

VOLUME NO. 36

Opinion No. 81

ELECTIONS — Absentee voters, period for applying for absentee ballot; Sections 19-107, 23-3301, 23-3703, Revised Codes of Montana 1947.

HELD: A county clerk and recorder must provide an opportunity for absentee voters to apply for an absentee ballot up to 12:00 noon on May 31, 1976 pursuant to section 23-3703 Revised Codes of Montana 1947.

May 19, 1976

Mr. Richard P. Heinz
County Attorney
County of Lake
P O. Box 88
Polson, Montana 59860

Dear Mr. Heinz:

You have requested my opinion as to whether a county clerk and recorder must provide an opportunity for absentee voters to apply for an absentee ballot up to 12:00 noon on May 31, 1976.

Section 23-3703 R.C.M. 1947 reads as follows:

During a period beginning seventy-five (75) days before the day of election and ending at 12 noon on the day before the election, an elector expecting to be absent from the county in which his voting precinct is situated, an elector in the United States service, or an elector who will be unable to go to the polls because of physical incapacity may apply to the registrar or city clerk for an absentee ballot. (Emphasis supplied)

Section 23-3301 R.C.M. 1947 provides for the date of the primary election as follows:

The primary election shall be held on the first Tuesday in June preceding any general election to select candidates for: ...

In 1976, the first Tuesday in June, is June 1. The day before the primary election is therefore May 31, the last Monday in May. Section 19-107 R.C.M. 1947 designates the last Monday in May as Memorial Day, a legal holiday. In essence your question is whether section 23-3707, *supra*, requires a county clerk and recorder to provide services until 12:00 noon on Memorial Day to facilitate absentee voters.

In most jurisdictions, absentee voting laws have been construed so as to further their purpose of protecting and furthering the right of suffrage. **Brown v. Grzeskowiak**, 230 Ind. 110, 101 N.E. 2d 639 (1951); **Brush v. Schum**, 102 Misc. 143, 168 N.Y.S. 391 (1917); **Maddox v. Board of State Canvassers**, 116 Mont. 217, 149 P.2d 122 (1944).

In **Van Horn v. Lyon**, 119 Mont. 212, 173 P.2d 891 (1946) the Montana Supreme Court stated:

Absentee voting is therefore an exception to the customary and usual manner of voting. It is the privilege granted by lawmakers which enables the absentee elector, the physically incapacitated elector, and the elector who has reason to believe that before the election day he will be absent from his county or physically incapacitated to obtain and mark his ballot in a different manner and at a different time and place than is required of electors generally who present themselves in person at their respective precinct polling places on the day of election.

For these reasons the laws conferring and regulating the privilege of absentee voting have generally received a strict construction. 29 C.J.S. Elections, sec. 210, p. 297. The absent voters law is in derogation of the common law and of the general election law....

Section 23-3703, *supra*, provides that an elector may apply for an absentee ballot up to 12:00 noon on the day preceding election. This requirement must be strictly construed, keeping in mind the purpose of the absentee voter laws, which is to protect and further the right of suffrage. The fact that May 31, 1976 is a legal holiday is not sufficient reason to close absentee voting early, and possibly prevent a qualified elector from exercising his franchise.

THEREFORE, IT IS MY OPINION:

A county clerk and recorder must provide an opportunity for absentee voters to apply for an absentee ballot up to 12:00 noon on May 31, 1976 pursuant to section 23-3703 R.C.M. 1947.

Very truly yours,

ROBERT L. WOODAHL
Attorney General