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VOLUME NO. 45

OPINION NO. 18

ELECTIONS - Power of legislature to order special election on initiative referendum;
INITIATIVE AND REFERENDUM - Power of legislature to order special election on initiative referendum;
LEGISLATURE - Power of legislature to order special election on initiative referendum;
MONTANA CODE ANNOTATED - Section 13-1-108;
MONTANA CONSTITUTION OF 1889 - Article V, section 1;
MONTANA CONSTITUTION OF 1972 - Article III, sections 5, 6;
MONTANA LAWS OF 1993 - Chapter 634.

HELD: The Legislature retains the power to order a statewide special election on Initiative Referendum 112 at a time other than the 1994 biennial general election.

December 3, 1993

Hon. Fred Van Valkenburg
President
Montana State Senate
State Capitol, Room 305
Helena, MT 59620

Dear Senator Van Valkenburg:

You have requested my opinion on four questions relating to the interrelationship between 1993 Mont. Laws, ch. 634 (commonly known and hereafter referred to as "HB 671"), a bill which made significant changes in Montana's income and corporate license tax laws, and IR 112, an initiative petition seeking a referendum vote on HB 671. Following the enactment of HB 671 by the Legislature and its signature by the Governor, voters submitted petitions to the Secretary of State bearing the signatures of a sufficient number of voters both to refer HB 671 for approval or rejection by the voters and to suspend its effectiveness pending the referendum election. You have posed questions which I have phrased as follows:

1. May the Legislature enact a bill requiring that the election on IR 112 be held on a date other than November 8, 1994, the date which appeared on the initiative petitions and on which the next regularly scheduled statewide general election will be held?
2. Prior to the election on IR 112, does the Legislature have the power to repeal HB 671? If so, what effect would the repeal have on the referendum election?
3. Prior to the election on IR 112, does the Legislature have the power to amend HB 671? If so, what effect would an amendment have on the referendum election?
4. If HB 671 is sustained by the voters in a referendum election held in 1994, what effect will the result of the referendum election have on income and corporate license tax liabilities for calendar years 1993 and 1994?

In your opinion request, you have asked that I answer the questions you pose serially rather than in a single opinion, due to the exigencies of the impending special session. I will therefore respond to your first question here and to the remaining questions in a forthcoming opinion.

Montana's constitutional provisions for initiative and referendum were added to the Montana Constitution by a 1906 amendment to article V, section 1 of the 1889 Constitution. Prior to 1906, the Constitution provided that the legislative power of the State of Montana was vested in the two houses of the legislature alone. The 1906 amendment returned a portion of that legislative power to the people through initiative and referendum. The amendment addressed the timing of elections on referenda as follows: "All elections on measures referred to the people of the state shall be held at the biennial regular general election, except when the legislative assembly, by a majority vote, shall order a special election." 1889 Mont. Const., art. V, § 1.

The 1972 revision of Montana's Constitution rewrote the initiative and referendum provisions from the 1889 Constitution, making major changes in the style and drafting of the provisions. The references were moved from the legislative article to one on general government, and the single section containing the provisions on initiative and referendum was divided into three

separate sections. It does not appear from the available historical materials, however, that the framers of the 1972 Constitution intended to make significant changes in the substance of the constitutional requirements. The 1972 provisions were adopted with very little substantive debate, and the committee reports indicate that the intention was to make no changes in the existing law. See, e.g., II 1972 Mont. Const. Conv. 820 (committee report stating that "[t]he only changes" from the 1889 version were in the number of petition signatures required, and that the two provisions were otherwise "analogous"); VII 1972 Mont. Const. Conv. 2717 (remarks of Delegate Etchart) (stating that "the only changes" from the 1889 provision were in the number of signatures required, and that the 1972 language was "parallel" to the earlier language).

The 1972 Constitution carried forward the earlier document's language on the timing of referendum elections in article III, section 6, which states:

Elections. The people shall vote on initiative and referendum measures at the general election unless the legislature orders a special election.

There is no Montana case law interpreting either the 1889 or the 1972 constitutional language with reference to the issue you have raised, but I find that the language is clear on its face and requires no extrinsic aids for its construction. See State ex rel. Gleason v. Stewart, 57 Mont. 397, 403, 188 P. 904, 906 (1920) (applying rule that constitutional provision clear on its face required no extrinsic aid for construction). The framers of the constitution clearly intended that the legislature retain the power to determine the timing of elections on initiative and referendum matters. Otherwise, the clause "unless the legislature orders a special election" becomes meaningless.

In this regard, it is significant that the Montana Constitution is a limitation upon, and not a grant of, legislative power. Accordingly, the Montana Supreme Court has repeatedly recognized that the legislature may enact any legislation not affirmatively prohibited by the Constitution. See, e.g., State ex rel. Bonner v. Dixon, 59 Mont. 58, 76, 195 P. 841, 844 (1921). Nothing in the Constitution prohibits the enactment of legislation setting a special election on a referendum, and accordingly, the legislature should be found to possess the power to do so.

My research has disclosed that the constitutions of the several states take divergent approaches to this question. In Arizona, the constitution provides that referenda be voted on "at the next regular general election," a provision which the Arizona courts

have construed to exclude legislative power to order a special election on a referendum at any time other than the biennial general election. Tucson Manor v. Federal Nat'l Mortgage Ass'n, 73 Ariz. 387, 241 P.2d 1126 (1952). In Maine, the constitution is silent as to the timing of referendum elections, and the Maine Supreme Court has held that in the absence of a specific limitation on the power of the legislature, it may order elections on referenda whenever it chooses. Opinion of the Justices, 66 A.2d 378 (Me. 1949).

The only case disclosed by my research in which a constitutional provision similar to Montana's has been applied with reference to this question is Libby v. Olcott, 134 P. 13 (Or. 1913), in which the Oregon Supreme Court applied that state's constitutional provision stating that referendum elections "shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election." Or. Const. art. 4, § 1. The 1913 Oregon legislature enacted a bill providing that all referenda regarding enactments of that session should be voted on at a special statewide election to be conducted in November 1913. A law enacted after the adoption of the special election date was challenged by a referendum petition. The proponents of the law brought suit to enjoin the special election, arguing among other things that the holding of a special election on the referendum was inconsistent with the Oregon Constitution. The Oregon Supreme Court rejected this challenge, relying on the explicit language of the Oregon Constitution allowing the legislature to order a special election at a time other than the biennial regular election. See also Bohrer v. Toberman, 227 S.W.2d 719 (Mo. 1950) (analogous provision of Missouri constitution).

The reasoning of the Oregon Court bears repeating here:

[The constitutional] language must be construed as part of the general scheme outlined in that section of the Constitution. It qualifies the reservation of power by the people which they call the referendum. To the legislative assembly they have committed the authority to call a special referendum election. Whether it fetters or facilitates the exercise of that reserved power does not concern us. It exists. It is the voice of the people themselves which we must heed and to which we must give effect.

134 P. at 16. The Court noted that the people clearly intended that legislation not be left in limbo for long periods of time by requiring that referendum petitions be filed within a relatively short period after the affected legislation is adopted, and held

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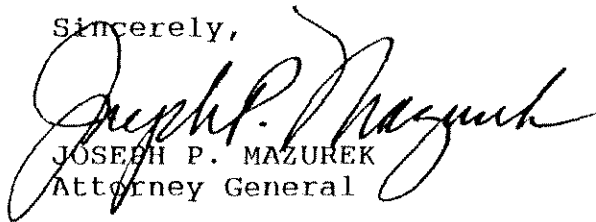
that legislation calling a special election on a referendum did not dilute the power of the people to express their will through the referendum process.

I find this reasoning persuasive in interpreting the Montana Constitution's similar language. The date of a referendum election is not, under Montana's constitutional scheme, essential to the efficacy of the referendum power. The essential ability of the people to "approve or reject by referendum any act of the legislature except an appropriation of money," Mont. Const. art. III, § 5, is not impaired by recognition that the people have returned to the legislature the power to order a referendum election at a time other than the biennial general election, provided that the legislature submits the issue at an election in which all of the qualified electors of the state may vote, State ex rel. Diederichs v. State Highway Comm'n, 89 Mont. 205, 215, 296 P. 1033, 1036 (1931), and all the statutory requirements for a special election are satisfied. See Mont. Code Ann. § 13-1-108.

THEREFORE, IT IS MY OPINION:

The Legislature retains the power to order a statewide special election on Initiative Referendum 112 at a time other than the 1994 biennial general election.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/cdt/brf