



MEMORANDUM

To: The Office of the Montana Secretary of State
From: The Office of the Montana Attorney General
Date: January 28, 2022
Re: Legal sufficiency review of Proposed Ballot Measure No. 24

Summary

The Attorney General determines that Proposed Ballot Measure No. 24 is not legally sufficient because it violates Article II, § 29 of the Montana Constitution and the Fifth Amendment of the United States Constitution.

The Attorney General determines that Proposed Ballot Measure No. 24 “could cause a regulatory taking” under MCA, § 13-27-312(9)(a) and that the proposed measure “will likely cause significant material harm to one or more business interests in Montana” under the same section.

Legal Sufficiency

The Attorney General determines that Proposed Ballot Measure No. 24 is not legally sufficient.

Montana law grants the Attorney General authority to conduct substantive legal review of proposed ballot measures to determine their legal sufficiency. *See* Mont. Code Ann. § 13-27-312(8) (“[L]egal sufficiency’ means that the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors, the substantive legality of the proposed issue if approved by the voters, and whether the proposed issue constitutes an appropriation.”).

“[I]ntervention in referenda or initiatives prior to an election is not encouraged.” *Cobb v. State*, 924 P.2d 268, 269 (Mont. 1996). To protect the rights of initiative and referenda enshrined in the constitution pre-election review should not be routinely conducted. *See Reichert v. State*, 2012 MT 111, ¶ 59. Measures that are “unquestionably and palpably unconstitutional on [their] face,” however, may be withheld as allowing them to go forward does not protect the right of initiative and referenda, and instead is “a waste of time and money for all involved.” *Id.*

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

Ballot Measure No. 24 amends MCA, § 75-5-316, outstanding resource water (“ORW”) classifications, in two significant ways. Current law prohibits the Department of Environmental Quality (“DEQ”) from authorizing degradation of ORWs, or from allowing new or increased point source discharge that would result in a *permanent* change in water quality in an ORW. MCA, § 75-5-316(2). First, Ballot Measure No. 24 amends -316(2) to prohibit DEQ from allowing point source discharge that would permanently or *temporarily* change ORW water quality. Second, Ballot Measure No. 24 circumvents DEQ’s petition process for listing ORWs in -316(4)–(10) by specifically designating two stretches of river as ORWs; the Gallatin River from the boundary of Yellowstone National Park to the confluence of Spanish Creek, and the Madison River from Hebgen Lake to Ennis Lake.

Ballot Measure No. 24 follows unsuccessful efforts by the measure’s proponents to effectuate the changes they seek through the administrative and judicial processes. The proposal to designate the Gallatin River from Yellowstone National Park to Spanish Creek mirrors a proposal from 2001 to do the same. *See* DEQ, Final Environmental Impact Statement Amending and Adopting the Draft Environmental Impact Statement for the Gallatin River Outstanding Resource Water Designation (January 9, 2007) (“DEQ Final EIS”). After years of consultation with stakeholder groups, the Board of Environmental Review (“BER”) declined to act on the petition. *See Montana Rivers et al. v. Montana Department of Environmental Quality*, Eighteenth Judicial District No. DV-20-200A, Order on Cross Motions for Summary Judgment at 3 (Sept. 20, 2021). BER’s reason included “the consensus between the petitioner, public interest group, and the development community in Big Sky [is] to protect water quality in the Gallatin River outside the context of an ORW.” *Id.* at 10. Cottonwood renewed the petition for the Gallatin River in 2018, which BER rejected without undergoing a new analysis or supplementing the 2007 EIS. *Id.* at 13. The court in *Montana Rivers* upheld the agency’s action because the statute leaves it to the department’s discretion to designate ORWs. *Id.* at 13–14.

The primary attack against Ballot Measure No. 24’s legal sufficiency is a substantive challenge that it imposes an uncompensated taking in violation of the Montana and United States Constitutions. *See e.g.* Views submitted by Madison County Board of Commissioners at 3–4.

The Takings Clause of the Fifth Amendment of the United States Constitution provides: “nor shall private property be taken for public use, without just compensation.” Under the Fourteenth Amendment this limitation upon the power of the federal government is applied to the states. Similarly, Article II, Section 29, of the Montana Constitution provides: “Private property shall not be taken or damaged for public use without just compensation....” Although the Montana Constitution contains the “or damaged” language that is absent from the Fifth Amendment, the Montana Supreme Court has ruled that the protections of the two clauses are

coextensive. *See Buhmann v. State*, 2008 MT 465, ¶ 74, 348 Mont. 205, 201 P.3d 70. The Takings Clauses do not prohibit the taking of private property, but they do place a condition on the exercise of the power of the government by requiring compensation.

Ballot Measure No. 24 unquestionably causes a regulatory taking by depriving affected property owners all productive or economically beneficial use of their land. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (“[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave the property economically idle, he has suffered a taking.”). A categorical taking occurs where regulation requires the land must “be left substantially in its natural state.” *Id.* at 1018. As BER concluded in a previous analysis, an ORW designation along the Gallatin River causes a categorical taking under *Lucas*. *See* BER, Taking or Damaging Impact Assessment for Rule Amendments Designating the Gallatin River an Outstanding Resource Water at 3. BER’s analysis determined an ORW designation effectively prohibits development unless development achieves “zero discharge” into the Gallatin River system. *Id.* at 1–2. “Zero discharge” isn’t, however, economically or technically feasible. *Id.* at 3. This results in a substantial limitation on previously allowable economic activity that in some cases crosses into a total preclusion of permitted activity. *Id.* at 3.¹

Commentors echo BER’s previous analysis. *See e.g.* views submitted by the Senior Water Rights Coalition (“The term “temporary” will severely limit or eliminate the ability of irrigators that divert out of the Madison River in the stretch identified as an ORW to conduct maintenance on their diversion and headgate structures. The ability to exercise these water rights is critical to the continued financial stability of those agriculture operations.”); Gallatin County Commissioner Skinner at 3 (“Any landowner along the designated stretches of both the Madison and Gallatin would effectively be prohibited from building a house with a septic system on their property.”). These commentors also correctly note that Ballot Measure No. 24 imposes more stringent water quality requirements for ORWs than under current law. By prohibiting temporary, as well as permanent, changes to water quality, the ballot measure would prevent DEQ from issuing any permits in the affected areas that results in any temporary change to water quality. This change only enhances the prior findings that an ORW designation likely results in a regulatory taking.²

¹ The Attorney General largely concurs with BER’s prior analysis and incorporates BER’s analysis into his legal sufficiency finding.

² Under an alternate analysis using the traditional *Penn Central* factors, the Attorney General also finds that Ballot Measure No. 24 results in a regulatory taking. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Here, an ORW designation imposes severe economic impacts on local governments and local businesses. As stated by various commentors, Ballot Measure No. 24’s “temporary” standard precludes permitted activity such as road maintenance and construction,

The Montana and federal constitutions prohibit takings without just compensation. *See* MONT. CONST. ART II, § 29; U.S. CONST. AMEND. V. Ballot Measure No. 24 contains no mechanism or proposal to compensate for its taking of private property. This defect must be fatal. *See Lucas*, 505 U.S. at 1026 (If “the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].”). If a ballot measure causes a taking, then the ballot measure must provide for a mechanism to provide just compensation to comply with the constitution. Because Ballot Measure No. 24 fails to do so, it unquestionably and palpably violates the constitution.

Additionally, various commentators ask the Attorney General to find the proposed measure legally insufficient because Ballot Measure No. 24 evades the consultation and review process set forth in MCA, § 75-5-105. *See e.g.* views submitted by Treasure State Resources Association et al. at 2–5. The Attorney General agrees to the extent that Ballot Measure No. 24 clearly circumvents the review process for designating the two stretches of river as ORWs. That the proponents evade this collaborative process has clearly stirred intense local opposition to their efforts. *See infra* n.4. The Montana Legislature intended a collaborative process involving state agencies, local governments, the state legislature, and the local community. *See* MCA, § 75-5-105(6–9). The Attorney General, at this time, declines to reach a decision on this argument because as stated, Ballot Measure No. 24 causes a taking without just compensation in violation of both the Montana and federal constitutions.

The Attorney General, therefore, finds that Ballot Measure No. 24 is not legally sufficient.

Significant Material Harm Statement

The Attorney General finds that Proposed Ballot Measure No. 24 will likely result in significant material harm to one or more business interests in Montana.

“When interpreting statutes, our role is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 7, 404 Mont. 80, 485 P.3d 741. The Attorney General shall “review the proposed ballot issue as to whether the proposed issue could cause a regulatory taking under Montana law or otherwise will likely cause

housing development, water and sewer systems, and as will be discussed it targets existing economic activity at Big Sky Resort. An ORW designation negatively impacts virtually the entire economic system in the affected areas.

significant material harm to one or more business interests in Montana if approved by the voters.” MCA, § 13-27-312(9)(a). “If the attorney general determines the proposed ballot issue will likely cause significant material harm to one or more business interests in Montana, the attorney general shall notify the secretary of state, which must include the finding set forth in 13-27-204(2) on the final form of the petition.” MCA, § 13-27-312(9)(b). MCA, § 13-27-204 governs the form of petitions for statutory initiatives. Proposed Ballot Measure No. 24 is a statutory initiative and MCA, § 13-27-312(9)(a) applies.

Multiple interested parties asked the Attorney General to exercise this authority by finding Ballot Measure No. 24 causes significant material harm to one or more business interests. *See infra* n.4. Based upon the evidence submitted by these parties and DEQ's prior analysis regarding an ORW designation, the Attorney General has little difficulty in concluding that if passed, Ballot Measure No. 24 will likely result in significant material harm to one or more business interests.

First, the measure's proponents admit the proposal targets development in Big Sky.³ The proponents have a clearly stated goal is to prevent DEQ from issuing any pollution discharge permits along the affected waterways. *Id.* An ORW designation will prohibit DEQ from issuing wastewater disposal permits in the affected areas which will sharply limit development. In 2007, DEQ concluded an ORW designation would reduce allowable additional residential units by 89% and allowable commercial development by 99%. *See* DEQ Final EIS at E-10.

The 2007 DEQ Final EIS further concluded that an ORW designation would result in economic loss of 90 construction jobs and \$6.86 million per year in lost wages. *Id.* at E-13. Additionally, an ORW designation would result in additional job losses in real estate, transportation, and local government. *Id.* The DEQ Final EIS also noted that an ORW designation would limit available housing in the affected area which would increase home prices and result in worsening housing availability and affordability. *Id.*

Views submitted by interested parties corroborate DEQ's prior findings. Interested parties representing agriculture, local government, tourism, real estate, construction, recreation, community housing projects, water and sewer districts, chambers of commerce, local elected officials, hospitality industry, and local

³ *See* Cottonwood Environmental Law Center, “Permanently protecting 35 miles of the Gallatin River.” Available online at <https://www.cottonwoodlaw.org/work/permanently-protecting-35-miles-of-the-gallatin-river>. (Accessed January 28, 2022).

businesses all submitted comments highlighting economic impacts Proposed Ballot Measure No. 24 would cause if passed.⁴

Ballot Measure No. 24 will likely cause significant material harm to communities in Gallatin and Madison counties. This includes the business interests ranging from agriculture, to tourism, to construction and real estate.

Changes to Ballot Statements

The Attorney General forwarded a proposed statement of purpose and implication that left intact the initiative sponsor's proposed statement.

Ballot statements “must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language.” MCA, § 13-27-312(4). As submitted, the Statement of Purpose did not comply with the requirements of -312(4) as it refers voters to sections of the MCA in order to ascertain legal definitions of terms in the proposed measure. As the Madison County Board of Commissioners noted:

The Statement of Purpose and Implication is not crafted in plain, easily understood language. Many of the terms used in the Statement of Purpose and Implication are complicated and likely unfamiliar terms to the average voter. Citing statutory code sections in the ballot language is not easily understandable as the average voter would have no idea of the content of a particular statute. For example, the statutory reference for the definition of “point source” conveys no meaning to an average voter as the average voter voting at a polling location has no access to look up statutory definitions while attempting to vote on an issue.

⁴ The Attorney General notes that the following groups and individuals submitted views in opposition to Ballot Measure No. 24, or expressed concerns related to the measure: Madison County Board of Commissioners, Town of Manhattan, Town of West Yellowstone, Big Sky County Water and Sewer District No. 363, Gallatin County Water and Sewer District, Gallatin County Commissioner Joe Skinner, Mayor Glen Clements, Senator Carl Glimm, Senator Mike Lang, Senator Cary Smith, Senator Jeff Welborn, Representative Jane Gillette, Representative Steve Gist, Representative Ron Marshall, Representative Brad Tschida, Representative Ken Walsh, Association of Gallatin Valley Irrigators, Big Sky Community Housing Trust, Bozeman Area Chamber of Commerce, Citizens for Balanced Use, Continental Construction, Hospitality and Development Association of Montana, Lone Mountain Land Company, Martha Johnson Real Estate, Montana Association of REALTORS, Montana Building Industry Association, Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana Mining Association, Montana Petroleum Association, Montana Stockgrowers Association, Montana Water Resources Association, Montana Wood Products Association, Northwestern Energy, Senior Waters Rights Coalition, Treasure State Resources Association, Ryan Blechta, Josh Chisholm, Charlie Johnson, Al Malinowski, Sarah McKenney, Rodney Meyers, Kendall Neal (McNeal & Friends), Sonja Nelson, Ruth Wardell, and Lewis Zanto.

Views of Madison County Board of Commissioners at 2. This view was echoed by many others. *See e.g.* views of Treasure State Resources Association et al. at 5–6. Further, multiple parties highlight that the definition of “point source” is subject to changing judicial interpretation, which compounds voter confusion. *See County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020). The Attorney General agrees that as submitted the Statement of Purpose and Implication does not comply with the requirements of -312(4). Therefore, the Attorney General submits the following Statement of Purpose and Implication that complies with the requirements of MCA, § 13-27-312.

[Initiative number] prohibits DEQ from approving a permit for any new or increased point source discharge if the permit would result in any change in water quality, including a temporary change in water quality, for “outstanding resource waters.” [Initiative number] bypasses the existing review process for designating an “outstanding resource water;” which includes local government consultation, review of social and economic impacts, and an environmental impact statement, and deems the Gallatin River from the boundary of Yellowstone National Park to the confluence of Spanish Creek, and on the Madison River from Hebgen Lake to Ennis Lake to be “outstanding resource waters” without the review and consultation process.

Further, numerous interested parties raised concerns that the statement of fiscal impact does not capture the costs to local governments and local communities of Proposed Ballot Measure No. 24. *See e.g.* views of Madison County Board of Commissioners at 2. The Attorney General understands and respects these views. However, the statement of fiscal impact directly follows from the language provided by the Governor's Office of Budget and Program Planning. *See* Ballot Issue No. 24 Fiscal Note at 2 (“Denial of DEQ permits could inhibit or stop construction, maintenance, improvements, and other activities requiring a DEQ permit.”). The statement of fiscal impact accurately reflects the costs to the state and effects on county or local revenues as provided in the fiscal note.

Therefore, the Attorney General declines to alter the following statement of fiscal impact:

[Initiative number] will result in increased costs to the state of approximately \$60,000 per year and require additional state employees. Denial of DEQ permits under [initiative number] may result in local fiscal impacts from inhibited or stopped construction, maintenance, improvements, or other activities requiring a DEQ permit.

CONCLUSION

Proposed Ballot Measure No. 24 is legally insufficient. Further, for the reasons stated, the Attorney General determines that Proposed Ballot Measure No. 24 will cause a regulatory taking and will likely cause significant material harm to one or more business interests in Montana.