

COUNTY GOVERNMENT - Amendments to form of local government recommended by local government study commission;
LOCAL GOVERNMENT - Amendments to form of local government recommended by local government study commission;
LOCAL GOVERNMENT STUDY COMMISSIONS - Election procedures for voting on commission recommendations;

MONTANA CODE ANNOTATED - Title 7, chapter 3, parts 2 to 7; Title 13; sections 7-3-102, 7-3-121 to 7-3-161, 7-3-124, 7-3-149, 7-3-156, 7-3-158, 7-3-160, 7-3-171 to 7-3-193, 7-3-187, 7-3-192(1), 7-3-193, 7-4-2102(1), 7-4-2102(3), 7-4-2104, 13-3-102(1), 13-10-201(6), 13-13-205;

OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 1 (1983).

- HELD: 1. A local government study commission is responsible for calling and establishing an election date for the purpose of voting on the study commission's recommendations.
2. Where a local government study commission proposal recommends that the county commission be increased in size from three to five members, the proposal may provide that incumbent county commissioners whose terms

have not expired retain their offices for the remainder of the terms to which they were elected. If no such provision is made and the study commission proposal is adopted, the incumbent commissioners would lose their positions when the newly-elected commissioners take office.

3. Recommendations of a local government study commission concerning an increase in the number of members on the board of county commissioners, alterations in commissioner districts, and a change to nonpartisan elections for commissioners would take effect upon adoption of the recommendations. Recommendations of a local government study commission to change to nonpartisan elections for other elected county officials would take effect at the beginning of the local government's fiscal year.
4. A local government study commission is responsible for setting the dates of a special primary and a general election to elect new officers required by the adoption of the study commission proposal.
5. The residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.
6. The timetables for filing declarations of nomination and changing precinct boundaries, found in Title 13, MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.

5 February 1986

Ed A. Miller, Chairman
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Board of Commissioners
P.O. Drawer H
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Dear Mr. Miller:

You have requested my opinion on several questions concerning the election procedure to be followed when a local government study commission recommends a modification of an existing form of government.

You indicate in your letter that the Big Horn County Local Government Study Commission (hereinafter referred to as the "Study Commission") is considering a proposal that would retain the county's commission form of government but would amend certain features of the existing government to increase the number of county commissioners from three to five, alter the districts from which county commissioners must be elected, and change from partisan to nonpartisan elections for all elected positions.

Your questions are predicated upon an assumption that the Study Commission proposals will be approved by the electors. I do not usually issue opinions on hypothetical questions. However, the statutory requirements for scheduling an election on study commission recommendations and an election of new county officials include rather rigid deadlines that permit no delay for the purpose of obtaining a legal interpretation of the applicable statutes. Therefore, I believe the issuance of an Attorney General's Opinion at this time is necessary under the circumstances presented by your request.

Your letter identifies several areas of confusion and inconsistency in the local government statutes, particularly in the procedures to be followed in making changes to existing forms of local government. A preliminary matter of concern involves certain phrases used in the statutes. Before responding to your specific questions, these phrases must be addressed.

The statutes which deal with making changes to an existing form of government refer to the adoption of an "alternative form" or "alternative plan" of government. It is important at the outset to determine whether these statutes have any application to elections on amendments to existing forms of government, such as are being considered by your Study Commission. Amendments to existing forms of government involve changes to the

features of the governmental structure without adoption of an entirely new form of government.

The statutes that were adopted in 1975 to implement article XI, section 3(1) of the Montana Constitution refer to the term "alternative form" of government as one of the five basic optional forms, plus a charter form, that are currently provided for in parts 2 through 7 of Title 7, chapter 3, MCA. See § 7-3-102, MCA. However, as other statutes were subsequently adopted to permit alteration of existing forms of local government by petition (in 1979) and by study commission (in 1983), the phrases "alternative form of government" and "alternative plan of government" lost their precise meaning. An examination of the more recently enacted statutes suggests that the phrases were often used, not only when referring to the actual adoption of a basic form of local government, but also when referring to the process of making amendments to certain features of a governmental structure, while retaining its basic form.

Section 7-3-149, MCA, for example, sets forth the procedure for calling a special election on the question of an "alternative form of government," directs which entity shall pay the costs of the election, and determines how many votes are necessary for adoption of the ballot measure. Subsection (3)(d) requires: "If the electors disapprove the proposed new form of local government, amendments, or consolidation plan, the local government retains its existing form." § 7-3-149(3)(d), MCA (emphasis added). A reading of section 7-3-149, MCA, in its entirety suggests that it deals not only with an election on adoption of one of the six alternative forms of local government provided for in parts 2 through 7 of Title 7, chapter 3, MCA, but also an election on proposed amendments to an existing form of government.

The significance of this point will be apparent in the responses to your specific questions, which I have consolidated into seven areas in an effort to avoid undue confusion.

1. Which entity must establish the date of the election on the Study Commission's recommendations?

Your first question concerns which entity must call for and schedule the date of an election on the Study

Commission's recommendations: the Study Commission itself, pursuant to section 7-3-187(1)(b), MCA, or the Board of County Commissioners under section 7-3-149(1), MCA.

Sections 7-3-121 to 161, MCA, were originally adopted in 1979 as procedures for altering existing forms of local government by petition of the electors. See § 7-3-121, MCA. One of those statutes, section 7-3-149, MCA, sets forth various procedures for an election on an alternative form of government, including a requirement that the governing body call for the election.

The statutes that deal with local government study commissions were adopted in 1983 and are found in sections 7-3-171 to 193, MCA. Section 7-3-192(1), MCA, provides that an alternative plan of government recommended by a study commission is to be submitted to the voters as provided in section 7-3-149, MCA:

[E]xcept that the study commission shall authorize the submission of the alternative plan of government to the voters at a special election to be held no less than 75 or more than 120 days from the date of the adoption of the final report. The special election may be held in conjunction with any regularly scheduled election. Study commissions elected on the general election date in 1984 shall submit a final report allowing for a vote on any recommendation no later than the general election date in 1986. [Emphasis added.]

Section 7-3-187(1)(b), MCA, is consistent with this exception. It describes the means by which the study commission, in its final report, shall certify the election date. It provides that if a study commission recommends an alternative form of government, the study commission's final report must contain a certificate establishing the date of the special election at which the alternative form of government shall be presented to the electors.

In summary, while section 7-3-149(1), MCA, generally assigns the responsibility of calling and scheduling an election to the local governing body, section 7-3-192(1), MCA, provides an exception for those elections that are held in order to vote on the

recommendations of a study commission, Section 7-3-187(1)(b), MCA, is consistent with section 7-3-192(1), MCA, in granting the authority to the study commission itself to call an election to vote on study commission recommendations. Specific statutes control over general statutes to the extent of any inconsistency. Department of Revenue v. Davidson Cattle Co., 37 St. Rptr. 2074, 2077, 620 P.2d 1232, 1234 (1980).

In addition to sections 7-3-187(1)(b) and 7-3-192(1), MCA, being more specific than section 7-3-149(1), MCA, sections 7-3-187(1)(b) and 7-3-192(1), MCA, were enacted more recently than section 7-3-149(1), MCA. Earlier statutes, to the extent of any repugnancy, are controlled by later statutes. State ex rel. Wiley v. District Court, 118 Mont. 50, 55, 164 P.2d 358, 361 (1946).

For these reasons, I conclude that the Study Commission, rather than the Board of County Commissioners, is authorized to call for and establish an election date on the question of amendments to the existing form of government proposed in the Study Commission's final report.

2. May those incumbent county commissioners whose terms of office have not expired remain in office if the number of commissioner positions is increased and the commissioner districts are altered?

You have also asked whether those county commissioners with unexpired terms would lose their seats or remain in office as "holdover" commissioners, should the electors approve a proposal to increase the size of a county commission and alter commissioner district boundaries.

Section 7-3-158, MCA, which applies to study commission proposals by operation of section 7-3-193(1), MCA, provides in pertinent part:

- (1) The members of the governing body holding office on the date the new plan of government is adopted by the electors of the local government continue in office and in the performance of their duties until the governing body authorized by the plan has been

elected and qualified, whereupon the prior governing body is abolished.

....

(3) A charter or a petition proposing an alteration to an existing form of local government may provide that existing elected officers shall continue in office until the end of the term for which they were elected or may provide that existing elected officers shall be retained as local government employees until the end of the term for which they were elected, and their salaries may not be reduced. [Emphasis added.]

As a preliminary matter, a reading of subsections (1) and (3) together suggests that the phrase "new plan of government" in subsection (1) includes amendments to an existing form of government, including an increase in the size of a county commission or a change in district boundaries. "Holdover" commissioners, then, would not be permitted to remain in office once the new governing body has been elected and qualified, unless the adopted study commission proposal included a specific provision that they be retained, pursuant to section 7-3-158(3), MCA. This interpretation is consistent with section 7-3-193(2)(c), MCA, which permits a study commission to "provide for existing elected officers under 7-3-158(3)."

You point out in your letter that such an interpretation appears to conflict with section 7-4-2102(1), MCA, which provides in pertinent part:

However, no commissioner district shall at any time be changed to affect the term of office of any county commissioner who has been elected. No change in the boundaries of any commissioner district shall be made within 6 months next preceding a primary election.

There is an exception to the operation of the above-quoted prohibition. Section 7-4-2102(3), MCA, provides that the prohibition "shall not apply to counties adopting an optional or alternative form of government authorized by law." At the time the exception was enacted, however, the phrase "optional or

alternative form of government" referred only to the basic statutory forms of local government, and did not refer to amendments to existing forms of government. Thus, the exception is inapplicable, and section 7-4-2102(1), MCA, would seem to operate to require that "holdover" county commissioners retain their positions even if a study commission proposal makes no provision for their remaining in office.

On the other hand, section 7-3-158, MCA, which prohibits "holdovers" unless specifically provided for in the adopted plan for change, was enacted more recently than section 7-4-2102, MCA. As has been noted earlier in this opinion, where two statutes are irreconcilable, the more recently enacted statute controls. State ex rel. Wiley v. District Court, supra.

Thus, I conclude that if the electors adopt a proposal to increase the number of county commissioners, all of the incumbent commissioners would lose their positions unless otherwise required by the adopted plan, pursuant to section 7-3-158, MCA. If no provision is made for holdovers in the Study Commission's plan, then they would remain in office only until the newly-elected commissioners take office, under section 7-3-158(1), MCA.

A related question concerns whether the adopted plan may provide for "holdover" commissioners where the plan alters the districts from which county commissioners must run in the future. The majority of courts have ruled that representation of a newly-formed district by a holdover elected official does not violate the one-person one-vote rule set forth in Reynolds v. Sims, 377 U.S. 533 (1964). This subject was addressed in 40 Op. Att'y Gen. No. 1 (1983). The opinion points out that the notion of representative government does not mean that an elected official represents only those people who voted for him or even those who had the opportunity to vote for him. An elected official does not constantly represent the same individuals, and it is impossible to avoid having some voters represented by an official whom they had no opportunity to support or oppose.

The case law, which is more thoroughly summarized in 40 Op. Att'y Gen. No. 1 (1983), persuades me that a study commission proposal is not invalid because it provides

for "holdover" county commissioners, even where the proposal alters the commission district boundaries.

3. What is the effective date of the Study Commission recommendations should they be adopted by the electors?

You have asked when the Study Commission recommendations become effective if they are adopted by the electorate. The controlling statute here is section 7-3-156, MCA. This statute, unlike most of the statutes on altering forms of local government by petition or by study commission recommendation, makes a clear distinction among the adoption of an alternative plan of local government, the creation of new offices, and the adoption of an amendment to an existing plan of government. Section 7-3-156, MCA, which applies to study commission proposals by operation of section 7-3-193(1), MCA, provides:

(1) An alternative plan of local government approved by the electors takes effect when the new officers take office, except as otherwise provided in any charter or consolidation plan. A consolidation or merger plan adopted by the electors takes effect in the same manner.

(2) Provisions creating offices and establishing qualifications for office under any apportionment plan become effective immediately for the purpose of electing officials.

(3) An amendment to an existing plan of government becomes effective at the beginning of the local government's fiscal year commencing after the election results are officially declared.

You indicate in your letter that the Study Commission is contemplating the creation of new county commissioner positions and establishing qualifications to include that the commissioners run in nonpartisan elections from new districts. Because the proposal involves the creation of new positions, section 7-3-156(2), MCA, is applicable. Subsection (2) requires such changes to take effect immediately, i.e., upon adoption of the change by the electors. Unless the adopted changes

include a provision that those commissioners with unexpired terms retain their seats (see the response to question no. 2, supra), the positions of all five commissioners would have to be filled at the ensuing election, and the changes concerning new districts and nonpartisan elections would necessarily apply to all five positions.

As for changing to nonpartisan elections for elected officials other than the county commissioners, section 7-3-156(3), MCA, is applicable. This change involves an amendment to an existing plan of government, i.e., a change to one of the features of the existing plan. The change does not involve the adoption of an entirely new plan of government nor does it relate to the creation of new offices. Thus, subsections (1) and (2) of section 7-3-156, MCA, do not apply. Under subsection (3), then, the beginning of the local government's fiscal year commencing after adoption of the amendments is the effective date for changing to nonpartisan elections for officers other than county commissioners.

4. Which entity must set the dates of the special primary and general elections for the purpose of electing new county commissioners if the Study Commission proposal is adopted by the electors?

Section 7-3-187(1)(c), MCA, requires a study commission to include in its final report "a certificate establishing the dates of the first primary and general elections for officers of a new government if the proposal is approved." Section 7-3-160(1), MCA, which applies to elections on study commission recommendations by operation of section 7-3-193(1), MCA, provides that the governing body must establish the dates for electing officials required by a new form of government. The two statutes are in conflict, and the more recently-enacted statute, which specifically addresses procedures for voting on study commission recommendations, should prevail, according to the rule cited in State ex rel. Wiley, supra. Thus, section 7-3-187(1)(c), MCA, is controlling, and the responsibility for setting election dates belongs to the Study Commission.

Although you do not ask about the application of section 7-3-160(2), MCA, which sets the period of time in which elections are to be held, I believe a discussion of that subsection is warranted. Subsection (2), unlike

subsection (1), is not inconsistent with any of the statutes that specifically address study commission recommendations. Therefore, subsection (2) is applicable. As a result, while the Study Commission is responsible for establishing election dates, those dates must fall within the time period provided in section 7-3-160(2), MCA. Pursuant to section 7-3-160(2), MCA, the primary election would have to be held not more than 120 days nor less than 75 days after the election approving the study commission proposal, and the general election would have to be held 75 days after the primary.

5. If the Study Commission recommendations are adopted, do the residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner?

Section 7-4-2104(2), MCA, prohibits the election of a county commissioner who has not resided in his district for at least two years preceding his candidacy. I am unaware of any statutory exception to this residency requirement. The exception to the operation of the residency requirement found in section 7-4-2102(3), MCA, applies to counties adopting an "optional or alternative form of government authorized by law." As noted earlier in the discussion of question No. 2, the exception found in section 7-4-2102(3), MCA, was enacted at a time when the reference to an alternative form of government meant the adoption of one of the five basic forms of government, plus the charter form. Thus, I conclude that the residency requirements in section 7-4-2104(2), MCA, apply to any candidates for county commissioner who may run for office as a result of the adoption of the Study Commission recommendations.

6. If the Study Commission recommendations are adopted, do the timetables for filing declarations of nomination and changing precinct boundaries, found in Title 13, MCA, apply?

The statutes that address the procedure for changing existing forms of local government do not include specific filing deadlines for candidates who run for offices created by the adoption of study commission recommendations. However, section 7-3-124, MCA, provides that except as otherwise provided in sections 7-3-121 to 161, MCA, "each election ... is conducted in

the same manner as an election involving ballot issues or of local officials." Section 7-3-124, MCA, applies to elections on study commission recommendations by operation of section 7-3-193(1), MCA.

The general statutes that address elections on ballot issues and local officials are found in Title 13, MCA. Section 13-10-201(6), MCA, requires that declarations for nomination shall be filed no sooner than the first business day in January of an election year for that office and no later than 5 p.m., 75 days before the date of the primary election. I conclude, therefore, that the timetable for the filing of declarations of nomination found in section 13-10-201(6), MCA, would apply to any elections of public officials that are required by adoption of the Study Commission recommendations.

By the same token, section 13-3-102(1), MCA, which prohibits the changing of precinct boundaries within 100 days of a primary election, is also applicable. The statute is not totally irreconcilable with section 7-3-106(2), MCA, which requires that the special primary election be held between 75 and 120 days from the date of the adoption of the study commission recommendations. Statutes are to be harmonized if possible. State Consumer Counsel v. Montana Dept. of Public Service Regulation, 181 Mont. 225, 229, 593 P.2d 34, 36 (1979). Thus, the 100-day limit found in section 13-3-102(1), MCA, applies.

Please note that the schedule for holding an election of new officers (§ 7-3-160(2), MCA), the schedule for filing declarations of nomination (§ 13-10-201(6), MCA), the schedule for changing precinct boundaries (§ 13-3-102(1), MCA), and the schedule for making absentee ballots available (§ 13-13-205, MCA) must be harmonized so that the election of new officers is held on a date that does not violate any of these statutes.

7. What is the legality of an apportionment plan and election scheme which include an at-large election provision?

It is neither appropriate nor possible for me to advise whether a districting plan would be upheld in a court of law. Challenges to districting schemes are dealt with on a case-by-case basis by the courts themselves, and

the outcome depends upon a great many factual considerations which vary with each case.

As a general matter, at-large elections are not unconstitutional, per se. However, if such elections are imposed or applied in a manner which results in a denial of voting rights, they may be subject to a court challenge. The courts consider many factors, but are primarily concerned with a disenfranchised minority, as set forth in such cases as White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973); and United States v. Dallas County Commission, 548 F. Supp. 875 (S.D. Ala. 1982).

As you are aware, Big Horn County is involved in pending litigation involving its currently-existing county commissioner districts. The ongoing litigation is an additional reason I must decline to answer this final question.

THEREFORE, IT IS MY OPINION:

1. A local government study commission is responsible for calling and establishing an election date for the purpose of voting on the study commission's recommendations.
2. Where a local government study commission proposal recommends that the county commission be increased in size from three to five members, the proposal may provide that incumbent county commissioners whose terms have not expired retain their offices for the remainder of the terms to which they were elected. If no such provision is made and the study commission proposal is adopted, the incumbent commissioners would lose their positions when the newly-elected commissioners take office.
3. Recommendations of a local government study commission concerning an increase in the number of members on the board of county commissioners, alterations in commissioner districts, and a change to nonpartisan elections for commissioners would take effect upon adoption of the recommendations.

Recommendations of a local government study commission to change to nonpartisan elections for other elected county officials would take effect at the beginning of the local government's fiscal year.

4. A local government study commission is responsible for setting the dates of a special primary and a general election to elect new officers required by the adoption of the study commission proposal.
5. The residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.
6. The timetables for filing declarations of nomination and changing precinct boundaries, found in Title 13, MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.

Very truly yours,

MIKE GREELY
Attorney General