

No. 482

**ELECTIONS—SPECIAL ELECTIONS—NOMINATION OF  
CANDIDATES—VACANCIES—BALLOT**

- Held:**
1. Nomination of candidates for special election must be made pursuant to either section 615 or 612, Revised Codes of Montana, 1935.
  2. The candidate for special election must be placed on a separate and special ballot, and not on the general ballot, where the special election is concurrent with the general election.
  3. The provisions of section 618, Revised Codes of Montana, 1935, does not apply to nominations for special elections to fill vacancies. A candidate for a special election may file his petition for nomination any time before the election, except that it must be filed to give the clerk sufficient time to have the special ballot printed and distributed to the various precincts.

September 12, 1942.

Mr. Wilbur P. Werner  
County Attorney  
Glacier County  
Cut Bank, Montana

Dear Mr. Werner:

You have requested the opinion of this office in regard to the following questions:

1. What method or methods are provided for by law for a person to have his or her name on the ballot in the special election to be held November 3rd, 1942, as a candidate to the unexpired term of State Senator for Glacier County?

2. Is Opinion No. 628, Volume 15, correct, which instructs that the candidate for a special election must be placed on a special and separate ballot, and not on the general ballot where the special election is held concurrent with the general election?

3. Does this office concur with former Attorney Generals' opinions concerning section 618, Revised Codes of Montana, 1935, which hold that the provisions of that section as stated shall not apply to nominations for special elections to fill vacancies, and that a candidate may file his petition for nomination any time before the special election, except that it must be in time to give the clerk and recorder sufficient time to have the special ballot printed and distributed to the various precincts?

The facts of the case as presented are these:

"A" was elected to the office of State Senator for Glacier County at the general election held in November, 1940. His term of office was to run for four years. He died July 11, 1942, leaving two and one-half years of his term unserved. As the date of his death was shortly before the primaries, it was too late to select a candidate to fill the unexpired term at the primary election on July 21, 1942. Governor Ford has heretofore issued a proclamation calling for a special election on November 3, 1942, to fill the unexpired term.

The questions will be disposed of in order.

1. The applicable sections are 615, 612, Revised Codes of Montana, 1935, and section 662, Revised Codes of Montana, 1935, as amended by Chapter 84, Laws of 1939. Section 615 provides candidates for public office may be nominated otherwise than by convention or primary meeting, and then provides for the procedure. Section 612 provides:

"Convention or primary meeting defined. Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the state. A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle."

The pertinent portion of Section 662, as amended by Chapter 84, Laws of 1939, is as follows:

"... Said county or city central committee shall have the power to make nominations to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election where such vacancy is caused by death, resignation, or removal from the electoral district, but not otherwise."

No controversy appears to exist under Section 615, Revised Codes of Montana, 1935. This Section was first enacted in 1889 (Laws of 1889, Section 5, P. 136) and has been re-enacted twice in identical form. The court treats this "section of the Code as contemplating simply the candidacy of one not a nominee of a party—an independent or electors' candidate." (State ex rel. Wheeler et al., v. Stewart, 71 Mont. 358, 230 Pac. 366.)

The controversy which you suggest exists around Section 612, Revised Codes of Montana, 1935, is not so real as apparent. In State ex rel. Smith v. Duncan, 55 Mont. 376, 55 Pac. 248, the court held no authority was given the County Central Committee under the statute (now, Section 662, as amended) to make an original nomination. The power conferred is limited strictly to filling vacancies occurring among candidates nominated by the primary nominating election. In other words, the power is limited to filling vacancies which occur after nominations have been regularly made. This rule was followed by this office in Opinion No. 320, Volume 17, under date of August 11, 1938.

In *State ex rel. Reibold v. Duncan*, 55 Mont. 380, 177 Pac. 250, the single question presented was whether the adoption of the General Primary Law operated to repeal in their entirety all prior existing laws which governed the nominations of candidates for public office. The court said, page 383:

"We do not agree with counsel that the primary election law was designed to furnish the exclusive means by which all candidates for public office shall be nominated, and that the failure of that Act to provide for nominations of candidates to be voted for at special elections was a mere oversight. The references in Sections 2 and 7 indicate clearly that the subject was not overlooked, but for some sufficient reason it was evidently considered that the provisions of the direct primary law are inapplicable to the nomination of candidates to be voted for at special elections, and that subject was reserved for control by existing laws or future legislation. No subsequent enactments dealing with the matter have been passed, and the authority to make such nominations must be sought in prior statutes.

"The nomination of a candidate to be voted for at this special election might be made pursuant to the provisions of Section 521, or Section 524, Revised Codes, and since the certificate tendered by this plaintiff complies in all respects with the requirements of Section 524, the county clerk was not justified in refusing to file it."

Section 521 and Section 524 to which the court referred are found in Revised Codes of Montana, 1907, and are Sections 612 and 615 in our Code of 1935.

In *State ex rel. Mills v. Stewart*, 64 Mont. 453, 210 Pac. 465, the holding of *State ex rel. Reibold v. Duncan* (supra) was followed, the court there saying:

"The Initiative Act (Laws, 1913, p. 570) did not entirely repeal the old law. The old law in many respects was left in full force and effect. In fact, the initiative measure did not in express language, contain any repealing clause at all. It only provided that every political party shall nominate all its candidates for public office under the provisions of that law, and not in any other manner. (Sec. 639, Revised Codes of Montana 1921.) But, as has been indicated, that inhibition referred only to the political parties in existence at the time of the primary. The court has held in the case of *State ex rel. Reibold v. Duncan*, supra, that the initiative law has no application to special elections, and that it was not designed to furnish the exclusive means by which all candidates for public office shall be nominated. The only law, then, under which nominations could be made by the new Socialist party thus organized on September 30, 1922, was Section 612, Revised Codes of 1921, which was in existence prior to the Initiative Act, and which, as we have seen, was not repealed thereby so far as related to special elections and to political parties coming into existence after the primary election."

It is therefore my opinion that nomination of candidates to be voted for at the special election to be held concurrent with the general election on November 3rd, 1942, must be made pursuant to the provisions of either 615 or 612, Revised Codes of Montana, 1935. Opinion No. 320, Volume 17, is not in conflict with this opinion. Also, Opinion No. 331, Volume 17, expressly recognizes the convention system referred to in Chapter 64, Revised Codes of Montana, 1935, is applicable to special elections.

2. Opinion No. 628, Volume 15, is correct in instructing that the candidates for a special election must be placed on a special and separate ballot, and not on the general ballot. The election is a special election, even though held concurrent with the general election. Chapter 170, Laws of 1939, does not change this result.

3. This office concurs with former Attorney Generals' opinions which say the provisions of Section 618, Revised Codes of Montana, 1935, do not apply to nominations for special elections to fill vacancies, and a candidate may file his petition for nomination any time before the general election, except that it must be filed to give the clerk sufficient time to have the special ballot printed and distributed to the various precincts. Section 618, Revised Codes of Montana, 1935, still contains the specific exception:

“ . . . but the provisions of this section shall not be held to apply to nominations for special elections to fill vacancies.”

Sincerely yours,

R. V. BOTTOMLY  
Attorney General