



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 28, 2002

Catherine E. Pollino, Director
Audits Division
Secretary of State
Public Service Building, Suite 500
Salem, Oregon 97310

Re: Opinion Request OP-2002-4

Dear Ms. Pollino:

You have asked for advice concerning the provisions of Article XV of the Oregon Constitution that authorize use of State Lottery money to restore and protect Oregon's wild salmonid populations, watersheds, fish and wildlife habitats and water quality. We set forth your questions and our short answers below, followed by our analysis.

1. Are expenditures for monitoring or evaluation activities "capital expenditures" under ORS 541.351(4) or Article XV of the Oregon Constitution?

Yes, if the monitoring or evaluation activities are part of a specific project: (a) to restore a wild salmonid population, watershed, fish or wildlife habitat, or water quality; (b) to protect or conserve one of those resources, if the project is for the long-term betterment of the resource; or (c) to realize long-term improvement in water quality in a specific area. Costs of monitoring or evaluation activities not related to such a project, or that are ordinary costs of maintenance or repair after a project is fully established, are not capital expenditures. In other words, the costs of regular on-going monitoring of water quality, fish populations, watersheds or habitats are not capital expenditures.

2. Are expenditures for Department of Agriculture weed control "capital expenditures" under ORS 541.351(4) or Article XV?

Yes, if the weed control is part of a specific project: (a) to restore a wild salmonid population, watershed, fish or wildlife habitat, or water quality; (b) to protect or conserve one of those resources, if the project is for the long-term betterment of the resource; or (c) to realize long-term improvement in water quality in a specific area. Costs of weed control undertaken as part of maintenance of an area that is already properly functioning are not capital expenditures.

Discussion

At the general election on November 3, 1998, the people approved Ballot Measure 66, which amended Article XV of the Oregon Constitution to authorize the use of 7.5% of the net proceeds of the State Lottery for the “purpose of financing the restoration and protection of wild salmonid populations, watersheds, fish and wildlife habitats and water quality.”^{1/} Article XV, section 4b, requires that no less than 65 percent of that money be used for “capital expenditures.” It states:

Moneys disbursed for the public purpose of financing the restoration and protection of wild salmonid populations, watersheds, fish and wildlife habitats and water quality from the fund established under Section 4 of this Article shall be administered by one state agency. ***At least 65% of the moneys will be used for capital expenditures.*** These moneys, including grants, shall be used for all of the following purposes:

(1) Watershed, fish and wildlife, and riparian and other native species, habitat conservation activities, including but not limited to planning, coordination, assessment, implementation, restoration, inventory, information management and monitoring activities.

(2) Watershed and riparian education efforts.

(3) The development and implementation of watershed and water quality enhancement plans.

(4) Entering into agreements to obtain from willing owners determinate interests in lands and waters that protect watershed resources, including but not limited to fee simple interests in land, leases of land or conservation easements.

(5) Enforcement of fish and wildlife and habitat protection laws and regulations (emphasis added).

You ask whether monitoring, evaluation and weed control constitute “capital expenditures,” as that term is used in Article XV, section 4b, and in ORS 541.351(4), which defines the term for purposes of the implementing legislation.^{2/}

The term “capital expenditures” is not defined in Article XV, nor is it used in any other provision of the Oregon Constitution. It is permissible for the legislature to adopt a statute clarifying terms used, but not defined, in constitutional measures, so long as the statute is consistent with the constitution. Letter of Advice dated May 13, 1991, to Representative Kelly Clark (OP-6407) at 8-9 *citing* Letter of Advice dated January 21, 1991, to Larry Cambell, Speaker of the House (OP 6397) and *Stevens v. Benson*, 50 Or 269, 274, 91 P 577 (1907). However, legislative action following the voters’ adoption of an initiated measure is not evidence of voter intent in adopting that measure. *Ester v. City of Monmouth*, 322 Or 1, 10 n 5, 903 P2d

344 (1995). Therefore, in answering your questions it is first necessary to determine what meaning the voters intended for the term “capital expenditures” in Measure 66. We then can determine whether the costs of monitoring, evaluation and weed control constitute capital expenditures under Article XV, section 4b, and ORS 541.351(4).^{3/}

In interpreting a constitutional measure adopted through the initiative process, such as Ballot Measure 66, we first look at the text and context of the measure to determine the intent of the voters. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). If the voters’ intent is clear from the text and context of the measure, the inquiry ends there. If the voters’ intent is not clear from the text and context, we look to materials that disclose the public’s understanding of the measure, such as information available to the voters at the time the measure was adopted. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994). Sources of information of that nature include ballot titles, explanatory statements and arguments in voters’ pamphlets, news stories and editorials. *Id.* We discern voter intent with regard to use of the term “capital expenditures” in responding to your first question.

1. Monitoring and Evaluation

a. Capital Expenditures

If a term is one of common usage, it typically should be given its “plain, natural, and ordinary meaning,” *PGE*, 317 Or at 611, unless the context suggests that some other meaning was intended or the words have a “well-defined legal meaning.” *Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319 (1994). For capital expenditures, however, the ordinary and legal meanings are essentially identical.

The dictionary definition of “capital expenditure” is “an expenditure for long-term additions or betterments properly chargeable to a capital assets account.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993 ed) (WEBSTER’S) at 332. “[C]apital assets” is defined, in turn, as “long-term assets either tangible or intangible (as land, buildings, patents, or franchises); *specif*: any assets so designated by statute or governmental regulation (as the U.S. Internal Revenue Code) – contrasted with *current assets*.” WEBSTER’S at 332. In other words, a “capital expenditure” is an expenditure for long-term additions or betterments regarded as capital under law, including tax law.

In construing “capital construction and improvements” as used in Article XI, section 11b of the Oregon Constitution (relating to property taxation), the Oregon Tax Court linked its plain, natural, and ordinary meaning to tax law. *Gill v. Beaverton School Dist. 48*, 14 Or Tax 25, 29-30 (1996). “Capital,” the court determined, suggests construction or improvements that “add value beyond a single operating period or which add to the accumulating assets of the governmental unit.” *Id.* at 31. The court went on to say:

This ordinary and usual meaning of capital construction or improvements is consistent with widely known accounting and tax concepts, which have

permeated much of the collective public mind. In contrast, operational supplies would be typically acquired and distributed within a single fiscal period.

Id. at 32. In light of these dictionary definitions and given that “capital expenditures” is an accounting and tax concept to begin with, we believe that federal tax principles likely contributed to voters’ understanding of the term as used in Article XV.^{4/}

In the tax context, capital expenditures are business expenses that cannot be deducted in the year incurred, but are instead added to the basis of an asset and depreciated over time or used to reduce capital gains at the time the asset is sold. *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 83-84 112 SCt 1039, 117 L Ed2d 226 (1992). Everyone paying taxes on business income must capitalize any amount “paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate” or “expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.” 26 USC § 263. In addition, 26 USC § 263A requires capitalization of direct and indirect costs allocable to the acquisition or improvement of property.

Based on these sources,^{5/} we believe that the plain, natural and ordinary meaning of the term “capital expenditures” is expenditures for long-term additions or long-term improvements to assets, including restoration, subject to any modification or clarification called for by the term’s context.

Context bears on the meaning of “capital expenditures” in at least three ways. First, the sentence in Article XV, section 4b immediately following the 65 percent requirement for capital expenditures states that “[t]hese moneys” must be used for “all” of the purposes listed in subsections (1)-(6). This raises the question whether “these moneys” refers only to the moneys used for capital expenditures or to all of the moneys disbursed under section 4b. The former would imply that the activities listed in subsections (1)-(6) were intended to be the definition of “capital expenditures.” However, some of those activities, such as “education efforts,” would not come within any ordinary definition of the term “capital expenditures.” Moreover, if the activities specified in subsection (1)-(6) are actually the subject of the 65 percent minimum, then the term “capital expenditures” would have been surplusage, which is a construction to be avoided. ORS 174.010. In contrast, the latter interpretation - - the moneys provided under section 4b are to be used in some combination for all of the five identified purposes, with 65% of the total being dedicated to capital expenditures - - presents no such problems. We therefore regard this as the correct interpretation.

Second, the context in which capital expenditures is used sheds light on the nature of the “asset” that is being supplemented or improved. As discussed above, a capital expenditure is directed toward a long-term “asset,” which is an “item of value owned” or, in accounting, one of a “series of items on a balance sheet representing the book values at a given date of resources, rights, or items of property owned[.]” WEBSTER’S at 131. Ownership and improvements in value are concepts more common to business than to watersheds, habitats, fisheries, and water quality. We think, however, that the context clarifies the meaning of “asset” and “capital expenditure” here. Article XV, section 4b specifies that 50% of the money in the parks and

natural resources fund is to be disbursed to restore or protect wild salmonid populations, watersheds, fish and wildlife habitats and water quality. Each of the four is a resource with value, i.e., it benefits the people living in the state as a source of food, livelihood, environmental health, or recreation and natural beauty.

Finally, the first sentence of section 4b tells us that not every expenditure resulting in a long-term addition to or betterment of one of the four listed resources is authorized. Rather, only those expenditures that restore or protect a listed resource are authorized.

We therefore conclude that, as used in Article XV, section 4b “capital expenditures” are expenditures for long-term additions to or betterment of wild salmonid populations, watersheds, fish and wildlife habitats, or water quality, if the addition or betterment serves to restore or protect those assets. This definition of capital expenditure would include the purchase of personal property that has a useful life longer than a single fiscal period, i.e., one biennium, and that is to be used in the restoration or protection of wild salmonid populations, watersheds, fish and wildlife habitats and water quality.

b. Expenditures for Monitoring and Evaluation

We turn to the question of whether the costs of monitoring or evaluation activities constitute capital expenditures. In asking this question, you note that the purchase of monitoring equipment or machinery to tabulate monitoring or evaluation data may be a capital expenditure under generally accepted accounting principles, but that a monitoring or evaluation activity, e.g., “counting fish [or] checking stream temperature,” would not. We agree that the purchase of equipment or machinery that has a useful life longer than a single fiscal period, and that is used for the purposes described above is a capital expenditure. We also agree that counting fish or checking stream temperature and other forms of monitoring or evaluation, standing alone, would not qualify. However, where monitoring or evaluation costs are directly related to specific projects for additions to or long-term betterment of a wild salmonid population or watershed or habitat area, or to improving water quality in a specific area, they may qualify as capital expenditures under Article XV, section 4b.

In understanding how long-term improvement differs from maintenance and repair, tax law is again instructive. As discussed above, expenditures for permanent improvements that increase or restore a property’s value are capitalized. These costs can include monitoring or evaluation. *See* Internal Revenue Service, Revenue Ruling 74-104, 1974-1 C.B. 70 (evaluation costs in connection with the acquisition of property for renovation and resale are capital expenditures). On the other hand, monitoring or evaluation activities that are not part of an effort to create or improve a specific area or fishery are more akin to maintenance or repair costs, which are not capitalized. The distinction, according to many courts, including the Ninth Circuit Court of Appeals, is that an expenditure “made to ‘put’ the particular capital asset in efficient operating condition” is for an improvement and therefore capitalized, while an expenditure “made merely to ‘keep’ the asset in efficient operating condition” is for a repair. *Moss v. C.I.R.*, 831 F2d 833, 835 (9th Cir 1987) *citing Estate of Walling v. Commissioner*, 373 F2d 190, 192-3 (3rd Cir 1967). *See also*, Revenue Ruling 66-18, 1966-1 C.B. 59 (costs of *establishing* Christmas

tree stand are capital expenditures, but ongoing costs once trees are established and growing freely are deductible as ordinary business expenses).

Whether a particular expenditure is for an improvement or for a repair depends upon its context. *Moss* at 835-36. Courts have devised the “rehabilitation doctrine,” which provides that

“an expenditure made for an item which is part of a ‘general plan’ of rehabilitation, modernization, and improvement of the property, must be capitalized, even though, standing alone, the item may appropriately be classified as one of repair.” *United States v. Wehrli*, 400 F2d 686, 689 (10th Cir 1968). Whether such a plan exists depends upon a “realistic appraisal of all the surrounding facts and circumstances, including, but not limited to, the purpose, nature, extent, and value of the work done[.]”

Moss, 831 F2d at 836. This doctrine, which seems a logical elaboration of the term’s ordinary meaning, tells us that monitoring or evaluation expenses that are part of a specific plan to restore or protect habitat, water quality or specific fisheries over the long-term may also qualify as capital expenditures.

Accordingly, we conclude that costs of monitoring or evaluation occurring as part of a project to restore a wild salmonid population, watershed or fish and wildlife habitat, or to realize long-term improvement in water quality in a specific area would be capital expenditures that may be counted against the 65% minimum specified in Article XV, section 4b. Likewise, those same costs incurred as part of a project to protect or restore one of the resources specified in section 4b would be capital expenditures if the project is for the long-term betterment of the resource. At the same time, costs to monitor or evaluate in order to maintain or preserve a resource that is already functioning as intended would not be capital expenditures.

A particular type of expenditure may change in character over time. For example, the state may choose to use Article XV moneys to fund the restoration of a riparian habitat. The restoration project may provide for building a fence to keep livestock away from a stream, replacing invasive plants along the stream with native plants and placing large woody debris in the stream. To help ensure that the habitat is restored, regular monitoring and evaluation may be necessary to identify areas requiring replanting or areas where debris has washed out vegetation that needs to be replaced. The cost of such monitoring and evaluation would be a capital expenditure. On the other hand, once the habitat has been restored and is functioning as intended, periodic monitoring of fencing, plants and debris would be an ordinary expense of maintaining the habitat area. While such monitoring may be part of a larger effort to protect or conserve a functioning habitat, its cost could not be characterized as a capital expenditure because it is aimed at maintaining the status quo, rather than achieving a long-term betterment. Likewise, the cost of monitoring or evaluation activities used in an effort to track and better understand water quality trends in a particular water basin or throughout the state would not be a capital expenditure. In such a situation, the research would not be associated with a specific project intended to add to or improve any particular capital asset.

c. ORS 541.351(4)

Your first question also asks whether monitoring and evaluation activities are “capital expenditures” as that term is defined in ORS 541.351(4), which raises the preliminary question whether or to what extent the term’s statutory definition may lawfully differ from its constitutional meaning.

As stated above, the legislature may clarify terms used but not defined in a constitutional provision. However, the legislature is bound by constitutional provisions and may not enact a statute that is contrary to specific constitutional provisions. 44 Op Atty Gen 431, 436 (1985). Moreover, there is nothing in Article XV authorizing the legislature to define “capital expenditures” for purposes of that constitutional provision without reference to the meaning intended by the voters for that term. *Shatzer v. Dept of Revenue*, 325 Or 211, 219, 934 P2d 1119 (1997) (“The legislature may not override the voters’ will and give unintended meaning to [a constitutional provision adopted by initiative]”). On the other hand, Article XV, section 4b permits the use of up to 35% of section 4b moneys for section 4b purposes other than capital expenditures. This means that the legislature may direct that moneys be expended on things it regards as capital expenditures, even if the constitution does not, as long as (1) the moneys are expended only for purposes authorized by section 4b as a whole; (2) at least 65% of section 4b moneys are used for capital expenditures as the term is used in the constitution; and (3) some moneys are spent for each of the purposes specified in subsections (1)-(6). With those parameters in mind, we see two potential disparities between the constitutional and statutory meanings.

First, Article XV, section 4b(3) authorizes expenditures to develop and implement “watershed and water quality enhancement plans,” but for wild salmonid populations and fish and wildlife habitats, section 4b says nothing of enhancement and authorizes expenditures only for restoration and protection. However, the statutory definition of “capital expenditures” includes direct expenses related to “[p]rojects that restore, *enhance* or protect *fish and wildlife habitat*, watershed functions, *native salmonid populations* or water quality.” ORS 541.351(4)(b) (emphasis added).

To “enhance” an asset means to increase its value or worth. WEBSTER’S at 753. This may be done in more than one way. For example, a person may enhance a historic home by adding a level to the existing structure. However, a historic home may also be enhanced by being restored to its original condition. If we interpret “enhance” in ORS 541.351(4)(b) to mean increase an asset’s worth or value through restoration or protection, then the term is consistent with Article XV, section 4b. It is a settled principle of statutory construction that a court may not adopt an interpretation of a statute that renders it unconstitutional “if another construction is reasonable which will uphold the constitutionality of the statute.” *State v. Harmon*, 225 Or 571, 577, 358 P2d 1048 (1961). Because we find reasonable an interpretation of “enhance” in ORS 541.351(4)(b) that is limited to increasing an asset’s worth or value by means of restoration or protection, and in light of the principle stated in *Harmon*, we adopt this interpretation.⁶¹ As so interpreted, we conclude that ORS 541.351(4)(b) does not define “capital expenditures” more broadly than was intended by the voters in adopting Article XV, section 4b.

The second question is whether ORS 541.351 gives “capital expenditures” a meaning narrower than that intended by the voters. It appears to do so in two ways. First, the statutory definition for “capital expenditures” incorporates statutory definitions for “protect” and “restore.” “Protect” is defined as “to minimize or mitigate adverse effects on salmonid and habitat[.]” ORS 541.351(8). “Restore” is defined as “to take actions likely to achieve sustainable population levels of native fish or wildlife and their habitats.” ORS 541.351(9). Article XV, section 4b authorizes the use of lottery funds to “restore and protect” wild salmonid populations, watersheds, fish and wildlife habitats and water quality without defining either term. There is nothing in the text or context of Article XV, section 4b, however, to suggest the voters intended to narrow the plain, natural and ordinary meaning of “restore” and “protect.” The construction we give to “enhance” subsumes the ordinary meaning of “restore,” but the statutory definition of “protect” appears narrower than the meaning of that term in Article XV, Section 4b. For example, the constitution authorizes capital expenditures for the protection of water quality, without regard to whether the project minimizes or mitigates adverse effects on salmonid and habitat. Second, the statutory definition of “capital expenditures” covers the purchase of personal property with a long-term use only if it is to be used to enforce fish and wildlife and habitat protection law, which is not a limitation that would have been understood by voters to be part of the term’s constitutional meaning.

Article XV, section 4b and ORS 541.377(6)(a) both require that at least 65% of section 4b moneys be used for capital expenditures, but they appear to define the term in slightly different ways. Other statutes provide for the possibility that more than 65% of the moneys may be used for capital expenditures. *See* ORS 541.377(6)(b) and 541.379(1). If the narrower meaning given to “protect” and “personal property” by ORS 541.351 should result in some activities that are capital expenditures under the constitutional provision not being so classified under the statute, then it will be necessary to separately calculate whether the 65% minimum has been met under the constitution and under the statute.

2. Weed Control Activities

Your second question asks whether the costs of weed control activities constitute capital expenditures. You note that the legislature has budgeted Measure 66 funds to the Department of Agriculture for weed control. As in the case of monitoring or evaluation, the purchase of weed control equipment or machinery with a useful life longer than a single fiscal period is a capital expenditure under the constitution if that equipment or machinery is used to restore or protect one of the resources identified in Article XV, Section 4b.

As with monitoring or evaluation, for the cost of weed control activities to be a capital expenditure, the activities must be part of a specific project to restore or protect a wild salmonid population, watershed or habitat area, or water quality in a particular area. Where invasive weeds have become established and the weed control project is directed at restoring an area by removing the weeds in a manner that will provide a long-term benefit, then the costs are capital expenses. Similarly, weed control activities that are part of a project to protect a watershed or other resource by preventing further weed encroachment will be a capital expenditure if the costs

are expected to result in the long-term control or eradication of the weeds. Conversely, costs for maintenance, e.g., periodic spraying of herbicides or mowing of an area that is already functioning as intended, are not capital expenditures even if they are part of a project designed to protect the resource through maintenance. In a different context, costs to map trends in weed distribution, if the mapping is not part of a project for the long-term betterment of a particular resource, are not capital expenditures.

Although ORS 541.351(4) does not specifically reference "weed control," it could be part of a project to enhance, restore or protect any of the resources covered by the statute. Therefore, we conclude that the statute allows for weed control costs in some circumstances. As with the costs of monitoring and evaluation activities, if there are any weed control costs that meet the constitutional but not the statutory definition, then it will be necessary to tally the expenditures for each separately.

Sincerely,

Donald C. Arnold
Chief Counsel
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DCA/KBC/RMW/DNH/dfp/naw:GENC0038

c: Geoffrey Huntington

^{1/} Article XV provides in relevant part:

SECTION 4 (4)(d) There is hereby created within the General Fund the Oregon State Lottery Fund which is continuously appropriated for the purpose of administering and operating the Commission and the State Lottery. The State Lottery shall operate as a self-supporting revenue-raising agency of state government and no appropriations, loans, or other transfers of state funds shall be made to it. The State Lottery shall pay all prizes and all of its expenses out of the revenues it receives from the sale of tickets or shares to the public and turnover the net proceeds therefrom to a fund to be established by the Legislative Assembly from which the Legislative Assembly shall make appropriations for the benefit of any of the following public purposes: * * * or restoring and protecting Oregon's parks, beaches, watersheds and critical fish and wildlife habitats. * * *.

(5) Effective July 1, 1999, 15% of the net proceeds from the State Lottery shall be deposited in a parks and natural resources fund created by the Legislative Assembly. Of the moneys in the parks and natural resources fund, * * * and 50% shall be distributed for the public purpose of financing the restoration and protection of native salmonid populations, watersheds, fish and wildlife habitats and water quality in Oregon. The Legislative Assembly shall not limit expenditures from the parks and natural resources fund. The Legislative Assembly may appropriate other moneys or revenue to the parks and natural resources fund.

^{2/} ORS 541.351(4) defines “capital expenditures” to mean “direct expenses related to”

(a) Personal property of a nonexpendable nature including items that are not consumed in the normal course of operations, can normally be used more than once, have a useful life of more than two years and are for use in the enforcement of fish and wildlife and habitat protection laws and regulations; or

(b) Projects that restore, enhance or protect fish and wildlife habitat, watershed functions, native salmonid populations or water quality, including but not limited to:

(A) Expenses of assessment, research, design or other technical requirements for the implementation of a project;

(B) The acquisition of determinate interests, including fee and less than fee interests, in land or water in order to protect watershed resources, including appraisal costs and other costs directly related to such acquisitions;

(C) Development, construction or implementation of a project to restore, enhance or protect water quality, a watershed, fish or wildlife, or riparian or other habitat;

(D) Technical support directly related to the implementation of a project; and

(E) Monitoring or evaluation activities necessary to determine the actual effectiveness of a project.

^{3/} Normally, when a case presents both statutory and constitutional issues for decision, a court addresses the statutory issue first because it will not decide constitutional questions “if there is an adequate subconstitutional basis for decision.” *Leo v. Keisling*, 327 Or 556, 562, 964 P2d 1023 (1998). Because your questions regarding the constitutional meaning of “capital expenditures” are not subject to resolution by a statutory analysis, and for the sake of analytical clarity, we address your constitutional questions first and your statutory questions second.

^{4/} Oregon statutes addressing both personal income and corporate excise tax are based on federal law. See ORS 316.022(6) (“‘Taxable income’ means the taxable income as defined in * * * the Internal Revenue Code[.]”); ORS 317.013(1) (“Those portions of * * * Internal Revenue Code, and any other laws of the United States pertaining to the determination of taxable income of corporate taxpayers, are adopted by reference as a part of this chapter.”).

^{5/} A review of the relevant Voters’ Pamphlet materials and pre-election media coverage of Measure 66 does not assist in determining voter intent with regard to the meaning of “capital expenditures.”

^{6/} We recognize that our interpretation of “enhance” results in overlapping meanings for “enhance,” “restore,” and “protect” as used in ORS 541.351(4)(b) and related statutes. Oregon courts follow the maxim of statutory construction that the legislature’s use of different terms in related portions of a statute likely indicates an intent for the terms to have different meanings. *State v. Adams*, 315 Or 359, 366, 847 P2d 397 (1993). However, the courts also have observed that “blind application” of the maxim “may lead to absurd results.” *State v. Foley*, 125 Or App 423, 428, 865 P2d 465 (1993). In this case, where an interpretation of “enhance” that did not overlap with the plain, natural and ordinary meanings for “restore” and “protect” would be contrary to the terms of the Oregon Constitution, we believe that a court would not apply the maxim.