Yes" vote prohibits private persons (defined) from trapping (defined) animals (defined) and trading raw fur (defined), parts of trapped animal; limits certain traps; other exceptions.

(25 words)

**Result of "No" Vote:** "No" vote retains laws permitting regulated trapping of furbearers, predatory animals, unprotected mammals; landowner license exception for trapping; trading pelts and body parts, if documented.<sup>3</sup>

(25 words)

**III. Summary**

The arguments contained in sections I. and II. of this letter are hereby incorporated into this section as additional arguments as to why the draft summary fails to meet the basic requirements of ORS 250.035. The draft summary should be modified to reflect the changes suggested in section I. and II. of this letter.

Further, the draft summary incorrectly states the current status of the law. For instance, the clause "no restrictions on killing by poisoning" is incorrect. See ORS 498.046.

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<sup>3</sup> We suggest changing the second clause of the "No" results statement from "unlicensed trapping by landowner" to "landowner license exception". The use of the term "unlicensed" is inflammatory and intended to influence the voter into supporting Petition #5. In addition, the use of the term "unlicensed" is inaccurate. The law that allows landowners to trap animals on their land is an exception to the general rule that all trappers must be licensed. See ORS 497.075(4)(a).

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In addition, the second full sentence of the draft summary, beginning "Landowner/occupier may kill wildlife...", is unclear as to whether the sentence is referring to the current state of the law, or the changes proposed by Petition #5. If this sentence is referring to the changes proposed by Petition #5, then the sentence is incorrect because Petition #5 will not allow landowner/occupiers to kill predatory animals through the use of poison.

Finally, the draft summary does not make any mention of the majority of Petition #5 - the numerous exemptions from the ban on trapping for various government activities. At the very least the draft summary must reflect these important exemptions.

Therefore, the draft summary should be modified to read:

**Summary:** Currently, Department of Fish and Wildlife regulates seasons, places, quantity, manner of trapping certain animals. Oregon law restricts trap sizes, restricts baiting of animals, prohibits toothed trap use, imposes trap-checking requirements, permits buying/selling of furbearer or pelt. Current law allows landowner/occupier to kill wildlife that is causing danger, is a public nuisance or health risk. Current law allows landowner/occupier to poison, trap noxious rodents, ground squirrels, and predatory animals infesting property. Measure prohibits private persons from trapping animals for commerce in fur or body parts, or for recreation and prohibits buying/selling/trading fur, body part of trapped animal. Measure prohibits Conibear and body-trapping traps. Measure allows special permits for government agencies/agents/employees. Prohibits using specified poisons, poisoning any mammal (with exceptions). Other provisions.

(125 words)

#### **IV. Procedural Requirements**

We believe that Petition #5 complies with the procedural requirements of the Oregon Constitution, including the "full text" requirement and the "separate votes" requirement of the Constitution and reserve the right to defend Petition #5 in any subsequent court proceedings.

#### **V. Conclusion**

The draft ballot title - and in particular the draft caption -- is horribly flawed and fails to comply with the most basic requirements of Oregon law. Thank you in advance for making the appropriate changes to the draft ballot title.

Very Truly Yours,

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