

VOLUME NO. 44

OPINION NO. 20

ELECTIONS - Submission of ballot issue at primary election;
 INITIATIVE AND REFERENDUM - Submission of ballot issue at primary election;
 MONTANA CODE ANNOTATED - Sections 13-1-101, 13-1-104, 13-1-107, 13-27-104, 13-27-310(2), 13-27-311(1), 13-27-410(1);
 MONTANA CONSTITUTION - Article II, section 2; Article III, section 6; Article XIV, sections 8, 9;
 OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 50 (1982), 19 Op. Att'y Gen. No. 412 (1942).

HELD: A constitutional amendment proposed by initiative pursuant to Article XIV, section 9, of the Montana Constitution may be submitted to the voters at a regular statewide primary election.

August 30, 1991

The Honorable Mike Cooney
 Secretary of State
 State Capitol
 Helena MT 59620

Dear Mr. Cooney:

You have requested my opinion on the following question:

May an initiative for a constitutional amendment be submitted to the voters at a statewide primary election?

Your inquiry arises out of the presentation by the Montana Shooting Sports Association of an initiative petition which would amend the Montana Constitution to guarantee individuals a right to hunt game animals. The Association has requested that the petition be processed in time for the

measure to be placed on the ballot for the statewide primary election to be held in June 1992.

By adoption of the 1972 Montana Constitution, the people of Montana "reserved unto themselves the exclusive right of governing themselves, and to alter or abolish the constitution whenever they deemed it necessary." State ex rel. Montanans for the Preservation of Citizens' Rights v. Waltermire, 231 Mont. 406, 412, 757 P.2d 746, 750 (1988); 1972 Mont. Const. Art. II, § 2. Amendment of the Constitution by initiative is expressly permitted by Article XIV, section 9, which provides:

(1) The people may also propose constitutional amendments by initiative. Petitions including the full text of the proposed amendment shall be signed by at least ten percent of the qualified electors of the state. That number shall include at least ten percent of the qualified electors in each of two-fifths of the legislative districts.

(2) The petitions shall be filed with the secretary of state. If the petitions are found to have been signed by the required number of electors, the secretary of state shall cause the amendment to be published as provided by law twice each month for two months previous to the *next regular state-wide election*.

(3) At *that* election, the proposed amendment shall be submitted to the qualified electors for approval or rejection. If approved by a majority voting thereon, it shall become a part of the constitution effective the first day of July following its approval, unless the amendment provides otherwise. [Emphasis added.]

Resolution of your inquiry turns on the meaning of "next regular state-wide election" as used in section 9(2) of Article XIV.

When construing a provision of the constitution, the same rules used in statutory construction are applied. Keller v. Smith, 170 Mont. 399, 404, 553 P.2d 1002, 1006 (1976). In either case, the intent of the framers is controlling. *Id.* at 405. "Such intent shall first be determined from the plain meaning of the words used, if possible, and if the intent can be so determined, the courts may not go further and apply any other means of interpretation." *Id.* In construing statutes or constitutional provisions, words employed should be given such meaning as is required by the context, and as is necessary to give effect to the purpose of the provision. In re Shun T. Takahaski's Estate, 113 Mont. 490, 129 P.2d 217, 220 (1942). Finally, "[l]egislative intent must be ascertained from an examination of all of the statutes on one subject matter as a whole, not just the wording of one particular section." 39 Op. Att'y Gen. No. 50 at 193 (1982)

(quoting Vita-Rich Dairy Inc. v. Department of Business Regulation, 170 Mont. 341, 533 P.2d 980, 984 (1976)).

The term "regular state-wide election," as used in Article XIV of the Montana Constitution, has not been interpreted by the Supreme Court of Montana. See Marbut v. Secretary of State, 231 Mont. 131, 752 P.2d 148, 151 (1988) (expressing "no opinion" as to whether "regular state-wide election" includes a statewide primary). The meaning of "regular election" has, however, been analyzed by the courts of many other states. Generally speaking, "[a] regular election is an election which recurs at stated intervals as fixed by law." Robb v. City of Tacoma, 175 Wash. 580, 28 P.2d 327, 332 (1933). "The word regular means conformable to an established rule, law, or principle, and the exact literal signification [sic] of the phrase 'next regular election,' is the next election held conformable to established rule or law." State ex rel. Watson v. Cobb, 2 Kan. 32, 54 (1863).

As applied to elections, "regular" is often used interchangeably with "general," both as distinguished from a "special" election. See 25 Am. Jur. 2d Elections § 3, at 692 (1966). "Any election which is not regularly held for the election of officers, or for some other purpose which shall come before the electors at regular fixed intervals, is necessarily a special election." Robb, 28 P.2d at 332.

Some courts have found that the term "regular election" does not embrace a primary election. For example, in People v. Holzman, 5 Ill. 2d 405, 125 N.E.2d 498 (1955), the Supreme Court of Illinois found that a primary election for the nomination of candidates of mayor, city clerk and city treasurer, and at which aldermen were elected for their individual wards, was not a "regular municipal, judicial or other general election" as required by statute. The court first concluded that insofar as the election pertained to the selection of nominees for particular offices, it clearly was a primary election as distinguished from a general election. "It 'is an election only in the qualified sense that it is moulded, in general, on the plan of an election and is conducted as an election is conducted, but for the purpose, only, of selecting candidates of a political party, with the right in no one else to participate therein.'" *Id.*, 125 N.E.2d at 499-500 (citation omitted).

The court further found that the selection of aldermen in particular districts did not transform the election into the "regular municipal" or "other general" election contemplated by the statute. The court reasoned:

[In determining whether an election is special or general, r]egard must be had to subject-matter as well as the date of election. ... [I]f an election occurs throughout the state uniformly by direct operation of law, it is a general election. On the other hand, if it depends upon the employment of some special preliminary proceeding peculiar to the process which may or may not occur,

and the election is applicable only to a restricted area, less than the whole state, it is a special election.

Id. at 500 (quoting Norton v. Coos County, 113 Or. 618, 233 P. 864, 866 (1925)). Because the election of aldermen was confined to their respective wards, the election was found to be a local election which did not meet the definition of "regular" or "general." *Id.*

Distinguishing between a "primary" and a "regular" election, the Supreme Court of North Carolina has held:

There is a well defined distinction between a primary election and a regular election "A primary election is a means provided by law whereby members of a political party select by ballot candidates or nominees for office; whereas a regular election is a means whereby officers are elected and public offices are filled according to established rules of law. In short, a primary election is merely a mode of choosing candidates of political parties, where as [*sic*] a regular election is the final choice of the entire electorate."

Ponder v. Joslin, 262 N.C. 496, 138 S.E.2d 143, 148 (1964) (quoting Rider v. Lenoir County, 236 N.C. 620, 73 S.E.2d 913, 919 (1953) (construing meaning of "regular election for county officers"))).

The Supreme Court of Michigan also has followed this rationale, holding that the submission at a primary election of a city charter amendment proposed by initiative petition rendered the election null and void where the statute required submission to the voters at a "regular municipal or State election." Millard ex rel. Reuter v. City of Bay City, 334 Mich. 514, 54 N.W.2d 635 (1952). "A primary election is not a regular election in any sense of the term. ... [A] primary election is merely the selection of candidates for office by the members of a political party in a manner having the form of an election." *Id.*, 54 N.W.2d at 636.

This line of cases reflects the principle that a primary election is not an election in the true sense of the word, because primaries were unknown at common law and derived from the traditional party nominating conventions and caucuses. Therefore, the rationale for excluding "primary" from the meaning of "election" is based on the fact that an election is historically understood as the final act of the voters in casting their ballots at the polls for the election of public officers. See, e.g., In re Jamestown Caucus Law, 43 R.I. 421, 112 A. 900, 901 (1921); Walton v. Olson, 40 N.D. 571, 170 N.W. 107, 109-10 (1918); Opinion of the Justices, 295 A.2d 718, 720-21 (Del. 1972); Davis v. Delahanty, 551 S.W.2d 227, 229 (Ky. 1977); Wagner v. Gray, 74 So. 2d 89, 91 (Fla. 1954). Accord Op. Att'y Gen. No. 83-149 (Ky. 1983); Op. Att'y Gen. Mar. 17, 1982 (S.C. 1982).

"Whether primary elections are within the intent and meaning of the term 'election,' as used in the constitutional and statutory provisions, often depends on the manner in which the term is used and the purpose of the provisions, and also on the factor of whether primary elections were in existence at the time the provisions were adopted or enacted."

Cox v. Peters, 208 Ga. 498, 67 S.E.2d 579, 583 (1951) (quoting 29 C.J.S. Elections § 112, at 150 (1965)). Thus, it has been held that primary elections could not have been intended within the meaning of constitutional provisions regarding elections where primaries were not in existence at the time the constitution was adopted. State ex. rel. Miller v. O'Malley, 342 Mo. 641, 117 S.W.2d 319, 322 (1938).

On the other hand, the United States Supreme Court has held that, to the extent a state "has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice," constitutional rights regarding voting are equally applicable to primary elections as to general elections. United States v. Classic, 313 U.S. 299, 318 (1941). Applying this rationale, courts have held that "[p]rimary election laws and laws governing general elections are so interwoven that together they comprise the election machinery of the state, and the rights, duties, privileges, and powers granted or imposed by one are equivalent to those granted or imposed by the other, in so far as the processes of the courts may be invoked to enforce or protect them." State ex rel. Merrill v. Gerow, 79 Fla. 804, 85 So. 144, 146 (1920).

A number of courts have held that a primary election is included within the term "regular" or "general" election. In O'Connor v. Superior Court, City and County of San Francisco, 90 Cal. App. 3d 107, 153 Cal. Rptr. 306, 309 (1979), the court found that submission of a proposition at a statewide primary election was proper where the statute allowed submission "at a regular election, or a special election ... called ... for the purpose of voting on a proposition." Because a "regular election" was defined as "an election, the specific time for the holding of which is prescribed by law," the court held that a direct primary constituted a regular election. *Id.* Likewise, the court in Dysart v. City of St. Louis, 321 Mo. 514, 11 S.W.2d 1045, 1052 (1928), held that a primary could not be distinguished from any other regular or general election prescribed by law, since "a special election is one called for a special purpose, not one fixed by law to occur at regular intervals."

The Supreme Court of Oregon has held that where a primary election was required by law to be held biennially on a particular date, the primary election was a general election at which a proposition for the issuance of county bonds could be submitted. Taylor v. Multnomah County, 119 Or. 123, 248 P. 167, 168 (1926). A like result was reached by the Supreme Court of Nebraska, which held that a statewide primary election constituted a "general election" within the meaning of state law for the submission of bonds.

The state-wide primary is part of the election system of Nebraska and is commonly understood to be a general election. The general law, operating automatically as to time, fixes the date of the state-wide primary without any other intervening cause. The public interest in the nomination of candidates for office is an inducement to the exercise of the elective franchise.

State ex rel. City of Lincoln v. Marsh, 107 Neb. 607, 187 N.W. 88 (1922).

Prior to adoption of the 1972 Montana Constitution, the Montana Supreme Court construed on several occasions the meaning of the phrase "general election" as used in the 1889 Constitution. In State ex rel. Diederichs v. State Highway Commission, 89 Mont. 205, 296 P. 1033 (1931), the court construed the meaning of the constitutional provision requiring submission of any debt or liability exceeding \$100,000 to the people "at a general election." 1889 Mont. Const. Art. XIII, § 2. The court held: "We think, considering the subject matter of the section, the term 'general election' does not mean necessarily the general biennial election. ... We think the 'general election' named means a state-wide election at which all the people entitled to vote may vote upon a question affecting them as a whole." *Id.*, 296 P. at 1036.

Following Diederichs, the court stated in Arps v. State Highway Commission, 90 Mont. 152, 300 P. 549, 553-54 (1931),

that a general election "is one that regularly recurs in each election precinct of the state on a day designated by law for the selection of officers, or is held in such entire territory pursuant to an enactment specifying a single day for the ratification or rejection of one or more measures submitted to the people by the Legislative Assembly, and not for the election of any officer, ... for the election having been simultaneously held in every voting precinct of the state conclusively establishes the fact that the election was 'general,' and not 'special,' which latter term ... would appear to mean an election held in only a subdivision or a part of the state."

(quoting Bethune v. Funk, 85 Or. 246, 166 P. 931, 932 (1917)). Accord Pioneer Motors v. State Highway Commission, 118 Mont. 333, 165 P.2d 796, 800 (1946).

In addition, one of my predecessors in office held expressly that the term "next regular election" used in a statute concerning the adoption of a county manager form of government included the next primary nominating election. 19 Op. Att'y Gen. No. 412 at 696 (1942). The opinion relied on the conclusion that "[a] regular election is an election recurring at stated times, fixed by law; while a special election is one arising from some exigency outside the usual routine." *Id.* Since the date of primary elections was established by law, the opinion

concluded that the primary constituted a regular election within the meaning of the statute. *Id.*¹

With these authorities as a backdrop, I turn to the language in question. Article XIV, section 9, is unique in its use of the term "next regular state-wide election." Of the two other constitutional provisions that pertain to submission of ballot issues by initiative or referendum, both refer to the "general election." See Mont. Const. Art. III, § 6; Art. XIV, § 8. The constitution includes several other references to the "general election," see, e.g., Mont. Const., Art. III, § 7; Art. V, § 4; Art. VI, § 2; Art. VI, § 6. It cannot be said that the framers did not contemplate the occurrence of primary elections. Article IV, pertaining to suffrage and elections, refers to "elections," with no distinction between or definition of primary and general elections. Article VI, section 2, expressly refers to primary elections in its discussion of the election of governor and lieutenant governor.

The statutes that flesh out these constitutional provisions are noteworthy in interpreting the meaning of "election." Although legislative determination of constitutional intent is not binding in the construction of constitutional provisions, it is entitled to some deference. *Keller v. Smith, supra*, 553 P.2d at 1007. See also *Davis v. City of Berkeley*, 51 Cal. 3d 227, 794 P.2d 897, 906 (1990). Section 13-1-101, MCA, includes the following definitions:

(4) "Election" means a general, special, or primary election held pursuant to the requirements of state law, regardless of the time and/or purpose.

....

(8) "General election" means an election held for the election of public officers throughout the state at times specified by law, ... For ballot issues required by Article III, section 6, or Article XIV, section 8, of the Montana constitution to be submitted by the legislature to the electors at a general election, "general election" means an election held at the time provided in 13-1-104(1).

....

(10) "Issue" or "ballot issue" means a proposal submitted to the people at an election for their approval or rejection, including but not limited to initiatives, referenda, proposed constitutional amendments, recall questions, school levy questions, bond issue questions, or a ballot question. ...

....

¹Although the Supreme Court of Montana has not interpreted the meaning of "regular election," it noted in *Montanans for the Preservation of Citizens' Rights v. Waltermire, supra*, 231 Mont. at 409, 757 P.2d at 748, that the district court had concluded that the "next regular state-wide election" contemplated by Article XIV, section 9 of the Montana Constitution included a state-wide primary election.

(14) "Primary" or "primary election" means an election held throughout the state to nominate candidates for public office at times specified by law[.]

....

(17) "Special election" means an election other than a statutorily scheduled primary or general election held at any time for any purpose provided by law. It may be held in conjunction with a statutorily scheduled election.

There is no statutory definition of "regular election."

The times for holding statewide general and primary elections are specified by law. §§ 13-1-104, 13-1-107, MCA. The provisions regarding initiative and referendum procedures do not refer to either a general or a primary election, but simply use a phrase such as "election at which they are to be voted upon by the people."² See §§ 13-27-104, 13-27-310(2), 13-27-311(1), 13-27-410(1), MCA.

Of most importance to the resolution of your inquiry are the definitions of "general election" and "special election." In particular, elections on constitutional amendments submitted pursuant to Article XIV, section 9, are specifically excluded from the definition of "general election." § 13-1-101(8), MCA. Additionally, primary elections are specifically excluded from the definition of "special election." § 13-1-101(17), MCA.

Finally, the framers of the constitution obviously were aware of the existence of primary elections when Article XIV, section 9, was drafted. As noted, the constitution expressly refers to primary elections on at least one occasion. Further, state law at the time the 1972 constitution was drafted provided for the regular holding of primary elections at specified times. See § 23-3301, R.C.M. 1947 (1969).

Viewing the language of Article XIV, section 9, in the context of other constitutional provisions, and giving due deference to the interpretation reflected in subsequent legislation, the conclusion is evident that the framers intended the phrase "next regular state-wide election" to be given a different meaning than "general election." Applying the ordinary definition of "regular,"³ I conclude that "regular state-wide election" encompasses the statewide primary election held biennially as required by law. This conclusion is bolstered by the

²Likewise, although section 13-27-207, MCA, refers to the "general" election, I do not find that section controlling in light of other constitutional and statutory provisions, particularly since it is intended to be only an example of the form for a petition for a constitutional amendment.

³See 19 Op. Att'y Gen. No. 412 at 696 (1942), *supra*.

broad interpretation given by the Montana Supreme Court to like provisions of law. Arps, supra.

I find the contrary authorities unpersuasive in view of the unique wording of the Montana Constitution. Unlike the provisions of other states' constitutions, in which "election" is used with no frame of reference, Montana's constitution expressly recognizes the existence of primary elections and was written during a time when primaries had become well established. Where the framers used the term "general election" in other provisions, including the immediately preceding section concerning constitutional amendments proposed by the Legislature, their choice of a different term in section 9 carries considerable weight in my determination.

Montana law allows the Secretary of State to certify that a primary election is unnecessary for a party which does not have candidates for more than half of the offices on the ballot if no more than one candidate files for nomination by that party for any office on the ballot. § 13-10-209(2), MCA. This does not affect the fact that the statewide primary is prescribed by law to occur at regular intervals. Further, section 13-10-209(4), MCA, expressly provides for the printing of ballot issues on primary ballots, and permits the printing of a separate ballot or the printing of the ballot issue on the nonpartisan ballot.⁴ Accordingly, nothing in section 13-10-209, MCA, affects my conclusion that the primary is a regular election.

You suggest that public policy concerns counsel a different conclusion. In particular, a ballot issue proposing to amend the constitution is of major significance to the state and should be submitted to the voters at a time when it is likely to receive the most voter attention. You point out that voter turnout is much lower during the primary elections, and therefore that not as many voters will take the opportunity to vote on a ballot issue submitted at a primary.

Although that concern and other policy considerations you have presented are unmistakably worthy of consideration if and when the constitutional and statutory provisions circumscribing this question are ever reviewed in the future, I am obliged at this moment to construe those provisions as I find them and not as I may prefer them to be. White v. White, 195 Mont. 470, 636 P.2d 844, 846 (1981). "In determining the public policy of this state, legislative enactments must yield to constitutional provisions, and judicial decisions must recognize and yield to constitutional provisions and legislative enactments. ... Judicial decisions are a superior repository of statements about public policy only in the absence of constitutional and valid legislative declarations." First Bank (N.A.)-Billings v. Transamerica, 209 Mont. 93, 679 P.2d 1217, 1219

⁴Section 13-14-115, MCA, which allows the governing body of a political subdivision to determine that a nonpartisan primary election need not be held, has no application here since it does not authorize the cancellation of a statewide primary election.

(1984). I find the constitutional and statutory provisions sufficiently clear in expressing the public policy of the state.

THEREFORE, IT IS MY OPINION:

A constitutional amendment proposed by initiative pursuant to Article XIV, section 9, of the Montana Constitution may be submitted to the voters at a regular statewide primary election.

Sincerely,

MARC RACICOT
Attorney General