

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 79 (2016)

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BALLOT TITLE CERTIFIED

May 25, 2016

Initiative Petition 79

Chief Petitioners: Shawn Donnille, Kate Taylor, Steve Pedery

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## **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).<sup>1</sup>

## **II. ARGUMENTS AND AUTHORITIES**

### **A. Introduction**

IP 79 would amend the Oregon Forest Practices Act ("OFPA"), which sets standards for all commercial activities involving the harvesting of trees in Oregon forests. *See* ORS chapter 527. Among other requirements, the OFPA 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

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<sup>1</sup> A copy of IP 79 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 at p. 1). Among all pesticides used in Oregon for any purpose, the forest sector generally uses only herbicides.

Oregon law prohibits aerially spraying certain pesticides<sup>2</sup> within 60-300 feet of drinking water. Specifically, OAR 629-620-0400 states that when “applying chemicals aerially or from the ground”<sup>3</sup> operators shall protect water and other forest resources by following product labels and by meeting the additional protective measures listed in the rule. Subsection 7 of the rule prohibits directly applying by aircraft fungicides and non-biological insecticides within 300 feet of significant wetlands, streams that contain fish or supply water for domestic use

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<sup>2</sup> Pursuant to ORS 634.006(8) and ORS 527.310(9) “pesticide” has a broad definition and includes fungicides, herbicides, and insecticides.

<sup>3</sup> “‘Chemicals’ means and includes all classes of pesticides, such as herbicides, insecticides, rodenticides, fungicides, plant defoliant, plant desiccants, and plant regulators, as defined in ORS 634.006(8); fertilizers, as defined in 633.311; petroleum products used as carriers; and chemical application adjuvants, such as surfactants, drift control additives, anti-foam agents, wetting agents, and spreading agents.” ORS 629-600-0100(10).

(Types F and D streams), large lakes, other lakes with fish use, and open standing water larger than one-quarter acre. OAR 629-620-0400(7). Current law also prohibits applying all types of pesticides from aircraft within 60 feet of these water sources. OAR 629-620-0400(4). Regarding the protection of homes and schools, it is prohibited to aerially spray herbicides within 60 feet of an “inhabited dwelling or school” for forestry purposes. ORS 527.672.

Additionally, all pesticide use must comply with Oregon’s Pesticide Control 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 trump 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 60 foot buffer zone. Additionally, 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.*

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

B. IP 79

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

The measure would prohibit the “aerial application of any pesticide, herbicide or fungicide for forestry purposes on or near any watershed that serves as a source of drinking water, any school, or any home.”<sup>4</sup> 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 aeriually 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. *See Exhibit*

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<sup>4</sup> The measure does not define “pesticide.”

7. 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” 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.

The measure also would amend ORS 527.630 and require the State Board of Forestry to adopt rules prohibiting and regulating timber harvests, various construction, and operation of gravel pits and rock quarries “that pose risks to public health and safety, drinking water or aquatic habitat by impacting” certain landslides. Section 1(5). The effect of this provision is unclear because the word “impact” is undefined. Additionally, the measure contains no standards for determining what constitutes a “risk” to drinking water or aquatic habitat. For example, landslides are typically natural geologic events that can have both good

and bad consequences for streams and aquatic life. In the short term, fine sediment from landslides entering a stream can suffocate fish eggs and young fry; however, in the long term, coarse gravel entering a stream from landslides is beneficial because it creates future spawning beds and pools for rearing habitat. Thus, it is unclear if, under the measure, this type of landslide would be considered a “risk” to aquatic habitat.

Significantly, the measure provides that it 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.

### C. IP 79’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 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).

The first part of the caption does not identify an actual major effect of the measure in the context of current law because current law already “prohibits forestry-related aerial pesticide spraying in specified locations.” As discussed above, ORS 527.672 already prohibits aerially spraying herbicides, a type of pesticide, within 60 feet of schools and homes for forestry purposes. And forestry rules already prohibit spraying all types of pesticides, and additional categories of chemicals, within 60 feet of certain water sources, including streams that provide drinking water. OAR 629-620-0400(4). *See also* OAR 629-620-0400(7) (prohibiting spraying certain pesticides within 300 feet of water sources). Additionally, product labels prohibit aerial application of pesticides in specified locations, and those prohibitions have the force of state law. ORS 634.372. As such, the caption does not identify an actual major effect of the measure and it will mislead voters to mistakenly believe that Oregon law does not currently “prohibit forestry-related aerial pesticide spraying in specified locations.”

Thus, the caption should be modified to explain that, in the context of existing law, the measure would “Ban most forestry-related aerial pesticide use,” which would be a direct result of the measure given that most of Oregon is in a



watershed that serves as a source of drinking water. This direct and practical effect does not require legal interpretation and would reasonably identify the actual major effect of the measure. Petitioner respectfully suggests the following caption:

**Bans most forestry-related aerial pesticide use; expands landslide-related rulemaking requirements**

However, if the Court declines to suggest this specific language, the Court should nevertheless require the Attorney General to modify the caption so it does not describe current law.

## 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 v. Myers*, 337 Or 568, 574 (2004). IP 79’s “yes” statement does not describe a result *of the measure* because Oregon law already prohibits aerial pesticide spraying for forestry purposes on or near streams that provide drinking water, and prohibits spraying herbicides (a type of pesticide) on or near (within 60 feet of) schools and dwellings. The “yes” statement must also identify the significant change regarding Oregon public policy regarding forest landowners’ rights to receive just compensation when land use restrictions reduce their land’s value. The measure states it is not subject to ORS 195.305; thus, the

measure creates an exception to the requirement to compensate owners when their land decreases in value as a result of land use restrictions.

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 current law only “limits” aerial pesticide spraying for forestry purposes in specified locations. This is incorrect; current law *prohibits* spraying all types of pesticides for forestry purposes in specified locations – such as within 60 feet of numerous water sources, including streams that provide drinking water. OAR 629-620-0400(4).<sup>5</sup> Describing current prohibitions merely as limitations is not only inaccurate but also slanted because the “yes” statement states the measure “prohibits” certain spraying, which sounds more protective and stringent than “limits.” When read in conjunction with the “yes” statement, it is unfair to describe the measure’s prohibitions as prohibitions and current law’s prohibitions as only limitations; thus, the word “limits” should be replaced with “prohibits.” Finally, the “no” statement should inform voters that current law requires compensating land owners for reduced land value.

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<sup>5</sup> Petitioner’s comments cited current law that prohibits spraying herbicides, but the certified “no” statement has changed to not refer to herbicides.

### 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 (1989)).

The summary is noncompliant because it fails to inform voters that landowners would not be entitled to receive just compensation if their land loses value due to 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. It is certainly a more significant effect than that the measure “specifies grounds and procedures for challenging regulations” and “authorizes enforcement lawsuits, attorney fees” and could be stated within the word limit by deleting these less significant aspects of the measure.

### **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 8th day of June, 2016.

Respectfully submitted,

s/ Jill Gibson

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GIBSON LAW FIRM, LLC

*Attorneys for Petitioner*

## 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) **Notwithstanding the provisions of ORS 527.714, t**The board shall adopt and enforce forest practice rules **to reduce the risk of serious bodily injury or death from a prohibiting and regulating timber harvest, construction and maintenance of roads, construction of landings, construction**

**and operation of gravel pits and rock quarries that pose risks to public health and safety, drinking water or aquatic habitat by impacting rapidly moving landslides or deep-seated landslides, including in headwater areas of watersheds necessary to achieve the purposes of this subsection 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 the 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.

## **DRAFT BALLOT TITLE**

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

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

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

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



May 10, 2016

VIA EMAIL – [irrlistnotifier@sos.state.or.us](mailto:irrlistnotifier@sos.state.or.us)

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

Re: Public Comment on Initiative Petition 79 (2016)

Dear Secretary Atkins,

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

### COMMENTS ON PROCEDURAL REQUIREMENTS

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

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

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



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

## COMMENTS ON THE BALLOT TITLE

### I. CURRENT LAW

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

In addition to state laws and regulations regarding pesticide use, The Federal Insecticide Fungicide and Rodenticide Act (FIFRA) governs the use of all herbicides according to federally-approved labels and provides that herbicide labels carry the full force of federal law. 7 USC § 136 *et seq.* FIFRA is administered and enforced by the U.S. Environmental Protection Agency and the Oregon Department of Agriculture. Additionally, all herbicide use must comply with Oregon’s Pesticide Control Act (ORS chapter 634) and applications in forests must be conducted in accordance with the Oregon Forest Practices Act (ORS chapter 527) and the Oregon Department of Forestry chemical rules (OAR chapter 629). Oregon law also prohibits applying pesticides<sup>1</sup> in a “faulty, careless, or negligent manner” or in a manner “inconsistent with its labeling.” ORS 634.372. This essentially gives all pesticide labels the force of state law, which is a significant additional protection because some pesticide labels provide stricter requirements than existing law, and in those situations the stricter label requirements trumps state law.

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

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

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

## **II. IP 79**

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

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

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

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

### **III. THE DRAFT BALLOT TITLE.**

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

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

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

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

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

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

#### **A. CAPTION**

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The “subject matter” of a ballot title is “the ‘actual major effect’ of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).” *Lavey v. Kroger*, 350 Or 559, 563, 258 P.3d 1194 (2011) (citation omitted). To identify the “actual major effect” of a measure, we consider the “changes that the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P.3d 1031 (2011).

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

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

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

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

## **B. RESULT OF “YES” VOTE STATEMENT**

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

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

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

We suggest the following statement:

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

## **C. RESULT OF “NO” VOTE STATEMENT**

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

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



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

We suggest the following “no” statement:

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

#### **D. SUMMARY**

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

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

We suggest the following summary:

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

Comments on IP 79

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

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

 Will Gibson



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

May 25, 2016

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

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

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 79 (2016) (BT-79-16) from co-chief petitioner Shawn Donnille (through counsel, Steven C. Berman) and Kristina McNitt (through counsel, Jill Gibson). Mr. Donnille and Ms. McNitt both object to all parts of the draft ballot title. In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

**Procedural constitutional requirements**

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

**A. The caption**

The ballot title must include "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." ORS 250.035(2)(a). The "subject matter" is "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194



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

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

We address the comments and objections below.

**1. Comments from Mr. Donnille**

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

**2. Comments from Ms. McNitt**

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

**3. Our response to the comments**

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

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

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

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

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

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

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

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

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<sup>2</sup> 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).

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

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

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

**B. The “yes” and “no” vote result statements**

We next consider the draft “yes” and “no” vote result statements. A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” ORS 250.035(2)(b). The “yes” vote result statement should identify “the most significant and immediate” effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft “yes” vote result statement provides:

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

A ballot title must include “[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” ORS 250.035(2)(b). The “no” vote result statement “should ‘address[] the substance of current law *on the subject matter of the proposed measure*’ and ‘summarize [ ] the current law accurately.’” *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft “no” vote result statement provides:

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

We address the comments and objections below.

**1. Comments from Mr. Donnille**

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

**2. Comments from Ms. McNitt**

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

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

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

### **3. Our response to the comments**

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

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

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

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

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

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

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

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

#### **D. The summary**

We next consider the draft summary. A ballot title must include “[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” ORS 250.035(2)(d). “The purpose of a ballot title’s summary is to give voters enough information to understand what will happen if the initiative is adopted.” *McCann*, 354 Or at 708. The draft summary provides:

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

We address the comments and objections below.

##### **1. Comments from Mr. Donnille**

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

##### **2. Comments from Ms. McNitt**

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

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

### 3. Our response to the comments

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

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

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

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

**E. Conclusion**

We certify the attached ballot title.

Sincerely,

/s/ Keith L. Kutler

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Enclosure

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**BALLOT TITLE**

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

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

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

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





# 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).

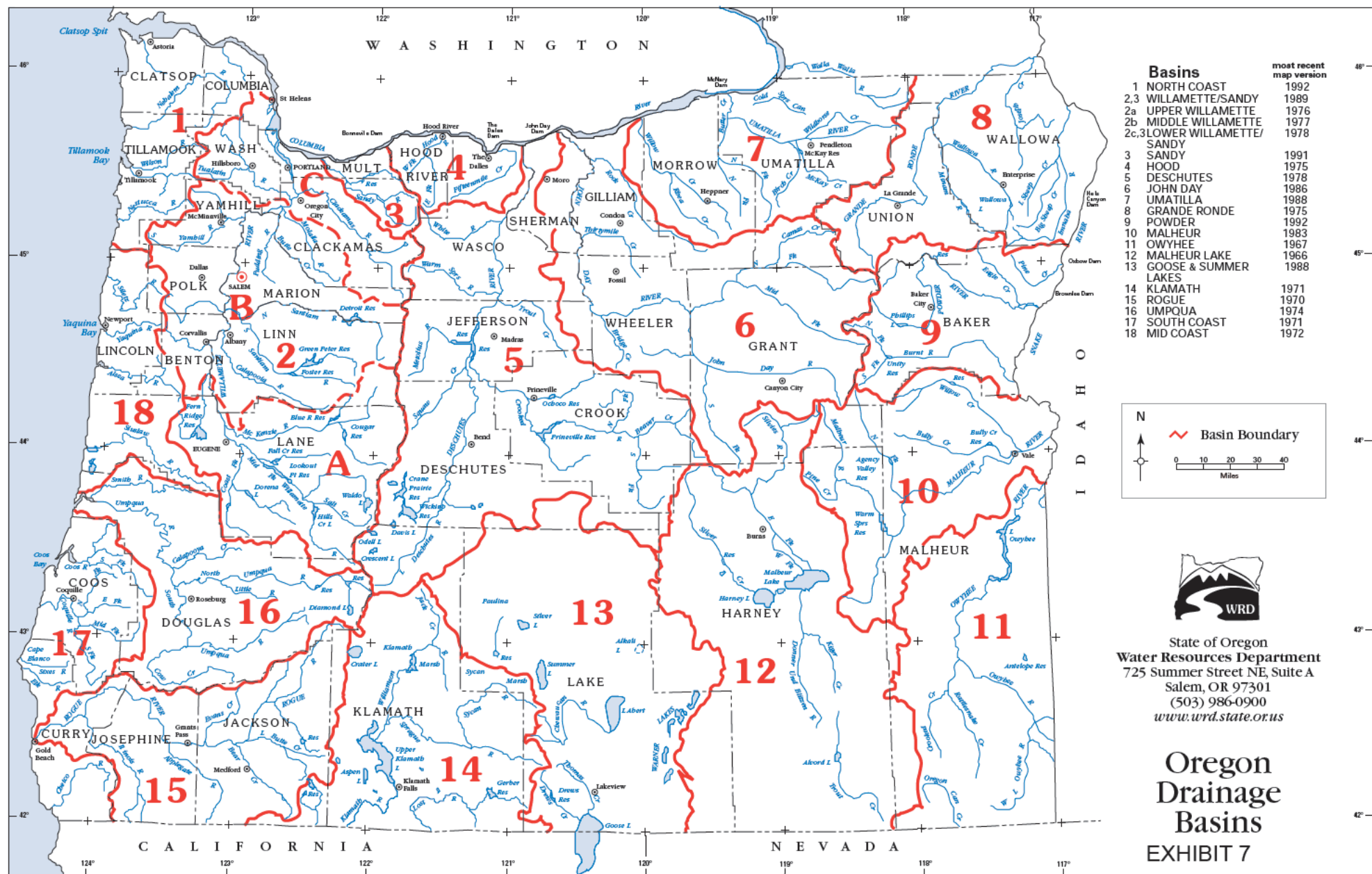
To sign up, call or visit your nearest ODF office or ODF's Salem headquarters (503-945-7200). You can also find the subscription form and more information about the FACTS subscription service by visiting the department Website at <http://egov.oregon.gov/ODF/> (Click on "Private Forests" then select "Forest 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/](http://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](http://www.oregon.gov/ODA/PEST/pare.shtml)
- Oregon Department of Environmental Quality, <http://www.oregon.gov/DEQ/> [www.oregon.gov/DEQ/](http://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 79) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on June 8, 2016.

## **CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 79) upon the following individuals on June 8 2016, by delivering a true, full, and exact copy thereof via U.S. Mail to:

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

Shawn Donnille  
771 W. 52<sup>nd</sup> Avenue  
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Steven C. Berman  
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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 by emailing SEL 324 to [irrlistnotifier@sos.state.or.us](mailto:irrlistnotifier@sos.state.or.us) to:

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

DATED this 8th day of June, 2016.

GIBSON LAW FIRM, LLC

s/ Jill Gibson

Jill Gibson, OSB # 973581  
Of Attorneys for Petitioner