

**Opinion No. 46****Service of Process—Corporations—Secretary of State—Delivery of  
Process to the Secretary of State**

**Held: 1. Service of process by mail upon the Secretary of State does not constitute "delivery" of said process within the meaning of Section 93-3009, RCM, 1947.**

**2. "Delivery" of process to the Secretary of State under the provisions of Sections 93-3008 and 93-3009, RCM, 1947, as amended, must be made manually by those persons designated by Section 93-3006, RCM, 1947.**

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January 29, 1958

Mr. Frank Murray  
Secretary of State  
Capitol Building  
Helena, Montana

Dear Mr. Murray:

You have requested my opinion concerning service of process by mail upon the Secretary of State, when such service is made under the provisions of Sections 93-3008 and 93-3009, RCM, 1947, as amended.

Under Section 93-3008, *supra*, service of process can be obtained against certain corporations, under certain conditions, upon the order of the clerk of court in which an action is pending:

" . . . directing process to be served upon the secretary of state of the state of Montana, or, in his absence from his office, upon the deputy secretary of state of the state of Montana; . . ."

The manner in which such service is made is set forth in Section 93-3009, *supra*, which provides:

"When such order is made, the summons and complaint, together with a copy of such order, shall be served upon the secre-

tary of state of the state of Montana, or, in his absence from his office, upon the deputy secretary of state, by delivering to and leaving with him a true copy of the summons and complaint, and a copy of such order . . ."

As indicated above, the service is to be made by "delivery" to the secretary of state or his deputy, so our question is: Does the mailing of process to the secretary of state constitute "delivery" of said process within the meaning of Section 93-3009, *supra*?

Section 93-3008, *supra*, constitutes the secretary of state as the statutory agent to receive and accept the service of process for certain corporations under certain conditions. (Section 93-3011, RCM, 1947; *Montana Valley Land Co. v. Bestul*, 126 Mont. 426, 253 Pac. (2d) 325.) Although there is authority to the contrary, the prevailing rule is that in the absence of express authorization, service by mail upon a statutory agent is insufficient, even though such service be acknowledged in writing by such agent. (*Bennett v. Supreme Tent of Knights of Maccabees of the World*, 40 Wash., 431, 82 Pac. 744; *Farmers v. National Life Association of Hartford, Connecticut*, (C.C.) 50 Fed. 829; *New River Mineral Co. v. Seeley*, 120 Fed. 193, 56 C.C.A. 505; *Hunstock v. Estate Development Corp.*, 22 Cal. (2d) 205, 138 Pac. (2d) 1; 23 Am. Jur. 530, "Foreign Corporations," Section 506; 148 A.L.R. 979.)

Illustrative of this rule is the case of *Hunstock v. Estate Development Corporation*, *supra*, in which a question identical to that which you have posed was before the supreme court of California in connection with a California statute that is similar in substance to Section 93-3008, RCM, 1947. The statute in question was Section 373, California Civil Code, (Now. Corp. Code, Sec. 3302) which provided in part as follows:

" . . . such court or judge may make an order that service be made upon such corporation by delivering to the secretary of state, or to any person employed in his office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, . . ."

In the *Hunstock* case the court held that this section of the code authorizing service upon corporations by delivering a copy of the process to the secretary of state under certain circumstances uses the word "delivery" as excluding any means other than manual, and does not authorize mailing a copy of the process to the secretary of state.

As the court said at page 3 of 138 Pac. (2d):

" . . . the context of section 373 requires a definition of 'delivery' as excluding any means other than manual. For the service upon the Secretary of State may be made by delivery of the process not only to him but also 'to any person employed in his office in the capacity of assistant or deputy.' The obvious purpose of this provision is to make a number of persons available for the service of process, a purpose which would be entirely unnecessary

if the legislature had intended delivery of a copy of the process be made by mail or express addressed to the Secretary of State and received in the course of the routine business of the office."

In my opinion the interpretation given the California statute by the court in the Hunstock case is applicable to the language of Sections 93-3008 and 93-3009, RCM, 1947, as amended.

It is my opinion, therefore, that service of process upon the secretary of state by mail does not constitute "delivery" of said process within the meaning of Section 93-3009, *supra*, and that delivery of said process must be made manually by those persons designated by Section 93-3006, RCM, 1947.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General