

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF ADOPTION
Rules I, II, and III pertaining to)
postelection audits)

TO: All Concerned Persons

1. On February 25, 2010, the Secretary of State published MAR Notice No. 44-2-156 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 516 of the 2010 Montana Administrative Register, Issue Number 4.

2. The Secretary of State has adopted the following rules as proposed: New Rules I (44.3.1718) and III (44.3.1720).

3. The Secretary of State has adopted the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE II (44.3.1719) SELECTION PROCESS FOR RANDOM-SAMPLE AUDIT (1) remains as proposed.

(2) A county exempt from the postelection audit requirements because it does not use a vote-counting machine or has a race that is within the margins of a recount pursuant to Title 13, chapter 16, part 2, MCA, shall notify the Secretary of State of its exemption no later than seven days after the election by submitting a ~~request~~ notice for exemption on the form approved by the Secretary of State.

(3) through (6) remain as proposed.

(7) The Secretary of State in collaboration with the counties will provide guidance to the counties as to ~~prescribe~~ the method the counties will use to ensure all individual precinct ballots, including but not limited to each precinct's absentee ballots, are accounted for in a manner that will correlate to a specific vote-counting machine. The ~~prescribed~~ method will ensure that the postelection audit is a blind count.

4. The Secretary of State has thoroughly considered the comments received. The comments received and the Secretary of State's responses are as follows:

COMMENT #1: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding proposed NEW RULE II(2):

"The text of proposed rule II (2) states that a county must notify the secretary of its exemption 'no later than seven days after the election'. However, one of the statutes implemented by this rule, section 13-17-503(5)(b), MCA, states that the county must notify the secretary 'as soon as practicable'. It appears from the plain language of

the statute that if it's not 'practicable' for the county to notify the secretary within seven days, the county may notify the secretary of its exemption on the eighth day or the ninth day or whatever other later day it is 'practicable' for the county to give its notification. For this reason there appears to be a difference between the implemented statute and the language of the proposed new subsection (2) of the rule in that the rule appears to shorten the time provided for in the statute for a county to give its notice if it's not practicable for the county to do so in seven days. There are two reasons why the rule cannot alter the statute: first, because MAPA states in section 2-4-305(6)(a), MCA, that a rule must be 'consistent with and not in conflict with the statute' implemented. Secondly, several Montana Supreme Court opinions have dealt with the subject of rules that conflicted with statute and held that an agency cannot adopt that type of an administrative rule. In Dept. of Revenue v. Estate of Dwyer, 236 M 405 (1989), the Supreme Court held that rules determining what portion of an estate was subject to taxation conflicted with the statute and that the part of the rules that conflicted was of no effect. Likewise, in Bell v. State, 182 M 21 (1979), an administrative rule added a licensing examination to a statutory list of qualifications for a barber's license that didn't include the examination. The Supreme Court held the requirement for an examination to be unlawful. For both of the foregoing reasons, I recommend and request that the secretary not adopt the seven day time limit but use the 'as soon as practicable' standard from the statute. I'd further recommend that if the secretary of state believes the 'as soon as practicable' time period standard used in 13-17-503(5), MCA, to be too lenient, that you draft legislation for introduction in the 62d Session to amend that section of law to provide for the maximum seven day time period."

RESPONSE #1: The Secretary of State believes "as soon as practicable" is defined in 13-17-505(1), MCA, which states that the random selection process shall be conducted by the State Board of Canvassers no sooner than seven days after the election and no later than nine days after the election. Because the counties must notify the Secretary of State of their exemption before the random selection process takes place in order to not include the county's precincts in the random selection to be audited, the logical extension when notification from the county must be received from the county is no later than seven days after the election. Therefore, the Secretary of State will leave the seven day requirement in the rule.

COMMENT #2: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding proposed NEW RULE II(2):

"Concerning this same subsection of this rule, I also see that the statute contains an absolute exemption for a county, but most notify the secretary of the exemption. Subsection (2) of the same rule, however, provides that the county is to notify the secretary by 'submitting a request for exemption'. The ordinary use of the term 'request' indicates an application or petition that may or may not be granted by the secretary. The statute [sic], however, gives the secretary no such power to determine to grant or deny the county's 'request'. For this reason too, the rule seems contrary to the statute (for all of the reasons previously cited above) and I'd therefore

recommend and request that the language of the rule be change [sic] to indicate that the exemption is complete at least upon the receipt of the county's notification to the secretary."

RESPONSE #2: The Secretary of State has changed the word "request" in (2) to "notice."

COMMENT #3: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding proposed NEW RULE II(7):

"In subsection (7) of proposed Rule II, the notice states that the secretary 'will prescribe' the method counties will use to ensure that precinct ballots are accounted for to correlate with a vote counting machine. By the reading of this language 'will prescribe' it appears that the notice intends that the method to be used by the counties will not be adopted as a rule pursuant to MAPA; otherwise I would expect to see the method to be stated in this new rule. As I'm sure you appreciate, there's no way for the secretary to 'prescribe' a method to be used by the counties that is enforceable by the secretary. This is because only administrative rules adopted in accordance with MAPA have any force and effect as law. The decision by the Montana Supreme Court in State v. Vainio, 306 M 439 (2001) and previous cases cited in that opinion makes this abundantly clear. For that reason, I'd recommend that the language of the rule make clear that the method chosen by the secretary, whatever that is and wherever it appears as guidance to the counties, is only to be considered as 'advice' by the counties and is not legally binding upon them in terms of the force and effect of the secretary's prescription of [sic] the counties choose not to follow that advice."

RESPONSE #3: The Secretary of State has removed the word "prescribed" from the text of (7) and substituted language stating the Secretary of State will "provide guidance to the counties." The Secretary of State has broad authority under 13-1-201 and 13-1-202, MCA, as the chief elections officer for the state to provide the election administrators with written directives and instructions relating to and based on election laws.

/s/ JORGE QUINTANA
Jorge Quintana
Rule Reviewer

/s/ LINDA MCCULLOCH
Linda McCulloch
Secretary of State

Dated this 5th day of April, 2010.