

No. 425

**ELECTIONS—SPECIAL ELECTIONS—VACANCY—
STATE SENATOR—NOMINATION OF CANDIDATE**

Held: Candidates to fill a vacancy in the office of State Senator may be nominated and appear on the ballot with party designation if the Governor, by proclamation, orders a special election to be held at the time of the general election and said proclamation is made before the closing date for filing petitions for nomination.

June 15, 1942.

Mr. John D. French
County Attorney
Lake County
Polson, Montana

Dear Mr. French:

You have requested my opinion on the method to be pursued in the filling of vacancies in the office of State Senator caused by the resignation of the incumbent whose term of office does not expire until 1944.

Section 45, Article V of the Constitution of Montana, provides:

“When vacancies caused by death, occur in either house of the legislative assembly, such vacancies shall be filled by appointment by the board of county commissioners of the county from which such vacancy occurs. All vacancies occurring from any other cause shall be filled by election upon proclamation of the governor.”

Under the provisions of the section quoted, a proclamation by the Governor calling a special election is a mandatory prerequisite before the vacancy can be filled. I have not overlooked *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932, in making this statement.

Sections 534 and 535, Revised Codes of Montana, 1935, prescribe the contents of the proclamation and the method of publishing and posting the proclamation of the Governor calling a special election.

The method of nomination for the special election is a more difficult problem:

By the enactment of the direct primary law (Chapter 65, Vol. I, Revised Codes of Montana, 1935), the practice of having candidates for office nominated by a primary election established a procedure which should be applied to special elections, when time will permit.

As much we intimated in *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 584, 144 Pac. 162. To a similar effect are *State v. Superior Court of King County*, 160 Wash. 520, 295 Pac. 730 and *State ex rel. Sears v. Gilliam*, 93 Wash. 248, 160 Pac. 757.

There is sufficient time for the Governor to issue a proclamation calling a special election for the office of State Senator in Lake County before the closing date, June 20, for filing petitions for nomination and such a proclamation ordering a special election may be made.

You have also requested my opinion whether a candidate to fill the vacancy could file a petition under the direct primary law, Chapter 65, Revised Codes of Montana, 1935, for nomination after the closing date, June 20, 1942, for filing petitions to fill other offices. The answer to this is apparent, in that Section 644, Revised Codes of Montana, 1935, contains no exception in the case of elections to fill vacancies. Its terms provide:

“All petitions for nomination under this act for offices to be filled by the state at large or by any district consisting of more than one county, and nominating petitions for judges of district courts in districts consisting of a single county, shall be filed in the office of the

secretary of state not less than forty days before the date of the primary nominating election; and for other offices to be voted for in only one county, or district or city, every such petition shall be filed with the county clerk or city clerk as the case may be, not less than thirty days before the date of the primary nominating election."

Therefore, a candidate who wishes to have a political party designation (Section 639, Revised Codes of Montana, 1935) must file this year on or before June 20, 1942.

It is my opinion that, if before June 20, the closing date for the filing of petitions for nomination, the Governor, by proclamation, orders a special election to be held at the time of the general election, the names of those so filing will appear on the ballot with political party designation. It is also my opinion petitions for nomination cannot be filed after June 20, 1942, but candidates may also be nominated under the provisions of Section 615, Revised Codes of Montana, 1935, as independent candidates and must be so designated on the ballot.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General