

## Opinion No. 119

## Elections, Primary—Filing—Offices and Officers

**Held:** Since there is no public office in being for which a candidate is to be nominated, other than county attorney and county commissioner, the clerk cannot lawfully accept such nominating petitions in the usual way and collect the fees therefor.

June 12, 1948

Mr. George D. Ore  
County Attorney  
Petroleum County  
Winnett, Montana

Dear Mr. Ore:

You have informed me that certain electors in Petroleum County desire to file petitions for nomination to offices in Petroleum County which are not presently elective offices, Petroleum County being under the Managerial form of government and said offices being filled by appointment of the county manager. You state Petroleum County is to vote at the primary election in July on whether they will remain under the managerial form of government or return to the former form of government.

Your question is, "Can the clerk lawfully accept such nominating petitions in the usual way, collect the required fee, etc.?"

At the present time there are no such elective offices in Petroleum County as those for which said electors desire to file. There is no certainty that there will be at any time in the future. The most there is is a contingency. Such offices may be established as a result of the special election to be held at the same time as the July primary. The offices are not in esse now nor will they be at the time of the primary election.

Section 640, Revised Codes of Montana, 1935, as amended by Chapter 27, Laws of 1945, provides in part:

"Petitions for Nomination to be Filed. Any person who shall desire to become a candidate for nomination to any office under this law shall send by registered mail, or otherwise, to the secretary of state, county clerk, or city clerk, a petition for nomination, signed by himself, accompanied by the filing fee hereinafter provided for, and such petition shall be filed and shall be conclusive evidence for the purpose of this law that such elector is a candidate for nomination by his party. . . ." (Emphasis supplied).

The section specifically provides the petition of nomination is to be filed "for an office under this law." Nowhere is there any authority for the clerk's receiving petitions for offices other than those covered by the direct primary law from anyone desiring to be a candidate for nomination at the primary election.

Section 632, Revised Codes of Montana, 1935, provides:

"On the third Tuesday of July preceding any general election (not including special elections to fill vacancies, municipal elections in towns and cities, irrigation district and school elections) at which public officers in this state and in any district or county are to be elected, a primary nominating election shall be held in accordance with this law in the several election precincts comprised within the territory for which such officers are to be elected at the ensuing election, which shall be known as the primary nomination election, for the purpose of choosing candidates by the political parties, subject to the provisions of this law, for senator in Congress, and all elective state, district and county officers, and delegates to any constitutional convention or conventions that may hereafter be called, who are to be chosen, at the ensuing election wholly by electors within this state, or any subdivision of this state, and also for choosing and electing county central committeemen by the several parties subject to the provisions of this law." (Emphasis supplied).

Section 632, above quoted, defines the scope of the direct primary, listing the offices under the law. It will be noted the law specifically covers "all elective state, district and county officers." It is also provided that the primary nominating election is to be held "preceding any general election . . . at which public officers in this state and in any district or county are to be elected. . . ." It cannot be said officers are to be elected for offices which are not yet in existence and which there is no certainty ever will be, simply because there is a possibility that such offices may be created in the future. The direct primary provides for the nomination of candidates for public offices existing at the time of the primary election, or offices presently provided for by law, to come into existence at a certain time in the future, not for offices which may thereafter be created.

At the time of the primary election, the only public officers to be elected in Petroleum County at the general election are county commissioners and the county attorney. Section 4954.19, Revised Codes of Montana, 1935.) Since those are the only elective county offices in Petroleum County at the time of the primary election, they are also the only offices for which candidates may be chosen at the July primary. The fact that other offices may be created by the action taken by the voters at the primary does not bring such offices into being so candidates can file and be nominated at the primary.

The law provides two other methods of nomination besides the direct primary. There is nomination by party convention or primary meeting as provided in Section 612, Revised Codes of Montana, 1935, as amended by Chapter 26, Laws of 1945, and nomination by certificate signed by electors as provided in Section 615, Revised Codes of Montana, 1935. Whenever the provisions of the Primary Nominating Election Law apply, the convention or primary meeting method of making nominations provided for in Section 612 is expressly ruled out and prohibited by the provisions of Section 639, Revised Codes of Montana, 1935. (LaBorde v. McGrath, 116 Mont, 283, 288, 149 Pac. (2d) 913.) However, if

the office is created or vacated subsequent to the primary election or at a time which makes it impractical or impossible to nominate by the direct primary, the methods provided in Section 612 and 615 are available.

We must take the law as the legislature has given it to us.

Therefore, it is my opinion, since there is no public office in being for which a candidate is to be nominated, other than county attorney and county commissioner, the clerk cannot lawfully accept such nominating petitions in the usual way and collect the fees therefor.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General