

IN THE SUPREME COURT OF THE STATE OF OREGON

PAUL S. COSGROVE, an individual  
Oregon elector; and TOM HAMMER, an  
individual Oregon elector,

Petitioners,

v.

ELLEN F. ROSEBLUM, in her official  
capacity as Oregon Attorney General,

Respondent.

Supreme Court No. S060909

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITION TO  
REVIEW BALLOT TITLE RE: INITIATIVE  
PETITION NO. 3 (SUPREME COURT)

Chief petitioners Paul Cosgrove and Tom Hammer (petitioners), who submitted comments on the draft ballot, challenge all parts of the certified ballot title for Initiative Petition 3 (2014). Pursuant to ORAP 11.30(6), respondent Attorney General submits this answering memorandum in response to the petition for review.

This court reviews to decide only whether the Attorney General's certified ballot title is in "substantial compliance" with the statutory requirements. ORS 250.085(5). On review, this court "examine[s] the proposed ballot title against the statutory requirements \* \* \* [and is] not concerned with whether petitioners' proposed title may be better or even whether [the court] could devise a better one[.]" *Burbidge v. Paulus*, 289 Or 35, 38, 609 P2d 815 (1980). Because the ballot title substantially complies with the requirements of ORS 250.035, this court should certify it without modification.

## **A. Current Law: The Oregon Renewable Portfolio Standard**

The Oregon Renewable Portfolio Standard, ORS 469A.005 to 469A.210, requires Oregon utilities and electricity service suppliers to comply with a “renewable portfolio standard.” ORS 469A.050 (setting forth applicable renewable portfolio standards for large utilities); ORS 469A.055 (setting forth applicable renewable portfolio standards for small utilities). The renewable portfolio standards require utilities to sell to consumers specified (minimum) percentages of “qualifying electricity” in a calendar year, with the percentages increasing over time. ORS 469A.010 (defining “qualifying electricity”); ORS 469A.020 (setting forth conditional restrictions on qualifying electricity); ORS 469A.065 (setting forth applicable renewable portfolio standards for electricity service suppliers).<sup>1</sup>

The primary means by which an electric utility may meet its renewable portfolio standard requirement is through the “use” of “renewable energy certificates” that are either obtained through generation of “qualifying electricity” or purchased during each calendar year. ORS 469A.070.<sup>2</sup> Administrative rule provides that only

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<sup>1</sup> Beginning in 2011, at least 5% of the electricity sold by large utilities to retail electricity consumers must be qualifying electricity. ORS 469A.052(1)(a). That amount increases to 15% in 2015; to 20% in 2020; and to 25% in 2025. ORS 469A.052(b)-(d). The required percentages for small electric utilities is much lower, culminating in, at most, 10% by the year 2025. See ORS 469A.055(2), (3).

<sup>2</sup> In lieu of purchasing or generating “qualifying electricity,” a utility may also satisfy its renewable portfolio standard by paying an “alternative compliance rate based on the cost of qualifying electricity.” ORS 469A.180.

those renewable energy certificates that are issued, monitored, accounted for, and transferred by or through the regional renewable energy certificate system and trading mechanism known as the Western Renewable Energy Generation Information System (WREGIS) can be used by a utility to establish compliance with Oregon's renewable portfolio standard. The Oregon Department of Energy (DOE), acting through the appropriate WREGIS protocol, identifies generating facilities eligible for creation of renewable energy credits that can be used to satisfy the renewable portfolio standard. ORS 469A.130; OAR 330-160-0025. Under current administrative rules, only those renewable energy certificates that are comprised of "qualifying electricity" created on or after January 1, 2007, may be used to satisfy the renewable portfolio standard. OAR 330-160-0015; OAR 330-160-0030. Generally, renewable energy certificates that are not "used" to comply with a renewable portfolio standard in a calendar year may be banked and carried forward indefinitely, for the purpose of complying with a renewable portfolio standard in a subsequent year. *See* ORS 469A.140.

"Qualifying electricity"—electricity that may be used to satisfy a utility company's renewable portfolio standard or form the basis of a renewable energy certificate—is limited to certain listed renewable energy sources, including hydroelectricity. ORS 469A.025. With one exception, however, the statute also imposes conditions on the use of hydroelectricity to comply with a utility company's renewable portfolio standard. Specifically, hydroelectricity qualifies as a renewable

energy source for purposes of the renewable portfolio standard only if certain conditions are met. First, the hydroelectricity must come from a facility that became operational on or after January 1, 1995. ORS 469A.020(1). Hydroelectricity from a facility that became operational on or *before* January 1, 1995, may still qualify if that the electricity is attributable to efficiency upgrades made on or after January 1, 1995. ORS 469A.020(3). If the efficiency upgrades were made to a Bonneville Power Administration (BPA) facility, only that portion of electricity attributable to Oregon's share of electricity may be used to comply with the renewable portfolio standard. ORS 469A.020(3).

Hydroelectricity from a facility that became operational on or before January 1, 1995, may also qualify if the facility is certified as a low-impact hydroelectric facility on or after January 1, 1995, by a national certification organization recognized by the State Department of Energy by rule. ORS 469A.025(4); OAR 330-160-0040 (designating certifying organization). To qualify under this exception to the age requirement, the generating facility must be either owned by an electric utility or (if not owned by an electric utility) it must be located in Oregon and licensed by the Federal Energy Regulatory Commission (or exempt from such license). ORS 469A.020(4). Additionally, the statute limits the amount of electricity from a certified low-impact facility that may be used to comply with a renewable portfolio standard. ORS 469A.025(5).

Second, hydroelectricity may be used to comply with a renewable portfolio standard only if the generating facility "is located outside any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the federal Wild and Scenic Rivers Act, \* \* \* or the Oregon Scenic Waterways Act[.]" ORS 469A.025(4)(a).<sup>3</sup> If the facility is located within a designated protected area, the energy produced may still qualify, provided that the electricity is attributable to efficiency upgrades made to the facility on or after January 1, 1995. ORS 469A.025(4)(b).

#### **B. Initiative Petition 3's Changes**

Section 1 of IP 3 contains a general policy statement concerning the role and import of hydroelectric power as a renewable energy source. Sections 2 and 3 propose amendments to ORS 469A.020 and 469A.025, respectively, by removing all restrictions on the use of hydroelectricity to comply with the renewable portfolio standard. Thus, if IP 3 is enacted, a utility company could satisfy its renewable portfolio standard with electricity from a hydroelectric facility regardless of the facility's age, efficiency upgrades, certification as low-impact, or its location in a designated protected area. (Pet Ex A at 2-4).

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<sup>3</sup> There appears to be one exception to this requirement—the Bonneville Power Administration may designate electricity as "environmentally preferred." ORS 469A.010. Electricity designated as such may be used to comply with a renewable portfolio standard without regard to the location of the generating facility. *Id.*; ORS 469A.135.

**C. The caption substantially complies with ORS 250.035(2)(a).**

ORS 250.035(2)(a) requires that the caption “reasonably identif[y] the subject matter of the state measure.” ORS 250.035(2)(a); *Prozanski v. Myers*, 326 Or 391, 394-95, 952 P2d 531 (1998). The certified caption does exactly that:

**Removes existing limitations on utilities’ use of hydroelectric power  
to meet statutory renewable portfolio standards**

In reviewing the caption, this court first examines the text of IP 3 and the changes it would make to existing law, then determines whether the words of the caption reasonably identify the measure’s subject matter. *Kain v. Meyers*, 337 Or 36, 41, 93 P3d 62 (2004). “Subject matter” means the “actual major effect” (or effects) of the measure, without being inaccurate or underinclusive. *Hunnicut v. Myers*, 342 Or 491, 495, 155 P3d 870 (2007); *Terhune v. Myers*, 342 Or 475, 480, 154 P3d 1284 (2007). Petitioners assert that the caption is inaccurate and misleading, because the actual major effect is to affirmatively recognize all hydroelectric energy as a qualifying, for purposes of renewable portfolio standards. (Pet 3-4).

We disagree. As “the cornerstone of the ballot title,” the caption must identify the subject matter in terms that will inform potential petition signers and voters of the full sweep of the measure. *Terhune*, 342 Or at 479. The “full sweep” of IP 3 is not just to recognize hydroelectric power as an important renewable energy source—something ORS 469A.010(3) already does. The broader effect of IP 3 is to repeal current restrictions on what hydroelectric power counts toward a utility’s renewable

portfolio standard. The caption states that effect accurately, without “understat[ing] or overstat[ing] the scope of the legal changes that the proposed measure would enact.” *Kain*, 337 Or at 40. The caption thus substantially complies with statutory requirements.

**D. The “yes” result statement substantially complies with ORS 250.035(2)(b).**

ORS 250.035(2)(b) requires that the “yes” result statement be a “simple and understandable statement \* \* \* that describes the result if the state measure is approved.” ORS 250.035(2)(b). The Attorney General’s “yes” result statement reads:

**Result of “Yes” Vote:** “Yes” vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

Petitioners argue that the “yes” result statement, like the caption, fails to inform voters that the measure’s true major effect. That argument fails for the reason explained above.

Petitioners further contend that the “yes” statement is “inaccurate and misleading” in that it suggests that IP 3 removes restrictions on the generating facility, rather than on the utility’s ability to apply electricity from that facility to its renewable portfolio requirements. But the “yes” result statement is consistent with ORS 469A.010, which provides that “electricity generated from a renewable energy source may be used to comply with a renewable portfolio standard only if *the facility* that generates the electricity *meets the requirements of ORS 469A.020.*” (Emphasis

added). Further, all statutory restrictions on age, location, ownership, etc., pertain to the facility itself: "qualifying electricity" must be generated by a qualifying facility.<sup>4</sup>

Especially when read in the context of the caption, the "yes" statement is not misleading. It expands on the caption by specifying what kind of "existing limitations on utilities' use of hydroelectric power to meet statutory renewable portfolio standards" the measure eliminates.

Petitioners also object to the use of the phrase "renewable portfolio standards" because voters may be unfamiliar with it. They assert, without any supporting authority, that the "yes" statement must explain the term. (Pet 7). On the contrary, this court has repeatedly approved ballot titles defining specialized terms in the summary. *See, e.g., Bauman v. Roberts*, 309 Or 490, 498, 789 P2d 258 (1990) (approving caption stating "doctor must give parent notice before minor's abortion," where summary described exceptions to notice requirement). The "yes" result statement substantially complies with ORS 250.035(2)(b).

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<sup>4</sup> Petitioners' argument that the current law restricts a utility's *use* of power for compliance purposes is not wrong. In fact, as discussed below, the Attorney General's "no" result statement correctly refers to "restrictions on using hydroelectric power to satisfy renewable portfolio standards." But it is more helpful to voters to explain that a "yes" vote would specifically eliminate the statutory "qualifiers" for hydroelectric facilities.



**E. The “no” result statement substantially complies with ORS 250.035(2)(c).**

ORS 250.035(2)(c) requires that the “no” result statement be a “simple and understandable statement \* \* \* that describes the result if the state measure is rejected.” ORS 250.035(2)(c). Here, the “no” statement does that:

**Result of “No” Vote:** “No” vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility’s age, environmental impact, ownership, location in protected areas.

Petitioners’ objection to the term “renewable portfolio standard” is addressed above. They further assert that the “no” result statement is “overly broad, inaccurate, and misleading” because it suggests “that existing law precludes” meeting compliance standards with hydroelectric energy from a “facility is located outside ‘a protected area.’” (Pet 9) (Emphasis added). On the contrary, the “no” statement expressly and correctly refers to restricting qualifying use if the facility is located “inside” a protected area.

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

ORS 250.035(2)(d) requires that the summary provide “a concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.” Petitioners contend the summary is not concise and impartial. They fail to identify how the summary is not impartial, however, and argue only that a “laundry list of other renewable energy sources” is not helpful. (Pet 9). But to understand how IP 3 will change existing law, voters need to know what the other qualifying

renewable energy sources are. Voters must be informed how hydroelectric power facilities currently fit into the statutory scheme in order to understand what statutory limitations IP 3 eliminates.

Finally, petitioners assert that the summary must state that the measure's actual major effect is to allow renewable portfolio standards to be met with lower-cost energy, thereby reducing power rates. (Pet 10). Nothing in the measure purports to do so, and "[s]peculation about potential secondary effects has no place in any part of [a] ballot title." *Bauman v. Roberts*, 309 Or 490, 495, 789 P2d 258 (1990). In sum, the summary substantially complies with the statutory requirements.

### CONCLUSION

For the foregoing reasons, the certified ballot title substantially complies with ORS 250.035. This court should certify the Attorney General's ballot title without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General  
ANNA M. JOYCE #013112  
Solicitor General

/s/ Leigh A. Salmon  
LEIGH A. SALMON #054202  
Assistant Attorney General  
leigh.a.salmon@doj.state.or.us

Attorneys for Respondent

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 19, 2012, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 3 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Nathan R. Rietmann, attorney for appellant, using the court's electronic filing system. I further certify that on December 19, 2012, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 3 (Supreme Court) to be served upon Paul Cosgrove and Tom Hammer, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

Paul Cosgrove  
NW Skyline Blvd  
Portland, Oregon 97210

Tom Hammer  
Wallace Road NW  
Salem, Oregon 97304

/s/ Leigh A. Salmon

LEIGH A. SALMON #054202  
Assistant Attorney General  
leigh.a.salmon@doj.state.or.us

Attorney for Respondent

ELLEN F. ROSENBLUM  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

December 19, 2012

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

Re: *Paul S. Cosgrove and Tom Hammer v. Ellen Rosenblum*  
SC S060909

Dear Chief Justice Balmer:

Petitioners Paul S. Cosgrove and Tom Hammer have filed a ballot title challenge in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Under separate cover, respondent Rosenblum is submitting her Answering Memorandum to Petition to Review Ballot Title.

Sincerely,

/s/ Leigh Salmon

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Leigh A. Salmon  
Assistant Attorney General  
leigh.a.salmon@doj.state.or.us

LAS:mlk/3838558

cc: Nathan Rietmann  
Paul S. Cosgrove/without encl.  
Tom Hammer/without encl.

OFFICE OF THE SECRETARY OF STATE

KATE BROWN  
SECRETARY OF STATE



ELECTIONS DIVISION

STEPHEN N. TROUT  
DIRECTOR

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

(503) 986-1518

December 14, 2012

The Honorable Ellen Rosenblum, Attorney General  
Anna Joyce, Solicitor General  
Dept. of Justice, Appellate Division  
400 Justice Building  
Salem, OR 97310

Re: Nathan R. Rietmann v. Ellen Rosenblum, Attorney General, State of Oregon  
S060909, Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #3. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi  
Compliance Specialist

enclosures

1270 Chemeketa St. NE  
Salem, Oregon 97301

Email: [nathan@rietmannlaw.com](mailto:nathan@rietmannlaw.com)  
Ph: (503) 551-2740

**Nathan R. Rietmann**  
**Attorney at Law**

November 9, 2012

Honorable Kate Brown  
Oregon Secretary of State  
Elections Division  
225 Capitol Street NE, Ste 501  
Salem, Oregon 97310

RECEIVED  
2012 NOV 9 PM 3 55  
KATE BROWN  
SECRETARY OF THE STATE

Re: Initiative Petition #3 (2014) –Draft Ballot Title Comments

Secretary Brown:

My office represents Paul Cosgrove and Tom Hammer who are the Chief Petitioners upon 2014 Initiative Petition #3 (IP 3). As electors and persons dissatisfied with the Attorney General's draft ballot title, Chief Petitioners respectfully submit the draft ballot title does not substantially comply with ORS 250.035(2)(a)-(d). For this reason, Chief Petitioners ask that the alternative ballot title set forth in this submission to be certified in lieu of the Attorney General's draft ballot title.<sup>1</sup>

**CAPTION**

ORS 250.035(2)(a) requires a ballot title caption to "reasonably" identify the subject matter of the measure in 15 words or less. 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." *Whitsett v. Kroger*, 348 Or. 243, 247 (2010). The inquiry should not be one of conjecture upon the proponents' motivation but, instead, identification of legal effect. *Kane v. Roberts*, 310 Or. 423, 427 (1990). "When the major effect of a proposed measure would be a substantive change in existing law, the ballot title should inform the reader of the scope of the change." *Rasmussen v. Kroger*, 351 Or. 358, 361 (2011).

The Attorney General has proposed the following caption:

**Removes conditional limitations on use of hydroelectric power to  
comply with utilities' renewable portfolio standards.**

<sup>1</sup> For purpose of discussion, Petitioners object to each discrete portion of the draft ballot title separately. However, any specific objection Petitioners raise in relation to a particular component of the draft ballot title is applicable to all other portions of the draft ballot title insofar as other portions of the ballot title present same or similar issues.

The draft caption does not substantially comply with ORS 250.035(2) because it does not inform voters of the scope of the substantive legal changes the measure would make and thereby fails to inform voters of the measure's major legal effect.

The major legal effect of IP 3 is to affirmatively recognize all hydroelectric energy as a "renewable energy source" that may be used to provide "qualifying electricity" under Oregon's renewable portfolio standards. *See*, ORS 469A.010(9)-(10). IP 3 makes this change by amending ORS 469A.025 to include affirmative new provisions specifically recognizing all hydroelectric energy as a renewable energy source. The measure then conforms existing law to the new provisions by repealing conflicting language in ORS 469A.020 and ORS 469A.025, which currently allow some hydroelectric energy to qualify as a "renewable energy source" when certain conditions are satisfied.

The draft caption does not inform voters that IP 3 has the actual major effect of affirmatively recognizing all hydroelectric energy as a qualifying "renewable energy source" for purposes of Oregon's renewable portfolio standards. Instead, the caption inaccurately and misleadingly suggests that IP 3 is simply a repealing measure that removes certain "conditional limitations" on otherwise allowed use of hydroelectric power to comply with renewable portfolio standards. However, in fact, IP 3 is a measure affirmatively establishing a new policy of allowing all hydroelectric energy to be a qualifying renewable energy source for purpose of Oregon's renewable portfolio standards, not in merely a repealing measure that removes limiting aspects of a preexisting policy.

In summary, the actual major effect of IP 3 is to create a new policy wherein all hydroelectric energy is recognized as being a qualifying "renewable energy source" for purposes of Oregon's renewable portfolio standards. In focusing exclusively upon the provisions of existing law that IP 3 will repeal, the Attorney General has created a caption where the measure's conforming amendments appear to be the subject and the measure's affirmative new provisions and policy are ignored. As a result, voters are left without an accurate sense of the measure's scope, or any basis for understanding the measure's thrust from either a practical or legal standpoint.

In addition to the fundamental objection stated above, Chief Petitioners object to the phrase "removes conditional limitations" on the grounds that it is entirely unclear and confusing. The law requires the caption to identify the subject matter of a measure in terms that will not confuse or mislead potential signers and voters. *See e.g., Mabon v. Myers*, 332 Or. 633, 637 (2001). In addition, the Oregon Supreme Court has recognized that "unfamiliar or technical terms" should not be used in a ballot title. *Terhune v. Myers*, 342 Or. 136, 141, (2006). The phrase "removes conditional limitations" is not one of common usage and has no plain meaning. The phrase is an obscure term of legal art if it can even be characterized as such. Moreover, voters will not be able to obtain a clear

definition of the phrase by resorting to a dictionary or conducting an Internet search. In short, Chief Petitioners respectfully submit that voters will find the phrase “removes conditional limitation” to be completely unintelligible in the context of the caption. A caption that cannot be readily understood by voters does not reasonably identify the subject of the measure, as the statute requires.

Chief Petitioners also object to the use of the phrase “utilities’ renewable portfolio standards.” The possessive use of the term “utilities” before the phrase “renewable portfolio standard” suggests that renewable portfolio standards are utility created or otherwise represent utilities own standards. The possessive use of the term “utilities” also misleadingly communicates that renewable portfolio standards are established, set, or otherwise controlled by utilities. This obscures the fact that renewable portfolio standards are state law requirements externally imposed upon utilities by force of law.

Finally, Chief Petitioners object to the use of the term “hydroelectric power” instead of the term “hydroelectric energy” that is actually used in the text of the measure. “In general—and absent a compelling reason to the contrary—the Attorney General should use the actual language of the measure in the Summary. *See e.g., Sampson v. Roberts*, 309 Or. 335, 340, (1990). Here, there is no compelling reason for the caption to use a term that is different than the term provided for in the text of the measure. Consequently, the caption and all other portions of the ballot title should be modified accordingly.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief petitioners respectfully request the following caption be certified in lieu of the Attorney General’s draft caption:

**Recognizes all hydroelectric energy as qualifying “renewable energy source” under Oregon’s renewable portfolio standards (RPS)**

**“Yes” Vote Statement:**

ORS 250.035(2)(b) requires that a ballot title contain a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.” The “yes” vote result statement is to be parallel to the “no” vote result statement to the extent practical. The purpose of the “yes” vote statement is to “notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.” *Novick v. Myers*, 337 Or. 568, 574 (2004). “[T]o comply with...the statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure.” *Caruthers v. Myers*, 344 Or. 596, 601 (2008). A result statement is not sufficient if it is incomplete or understates the scope of the changes the measure would enact. *Greenberg v. Myers*, 240 Or. 65, 70 (2006).



The Attorney General's draft "yes" vote statement provides as follows:

**Result of "Yes" Vote:** "Yes" vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas.

The Attorney General's draft statement does not substantially comply with ORS 250.035(2)(b) because it does not adequately inform voters of the results of enactment in simple and understandable terms. One of the overarching difficulties in preparing a ballot title for this particular measure is that it pertains to the specialized subject of "renewable portfolio standards." The term "renewable portfolio standards" is unfamiliar to many voters, as are the actual requirements the term is used to describe. Consequently, the meaning of the term "renewable portfolio standard" is not simple and understandable and the results statement must, in one fashion or other, illuminate what a renewable portfolio standard is or does so that voters can understand the results of enactment. The draft "yes" vote statement does not do this and is deficient for such reason.

The Attorney General's draft "yes" vote statement is also underinclusive and contains information that is not "accurate and neutral" as the statute requires. These particular deficiencies arise from the provisions of the "yes" vote statement informing voters that IP 3 will allow utilities to satisfy renewable portfolio standards from "any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas."

As an initial matter, the list of factors that IP 3 will supposedly allow utilities to satisfy renewable portfolio standards "regardless of" is underinclusive. To the extent it may be said that IP 3 has the result of allowing utilities to satisfy renewable portfolio standards "regardless of" a facility's age, environmental impact, or location in protected areas, it is equally true that IP 3 allows utilities to satisfy renewable portfolio standards "regardless of" innumerable other factors (e.g. ownership, cost, impact on wholesale price, availability alternative electricity sources, generation capacity, location outside protected areas, etc etc). As the list of factors IP 3 would allow utilities to satisfy renewable portfolio standards "regardless of" is likely unlimited, and certainly more extensive than the three factors identified in the draft "yes" vote statement, the result statement does not substantially comply with the statutory standard.

Secondly, it is inaccurate for the results statement to assert that IP 3 would allow utilities to satisfy renewable portfolio standards from "any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas." An array of laws and regulations exist to determine whether a hydroelectric facility may appropriately operate in light of its age, environmental impact, or location in a protected area. IP 3 would not have the result of allowing utilities to satisfy renewable portfolio standards from any facility "regardless of" the facility's age, environmental impact, or

location in protected areas. Nevertheless, this is exactly what is misleadingly and inaccurately stated in the draft “yes” vote statement. In addition, the description of the factors listed in the draft “yes” vote statement are inaccurate, misleading, and overly broad for the reasons stated in the subsequent discussion of the “no” vote statement.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief petitioners respectfully request the following caption be certified in lieu of the Attorney General’s draft “yes” vote results statement:

**Result of “Yes” Vote:** “Yes” vote recognizes all hydroelectric energy as qualifying under (RPS) requirement that utilities supply a certain percentage of their electricity from qualifying renewable energy sources.

#### **“No” Vote Result Statement**

ORS 250.035(2)(c) requires that a ballot title contain a simple and understandable statement of not more than 25 words that explains what will happen if voters reject the measure. This means the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, or the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or. 219, 223 (2003). As the Oregon Supreme Court has also stated, “[t]he ‘no’ vote result statement needs to include a description of the law that a ‘no’ vote would leave in place. *Whitsett v. Kroger*, 348 Or. 243, 251-252 (2010).

The Attorney General’s draft “no” vote statement provides:

**Result of “No” Vote:** “No” vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility’s age, environmental impact, and location in protected areas.

Like the “yes” vote statement, the “no” vote statement attempts to describe the result of a “no” vote using the specialized term “renewable portfolio standards.” The term “renewable portfolio standard” is not familiar to voters and attempting to explain the result of a “no” vote without additional clarification as to the meaning of this term produces a statement that is not simple and understandable as the statute requires.

In addition, the “no” vote statement’s description of the law a “no” vote would leave in place is overbroad, inaccurate, and misleading. The statutes IP 3 seeks to modify do not broadly preclude the use of hydroelectric energy to comply with a renewable portfolio standard if the hydroelectric facility has an “environmental impact.” Rather, the relevant statutes specifically require certain facilities to be certified as “low impact....on or after January 1, 1995, by a national certification organization recognized by the State Department of Energy by rule.” ORS 469A.420(4).

Similarly, the laws that IP 3 would leave in place do not broadly and generally preclude hydroelectric energy from being used to comply with renewable portfolio standards if the facility is located in a “protected area” as the draft statement suggests. Instead, existing law more narrowly disqualifies hydroelectric facilities in “any protected area designated by the Pacific Northwest Electric Power and Conservation Planning Council as of July 23, 1999, or any area protected under the Federal Wild and Scenic Rivers Act, Public Law 90-542, or the Oregon Scenic Waterways Act, ORS 390.805 to 390.925.” ORS 469A.020(4). In addition, IP 3 does not seek to authorize the location of hydroelectric facilities in any protected areas as the “location in protected areas” language may inaccurately indicate to voters.

While the “no” vote statement is overinclusive in certain respects, it is underinclusive in others. In particular, the statement is underinclusive because its list of limiting factors in existing law is incomplete. For example, existing law contains limitations based on the amount of electricity generated per year (ORS 469A.025(5)), whether the facility is located in Oregon (ORS 469A.020(4)(b)), ownership of the facility (ORS 469A.020(4)(a)-(b)), efficiency upgrades to the facility (ORS 469A.020(3)), whether or not the facility is FERC licensed (ORS 469A.020(4)(b)), and other limitations. Listing particular limitations and excluding other limitations makes the “no” vote statement underinclusive, as well as inaccurate and misleading.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief Petitioners respectfully request the following caption be certified in lieu of the Attorney General’s draft “yes” vote results statement:

**Result of “No” Vote:** No vote retains current law’s conditions on hydroelectric energy qualifying under (RPS) requirement that utilities supply certain percentage of electricity from qualifying renewable energy sources.

**Summary Statement:**

ORS 250.035(2)(d) requires a ballot title to contain a 125-word statement, which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the “breadth of its impact.” *Fred Meyer, Inc. v. Roberts*, 308 Or. 169, 175 (1989).

The Attorney General’s draft summary is as follows:

**Summary:** Under existing law, renewable portfolio standards require Oregon utilities to deliver a percentage of their electricity from eligible renewable resources by 2025. Eligible resources include biomass,

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geothermal, hydropower, solar, tidal, wave, wind, and hydrogen. Use of biomass and hydropower have conditional limitations. Conditional limitations on use of hydropower to satisfy renewable portfolio standards relate to the age of the generating facility, the facility's designation as "low-impact," and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. The proposed measure would remove those restrictions, allowing Oregon utilities to satisfy renewable portfolio standards by supplying hydroelectricity from facilities that are in protected water areas, are not certified as "low-impact," and without regard to the age of the facilities.

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The Attorney General's draft summary does not summarize the measure and its major effects in a concise and impartial manner. The summary's laundry list of other renewable energy sources and discussion of biomass do not aid in summarizing the measure or its major affect. In addition, the last sentence of the draft summary describes the major effect of the measure by more or less restating the immediately preceding sentence in an unhelpful and redundant manner. Beyond the above, the summary's description of the measure's major effect is underinclusive for reasons stated in relation to other portions of the ballot title.

In addition, the summary fails to acknowledge that IP 3 has the actual major effect of allowing renewable portfolio standards to be met with lower-cost energy, which in turn, reduces wholesale power costs. The Oregon Supreme Court has recognized that "[t]he fiscal consequences of a measure may be its major effect..." *Straube v. Myers*, 340 Or. 253, 263 (2006). In this case, it is clear that reducing the cost of energy is a major effect of IP 3, and in fact, that is why the measure is entitled as the Affordable Renewable Energy Act. Therefore the measure summary must include some reference the measure's major effect of reducing power rates and the cost of complying with renewable portfolio standards.

For all of the above reasons, and those additional reasons discussed in reference to other portions of the ballot title, Chief Petitioners respectfully request the following caption be certified in lieu of the Attorney General's draft "yes" vote results statement:

**Summary:** Existing law establishes renewable portfolio standards (RPS), which require utilities to supply a certain percentage of their electricity from qualifying "renewable energy sources." The proposed measure recognizes all hydroelectric energy as a qualifying "renewable energy source" that utilities may use to comply with RPS requirements and thereby reduces wholesale power costs. Currently, hydroelectric energy is only recognized as a qualifying "renewable energy source" if the facility meets requirements relating to ownership of the facility, age of the facility, location of the facility within certain state, federal, or NW Power & Conservation Council protected water areas, amount of hydroelectric

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energy produced, and designation as "low impact" by a national certification organization recognized by the State Department of Energy by rule, in addition to other requirements.

Chief Petitioners appreciate the opportunity to provide comments and respectfully request that the alternative ballot title set forth herein be certified in lieu of the draft ballot title.

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Nathan R. Rietmann

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ELLEN F. ROSENBLUM  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

November 28, 2012

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

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KATE BROWN  
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Removes Existing Limitations On Utilities' Use Of  
Hydroelectric Power To Meet Statutory Renewable Portfolio Standards  
DOJ File #BT-3-12; Elections Division #3

Dear Mr. Trout:

We have reviewed the comments submitted in response to the draft ballot title for the above-referenced prospective initiative petition. We provide the enclosed certified ballot title. We have changed the draft caption, the "yes" and "no" statements, and the summary in response to the comments.

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

We received comments from Nathan R. Rietmann on behalf of chief petitioners Paul Cosgrove and Tom Hammer. We address below those commenters' objections to the various sections of the draft ballot title.

**A. Caption**

The draft caption prepared by this office is as follows:

**Removes conditional limitations on use of hydroelectric power to comply  
with utilities' renewable portfolio standards**

Commenters Cosgrove and Hammer posit that the caption fails to comply with ORS 250.035(2)(a) in four respects. First, they contend that the caption fails to identify the measure's major legal effect, which, in their view, is to "affirmatively recognize[e] all hydroelectric energy as a qualifying 'renewable energy source' for purposes of Oregon's renewable portfolio standards." Second, they object to the use of the phrase "removes conditional limitations" because it is not a phrase of common usage and it has no plain meaning. Rietmann 2. Third, they object to the possessive use of the term "utilities" because it suggests that the renewable

portfolio standards are established by the utilities themselves. Finally, the commenters contend that the reference to “hydroelectric power” should be changed to “hydroelectric energy.” Rietmann 3.

We disagree with the commenters’ first suggestion. While it is true that the measure includes a general policy statement in support of hydroelectric power, the primary legal effect of the measure is to repeal certain provisions of existing law that place restrictions on a utility company’s ability to use hydroelectric power to comply with its renewable portfolio standard. To suggest that the measure does nothing more than affirmatively recognize all hydroelectric power as a qualifying renewable energy source implies that the measure does not alter any aspect of existing law.

We agree that the phrase “removes conditional limitations” is a somewhat “obscure term of legal art” that could confuse some voters. We also agree that using the possessive version of “utilities” in conjunction with “standards” could mislead some voters into believing that the renewable portfolio standards are created or otherwise managed by the utility companies, as opposed to the legislature. We have modified the caption accordingly.

Finally, the commenters suggest that the reference to “hydroelectric power” should be changed to “hydroelectric energy” because that is the phrase that is used in the text of the measure. Rietmann 3. The commenters, however, are mistaken; the measure uses both phrases without distinction. *Nesbitt v. Myers*, 335 Or 424, 428, 71 P3d 530 (2003) (“Certainly, we cannot say that the choice of one permissible choice of phrase over another permissible choice means that the Attorney General’s modified caption fails to comply substantially with ORS 250.035(2)(a).”).

Consistent with our responses to the comments, we certify the following caption:

**Removes existing limitations on utilities’ use of hydroelectric power to meet  
statutory renewable portfolio standards**

## **B. Result Statements**

The draft “yes” and “no” result statements prepared by this office are as follows:

**Result of “Yes” Vote:** “Yes” vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility’s age, environmental impact, or location in protected areas.

**Result of “No” Vote:** “No” vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility’s age, environmental impact, and location in protected areas.

The commenters assert that both the “yes” statement and the “no” statement fail to comply with statutory requirements for a variety of reasons. Rietmann 3-6. With respect to both statements, the commenters suggest that use of the phrase “renewable portfolio standards” might

be unfamiliar to many voters and therefore should be avoided. Yet the measure itself contains extensive references to “renewable portfolio standards,” and the commenters’ proposed alternative for both the “yes” and the “no” statement merely uses an abbreviation—“(RPS)”—in lieu of the full phrase. We believe that attempting to abbreviate the phrase “renewable portfolio standards” would confuse voters, rather than inform voters in simple and understandable terms. Nevertheless, we agree that it would be helpful to voters to explain that a “renewable portfolio standard” is a statutory requirement that utilities supply certain percentages of their electricity from qualifying renewable energy sources. That information, however, is provided elsewhere in the ballot title.

The commenters also assert that both the “yes” and “no” statements are inaccurate and therefore potentially misleading to voters. The draft “yes” statement states that the measure, if passed, would allow utility companies to satisfy their renewable portfolio standards with power from any hydroelectric facility, “regardless of the facility’s age, environmental impact, or location in protected areas.” Rietman 4-6. The commenters posit that the “yes” statement is underinclusive because it is equally true that a utility company could satisfy its renewable portfolio standards “regardless of” innumerable other factors, such as ownership, cost, or impact on wholesale price.

The draft “no” statement provides that a “no” vote would retain current restrictions on the use of hydroelectric power to satisfy renewable portfolio standards “based on facility’s age, environmental impact, and location in protected areas.” Rietmann 4-6. The commenters suggest that the “no” statement is overbroad, and therefore inaccurate, because the existing law narrowly defines what constitutes “low impact” and “protected areas.” The commenters also suggest that the list in the “no” statement is incomplete because existing law contains additional limitations based on the facility’s location, efficiency upgrades, among others. Rietmann 5-6.

We disagree that the “yes” and “no” statements are misleading in the way the commenters assert. The primary restrictions on utilities’ use of hydroelectric power to satisfy renewable portfolio standards relate to the hydroelectric facility’s age, location, and environmental impact. We believe those factors are “the most significant and immediate,” and carry “the greatest consequence, for the general public.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). Therefore, elimination of those restrictions is the major effect of a “yes” vote, and retaining them is the major effect of a “no” vote. Nevertheless, there is room in the “yes” result statement to clarify that the measure removes other limitations, as well.

Consistently with our responses to the comments, we certify the following “yes” and “no” statements:

**Result of “Yes” Vote:** “Yes” vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

**Result of “No” Vote:** “No” vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility’s age, environmental impact, ownership, location in protected areas.



**C. Summary**

Finally, the chief petitioners assert that, for most of the reasons set forth above, the draft summary does not summarize the measure and its major effects in a concise and impartial manner. Rietmann 7. For the reasons already explained above, we disagree that the summary is misleading in the way the commenters assert. The commenters also do not identify any way in which the summary is not impartial except, perhaps, to suggest that the “laundry list of other renewable energy sources and discussion of biomass” is not helpful in summarizing the measure or its major effect. Rietmann 7. We disagree. In explaining how a proposed measure will change existing law, it is often helpful to explain the current state of the law. *See Peppers v. Myers*, 325 Or 611, 616, 942 P2d 273 (1997). Existing law specifically defines qualifying renewable energy sources, including hydroelectric power, but places limitations on the use of hydroelectric power to satisfy utility companies’ renewable portfolio standards. The primary effect of the measure is the remove the statutory limitations on such use of hydroelectric power, placing it on equal footing with the other, statutorily listed renewable energy sources. We thus believe including those renewable energy sources helps the voter understand the legal context of this measure. Nevertheless, we agree that the reference to limitations on use of biomass could confuse some voters, and we have modified the summary accordingly.

The chief petitioners also assert that, because the measure has the actual major effect of allowing renewable portfolio standards to be met with lower-cost energy, the summary must include some reference to the fact that the measure will reduce power rates. Rietmann 7. Nothing in the measure itself purports to lower energy rates, and we decline to speculate about any potential secondary effects the measure may have on energy rates. *Bauman v. Roberts*, 309 Or 490, 495, 789 P2d 258 (1990) (“Speculation about potential secondary effects has no place in any part of [a] ballot title.”).

Consistently with our responses to the comments above, however, we have modified the summary, and we certify the summary in the attached ballot title.

**Conclusion**

We have modified the caption, the “yes” statement, the “no” statement, and the summary in response to the comments we received. We certify the attached ballot title pursuant to ORS 250.067(2).

Sincerely,

 Leigh A. Salmon

Assistant Attorney General

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November 28, 2012

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Enclosure

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**BALLOT TITLE****Removes existing limitations on utilities' use of hydroelectric power to meet statutory renewable portfolio standards**

**Result of "Yes" Vote:** "Yes" vote removes age, ownership, environmental impact, location, and other restrictions on hydroelectric power facilities that utilities may use to satisfy statutory renewable portfolio standards.

**Result of "No" Vote:** "No" vote retains restrictions on using hydroelectric power to satisfy renewable portfolio standards based on, primarily, facility's age, environmental impact, ownership, location in protected areas.

**Summary:** Existing law establishes renewable portfolio standards which require utilities to supply a certain percentage of their electricity from qualifying "renewable energy sources." Qualifying renewable energy sources include biomass, geothermal, hydroelectric power, solar, tidal, wave, wind, and hydrogen. Statute imposes conditional limitations on use of hydroelectric power to satisfy renewable portfolio standards, based on factors including: the age of the generating facility, the facility's designation as "low-impact," the facility's ownership, and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. Measure removes those restrictions, allowing utilities to satisfy renewable portfolio standards using hydroelectricity from any hydroelectric facility, without regard to location in protected water areas, certification as "low-impact," the facility's age, other currently limiting factors. Other provisions.

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DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

October 26, 2012

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

Re: Proposed Initiative Petition — Removes Conditional Limitations On Use Of  
Hydroelectric Power To Comply With Utilities' Renewable Portfolio Standards  
DOJ File #BT-3-12; Elections Division #3

Dear Mr. Trout:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to conditions imposed on utility companies' use of hydroelectric power to comply with statutory renewable portfolio standards.

Written comments from the public are due to you within ten business days after your receipt of this draft title. A copy of all written comments provided to you should be forwarded to this office immediately thereafter.

A copy of the draft ballot title is enclosed.

Misty Kintz  
Legal Secretary

LS1:mlk/3723956

Enclosure

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## **DRAFT BALLOT TITLE**

### **Removes conditional limitations on use of hydroelectric power to comply with utilities' renewable portfolio standards**

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**Result of "Yes" Vote:** "Yes" vote allows utilities to satisfy renewable portfolio standards from any hydroelectric facility regardless of the facility's age, environmental impact, or location in protected areas.

**Result of "No" Vote:** "No" vote retains limitations on use of hydroelectric power to satisfy renewable portfolio standards based on facility's age, environmental impact, and location in protected areas.

**Summary:** Under existing law, renewable portfolio standards require Oregon utilities to deliver a percentage of their electricity from eligible renewable resources by 2025. Eligible resources include biomass, geothermal, hydropower, solar, tidal, wave, wind, and hydrogen. Use of biomass and hydropower have conditional limitations. Conditional limitations on use of hydropower to satisfy renewable portfolio standards relate to the age of the generating facility, the facility's designation as "low-impact," and the facility's location within certain state, federal, or NW Power & Conservation Council protected water areas. The proposed measure would remove those restrictions, allowing Oregon utilities to satisfy renewable portfolio standards by supplying hydroelectricity from facilities that are in protected water areas, are not certified as "low-impact," and without regard to the age of the facilities.

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