

CONSTITUTIONS - Appointment of district judge;
COURTS, DISTRICT - Appointment of district judge;
ELECTIONS - Election of district judge following
appointment and confirmation;
JUDGES - Appointment of district judge;
LEGISLATURE - Senate confirmation of district judge
nominee;
MONTANA CODE ANNOTATED - Sections 3-1-1013, 3-1-1014,
13-1-104(1), 13-1-107, 13-10-201(6), 13-14-112(4);
MONTANA CONSTITUTION - Article VII, sections 8(1), 8(2);
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No.
115 (1978).

HELD: An individual appointed by the Governor to the
office of district judge need not run in the
general election for the year in which Senate
confirmation takes place if, at the time of
confirmation, the filing date for judicial
candidates has passed.

10 March 1986

Ted O. Lympus
Flathead County Attorney
Flathead County Courthouse
Kalispell MT 59901

Dear Mr. Lympus:

You have asked my opinion as to whether a district judge recently appointed by the Governor must run for election in the general election to be held in 1986. In November 1985 the Governor appointed a new district judge to fill the vacancy created by the death of the Honorable James M. Salansky. Judge Salansky's term of office was to expire in January 1989. Article VII, section 8(1) of the Montana Constitution provides for the selection and confirmation of district judges appointed under these circumstances:

The governor shall nominate a replacement from nominees selected in the manner provided by law for any vacancy in the office of supreme court justice or district court judge. If the governor fails to nominate within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the nomination. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session shall be effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made. [Emphasis added.]

The underscored constitutional language quoted above is paraphrased in section 3-1-1013, MCA, clearly indicating that the Governor's nomination must in all instances be confirmed by the Senate.

On March 24, 1986, the Legislature will meet in special session to consider a number of matters that have arisen since the last session adjourned. I have been advised that the Governor's nomination will be submitted to the Senate for confirmation at the special session. Section 13-1-104(1), MCA, specifically provides for election of district judges in the general election to be held in

November of even-numbered years. Section 13-10-201(6), MCA, however, requires declarations for nomination to be filed with the Secretary of State "no later than 5 p.m., 75 days before the date of the primary election." This filing deadline is applicable to nonpartisan judicial candidates. § 13-14-112(4), MCA. Former statutes setting similar filing deadlines have been held to be mandatory by the Montana Supreme Court. State ex rel. Bevan v. Mountjoy, 82 Mont. 594, 600, 268 P. 558, 560 (1928); State ex rel. Galen v. Hays, 31 Mont. 227, 230, 78 P. 301, 302 (1904). The primary election must be held on the first Tuesday after the first Monday in June preceding the general election. § 13-1-107, MCA. Thus, the primary election will be held on June 3, 1986, and the filing deadline for declarations for nomination is March 20, 1986. The question thus becomes whether an election for the office of district judge must be held in November of 1986 when the confirmation of the Governor's nominee will not occur, if at all, until sometime after the statutory filing deadline provided in section 13-10-201(6), MCA. I conclude that the nominee, if confirmed, need not run for election in 1986.

Article VII, section 8(2) of the Montana Constitution specifies the procedure for the first election following Senate confirmation of a district judge nominee:

If, at the first election after senate confirmation, and at the election before each succeeding term of office, any candidate other than the incumbent justice or district judge files for election to that office, the name of the incumbent shall be placed on the ballot.
[Emphasis added.]

The language of this constitutional provision sheds some light on the issue, for it refers to candidates filing for the first election after Senate confirmation. The drafters of the Constitution obviously intended that Senate confirmation must take place before the entire election process has been set in motion. This is consistent with my holding in 37 Op. Att'y Gen. No. 115 at 492 (1978), that Senate confirmation of a district judge nominee is a prerequisite to placing that office on the ballot for election. Potential candidates cannot file for election to the instant office by the deadline of March 20, 1986, because at that point the nominee will not have been confirmed, as required by the Montana

Constitution. Failure of the Senate to confirm the nomination would, moreover, result in the office becoming vacant, in which case the selection and confirmation process would have to be repeated. Mont. Const. art. VII, § 8(1). The first election after Senate confirmation of the nominee for the office, for which candidates will have an opportunity to file, will be the general election in 1988. See § 13-1-104(1), MCA.

Section 3-1-1014, MCA, provides that a nominee confirmed by the Senate "serves until the next succeeding general election," and the candidate elected at that election holds office for the remainder of the unexpired term. Although at first blush this provision appears to require a judicial nominee to run at the first general election following Senate confirmation, the statute must be read in light of the Constitution. 82 C.J.S. Statutes § 362 (1953); Goodyear Aircraft Corp. v. Industrial Commission, 158 P.2d 511, 515 (Ariz. 1945). Article VII, section 8(2) of the Montana Constitution specifically refers to candidates filing for the first election after Senate confirmation of the nominee. The phrase "next succeeding general election" in section 3-1-1014, MCA, must therefore be construed as referring to the next general election after Senate confirmation for which the statutory filing deadline has not passed, in this case 1988.

THEREFORE, IT IS MY OPINION:

An individual appointed by the Governor to the office of district judge need not run in the general election for the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed.

Very truly yours,

MIKE GREELY
Attorney General