

HJR 46: Revision of Election Laws

Your Ballot's in the Mail: An Overview of Vote-by-Mail Issues

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Introduction

For the past two decades, Montana voters have been able to vote in elections held only by mail – if they are voting in certain types of elections and live in an area where the county election administrator or school district has decided to hold mail ballot elections.

These elections differ from the absentee balloting allowed under law in that all voters cast their ballot by mail. Under absentee voting, only those voters who cannot make it to the polls for a specific election or who want to vote by mail for one election or on a permanent basis may vote absentee, a procedure that allows them to return their ballot by mail or deliver it to the election administrator's office.

The Montana Legislature approved the use of mail ballot elections in 1985, when it passed Senate Bill 169 by Sen. Ethel Harding, a former Lake County clerk and recorder. Sen. Harding proposed the legislation as a way of boosting turnout and reducing costs for small elections that sometimes involved only one issue and a handful of election workers.¹

The mail ballot law placed specific limitations on the types of elections that could be held by mail. The original legislation excluded school elections, for example, but the law was amended just two years later to include them. However, mail ballot elections still may not be used for:

- any regularly scheduled federal, state, or county election;
- a special election for a federal or state office, unless the Legislature specifically authorizes the procedure; or
- a regularly scheduled or special election when another election in the political subdivision is taking place at the polls on the same day.

Elsewhere in the country – particularly in the West – states and local governments are considering or have approved expanded use of mail ballot elections. House Joint Resolution 46, approved by the 2007 Legislature, sought a study on whether to expand or require the use of mail ballot elections in Montana.

¹ Minutes of the Senate State Administration Committee, Feb. 4, 1985.

The resolution stemmed in part from the numerous, piecemeal changes to Montana's election laws in recent years. In 1999, Montana legislators passed SB 151, which allowed people to vote absentee for any reason at all, eliminating the requirement that such voting be restricted to instances in which voters were going to be absent from the precinct or were physically unable to get to the polls on Election Day because of illness or a health emergency. In 2005, lawmakers approved Senate Bill 88, allowing voters to opt for permanent absentee balloting in all future elections.

Those changes have led to an increase in the number of voters choosing to vote by mail through absentee ballots. Figures from the Montana Secretary of State's Office show that 15.5% of Montanans voted absentee in 2000, the first year after no-excuse absentee voting went into effect. Nine counties had absentee voting rates of 20% to 25% in the 2000 election. By 2004, absentee ballots made up 22% of the votes cast. By 2006, when permanent absentee voting was allowed, 29.5% of all Montanans who voted did so by mail, using absentee ballots. Forty-five counties had absentee voting rates of 20% or higher; in nine counties, one-third or more of the votes were absentee.

Additional changes to election laws have also created more complex situations for election administrators. The 2003 Legislature approved specific absentee voting procedures for absent military and overseas voters and provisional voting procedures designed to allow voting by people whose registration or identity had not been confirmed before Election Day. Both changes were designed to conform with federal law. The 2005 Legislature also approved late voter registration, including Election Day registration.

During testimony on HJR 46, election administrators noted that these gradual changes in voter registration and absentee voting laws essentially meant that they were running five operations on Election Day: the regular election being conducted at polling places; military absentee voting; permanent absentee voting; emergency absentee voting; and same-day registration and voting.

Elsewhere in the Country

Oregon has led the way in the vote-by-mail movement, through a voter initiative approved in 1998 that requires mail balloting for all elections -- including federal elections for president and members of Congress. Two other states have since considered, but rejected, similar initiatives: Colorado in 2002 and Arizona in 2006.

But numerous bills have come before state legislatures in the last few years, to either allow mail balloting in some instances or to expand on existing mail ballot provisions. Perhaps the legislation having the most immediate and widespread impact was the bill approved by the Washington Legislature in 2005, giving county election officials the choice of determining whether to hold all elections by mail.

Twenty-nine of the state's 39 counties made the switch that year, while another four went to mail ballots in 2006. King County – the state's most-populous county, encompassing Seattle – decided in June 2006 to convert to mail ballot elections by 2008. That change will leave Pierce County, the second-most populous county and home to Tacoma, as the only county maintaining county-wide polling sites. And 90% of the 2006 primary ballots in Pierce County were cast by mail.²

In 2007, 28 bills were introduced in 19 legislatures around the country to either allow for or expand mail ballot elections. Most failed, although North Dakota did approve a measure expanding the use of mail ballot elections, by giving counties the option of holding any election by mail. In addition, 10 states have not yet acted on the bills or have carried them over for consideration next year: Alaska, California, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Tennessee.³

Pros and Cons

In general, mail ballot advocates nationally and in Montana point to several factors that they believe make mail balloting a cost-effective and efficient way to conduct elections:

- Ease of voting, particularly for some voters who are elderly, have child care needs, or have disabilities. Voting by mail allows people to vote at a time convenient to them, with time to examine complicated ballot issues and without having to drive or find transportation to the polls or wait in line to vote.
- Increase in voter turnout, because the ballots come to the voters.
- A reduced need for poll workers, who are becoming increasingly difficult to recruit because of the time commitment involved for both training and Election Day activities and because of the increasing complexities of administering elections.
- Fewer errors in handling of ballots than may occur when hundreds of election judges are working in different precincts across the state and may be resolving Election Day questions in different ways if they don't contact the county election administrator for direction.
- The ability to discover ballot printing or handling errors in advance of Election Day, giving election officials time to correct errors before voting is complete.

² Letter from Washington Secretary of State Sam Reed to Pierce County Councilmember Dick Muri, July 10, 2007, available at

<http://www.secstate.wa.gov/documentvault/LettertoPierceCountyCouncilregardingVotebyMailJuly102007-1925.pdf>.

³ "Election Reform Legislation," *National Conference of State Legislatures* [on-line]; available from <http://www.ncsl.org/programs/legismgt/elect/elections.cfm>; accessed Nov. 12, 2007.

- A possible reduction in expenses, because many of the cost-intensive factors of polling places would no longer exist, such as compensation for election judges and purchase and maintenance of voting equipment for each polling place, and because the hybrid system of polling place and absentee elections would be eliminated. Gauging the extent of any savings is difficult, however, as the savings could be offset by additional costs for administering the elections.
- Possible improvement in the overall management of voter lists because ballots are not to be forwarded. Election administrators receive the undeliverable ballots and can then contact people who have left a forwarding address, making it easier to notify people that they must update their registration information to receive a ballot.
- Tighter oversight of the election process because the elections staff will be working primarily at the elections office, under the direct supervision of the election administrator. Political parties and other election observers also are able to concentrate their monitoring efforts in fewer locations.

Opponents of the idea generally point to these concerns:

- An increased possibility of fraud, because the process may allow new or greater opportunity for interception of the ballots while they are being delivered to the voter or returned to the elections office – a time when the election administrator or election judges are not available to monitor the handling of the ballots.
- Possible undue influence, if family members, employers, or interest groups pressure someone to vote a certain way when no safeguards are in place to ensure that a person can cast his or her vote in private.
- Possible loss of the secrecy of the ballot, because a person's name is clearly visible on the return envelope.
- Concerns that voters with certain disabilities may face accessibility issues in voting without assistance and thus cannot vote at home. In addition, they may have less convenient access to an AutoMark if the places of deposit at which the machines are located are farther from their homes than their polling places were.
- Possible disenfranchisement of people who change their addresses often or are sharing living quarters, because ballots may not reach them.
- Possible disenfranchisement caused by unreliable or late mail delivery in some areas. U.S. Postal Service figures show that in 2006, the Postal Service

delivered 95% of its overnight first-class mail on time, while the on-time delivery rate for first-class 2-day mail was 91% and for 3-day mail was 90%.⁴

- Loss of the ability to put ballots through “precinct counters,” machines that indicate whether someone has voted for too many candidates in a race. The use of these machines gives about half of all Montana voters a chance to correct their ballots before they’re cast⁵ because some, but not all, Montana counties use the machines at the precinct level.
- Greater difficulty for voters whose registrations have lapsed because they will no longer be able to reactivate the registration at a precinct polling place on Election Day if they have been placed on the inactive list. In a mail ballot election, reactivation could occur on Election Day only if the voter went to the county election administrator’s office.
- Loss of the sense of community that polling place elections generate on Election Day.

Evaluating the Arguments

While numerous voting jurisdictions, including many in Montana, have allowed voting by mail in limited circumstances, only Oregon has taken the step of requiring mail ballots for all elections. Thus Oregon’s experience provides the most complete information for evaluating the effects of a system that requires mail ballots.

Until voters approved the 1998 initiative requiring mail ballot elections, Oregon voters could use mail ballot elections only for local elections and certain special elections. When U.S. Sen. Bob Packwood resigned his seat in October 1995, the state had its first opportunity to conduct a federal election by mail because his replacement was selected in a special election.⁶ Both the December 1995 primary election and January 1996 general election for a replacement senator were held by mail.

By the 1998 primary election, more Oregonians voted by mail – using permanent absentee ballots – than voted at the polls. Fifty-three percent of the voters cast absentee ballots.

That summer, vote-by-mail backers gathered enough signatures to put the initiative before voters in November. It passed, garnering 67% of the vote.

⁴ “2006 Comprehensive Statement on Postal Operations,” *U.S. Postal Service*, P. 71

⁵ “Help America Vote Act & Related Elections Issues,” *Montana Legislative Audit Division*, August 2007, P.40.

⁶ Priscilla L. Southwell, “Five Years Later: A Re-Assessment of Oregon’s Vote by Mail Electoral Process,” *Department of Political Science, University of Oregon*, 2003.

Studying the Effects of Oregon's System

Two studies have taken a look at the effects of the change and how it has worked over time.

Ballot Integrity and Voting by Mail: The Oregon Experience, a 2005 study by Dr. Paul Gronke of the Early Voting Information Center at Reed College, found that:

- A small but measurable growth occurred in voter turnout, although the increase was attributed largely to the retention of existing voters.
- No evidence showed that mail ballot elections produced a partisan advantage for one political party or the other.
- Ballot integrity was not harmed by mail balloting. Two separate academic teams determined that mail ballot elections had a more accurate vote count. The study pointed to a claim by one group that it had a list of six people who had voted twice. However, the claim was false for five of the individuals, while election officials had caught the sixth case and were investigating it.
- The signature verification process and tracking system required for mail ballots reduced the risk of significant attempts to cast fraudulent ballots.
- No clear evidence exists that mail ballot elections are less costly, although the report did note: "What does seem apparent is that an all-mail system is less expensive to administer than a "hybrid" system of polling place and absentee balloting."
- The procedures for ballots that are not returned via mail may provide opportunities for the ballots to be destroyed, tampered with, or never delivered. While the Secretary of State's Office discourages voters from using any method other than mail or a designated drop-off site, election administrators say they have no way of knowing whether they received every ballot that was given to someone other than an authorized election official, such as a volunteer for a political campaign.

Five Years Later: A Re-Assessment of Oregon's Vote by Mail Electoral Process, by Priscilla Southwell of the University of Oregon, analyzed the responses of a random survey of 695 voters about voting habits and preferences. The 2003 study found that:

- Nearly 81% of the respondents preferred voting by mail to voting at the ballot box, with support highest among homemakers, people with disabilities, retirees, and voters in the youngest and oldest age groups. Homemakers had the

strongest preference for the mail ballot system, at 93.3%, followed by people with disabilities or who were unable to work at 89.3%, voters who were 18 to 25 years of age at 86.7%, voters aged 65 or older at 86%, and retirees at 85.5%. Unemployed respondents ranked lowest, but 71.4% still preferred voting by mail to polling place elections. Among white respondents, 81.5% indicated a preference for mail balloting, while 79.3% of nonwhites preferred mail balloting.

- Voters who described themselves as moderates also expressed a slightly higher preference for mail ballot elections than those voters who described themselves as liberal or conservative – 86.6% of the survey respondents were moderates, while 77.9% said they were conservative and 75% said they were liberal.
- Two-thirds of the respondents said they voted at the same rate as they did before the change to mail balloting, while 29% said they voted more often than they had in the past and 4.1% said they voted less often. Virtually the same percentage of white and nonwhite respondents said they voted at about the same rate – 66.8% of whites, compared with 66.1% of nonwhites. However, a slightly higher percentage of white respondents said they voted more often with mail balloting – 29.6%, compared with 27.1% for nonwhites. And 6.8% of nonwhites said they voted less often, compared with 3.6% of white respondents.
- Twenty-eight percent of voters describing themselves as moderate said they voted more often under the vote-by-mail system, compared with 23% for self-described liberals and nearly 27% for conservatives. However, nearly 9% of conservative respondents said they voted less often, compared with about 5% for liberal respondents and about 4% for moderates.
- A higher percentage of Democratic respondents said they voted more often than they had with polling place elections – 32%, compared to nearly 29% for Republicans and 25% for independents. However, a higher percentage of Democrats also said they voted less often – nearly 5%, compared with 4% for Republicans and 2% for independents.

“The consequences of vote by mail on the nature of the electorate is one of the most hotly debated aspects of this electoral reform,” Southwell’s report noted, “but this survey suggests that neither of the two major parties have much to lose or gain from vote by mail. Instead, the groups that reported that they vote more often under vote by mail are simply a set of individuals – women, young people, and the disabled and retirees – who have found it more convenient to vote under a system that does not require them to be physically present on ‘the first Tuesday after the first Monday.’”

Oregon's Voting Statistics

An examination of Oregon's voting statistics shows that turnout has, indeed, increased with mail ballot elections, with the increase most notable in presidential-election years.

In 1996, before Oregon went to mail ballots only, the state recorded a voter turnout of 71.3%. In 2000, the first major election year of mail ballot-only voting, turnout increased to 79.8%. And it increased substantially again in the next presidential election, reaching 86.5% in 2004.

Turnout in off-years jumped between 1998, the last year of polling place elections, and 2002, going from 59% in 1998 to 69.1% in 2002. It held fairly steady for the next off-year election, at 70.8% in 2006.

A comparison of turnout by registered voters in Oregon and Montana shows that while turnout was fairly similar in both states for the 1996 presidential election, a significant gap opened up after Oregon went to mail ballot elections.

Turnout of Registered Voters, 1996-2002

| Year | Oregon | Montana |
|-------------|---------------|----------------|
| 1996 | 71.3% | 70.6% |
| 1998 | 59% | 53% |
| 2000 | 79.8% | 59.9% |
| 2002 | 69.1% | 54.5% |
| 2004 | 86.5% | 71.4% |
| 2006 | 70.8% | 63.3% |

However, the interested parties serving as a work group for the House Joint Resolution 46 study felt it was important to look at two other aspects of turnout: whether changes had occurred in the percentage of the voting age population that was registering for and voting in elections and whether turnout in precincts with a large American Indian population had changed.

Montana does not track its voting age population. However, the United States Election Project at George Mason University has estimated figures for the number of people who are eligible to vote in each state in past elections dating back to 1980. The project uses U.S. Census Bureau figures for the number of people over age 18 and reduces those figures to account for non-citizens and, depending on state law, incarcerated felons and mentally incapacitated persons.⁷ The following tables use those adjusted figures for both Oregon and Montana to indicate trends in voter turnout in both states since 1996.

⁷ "Voter Turnout Frequently Asked Questions," *United States Election Project* [on-line]; available from http://elections.gmu.edu/Voter_Turnout_FAQ.htm#How%20to%20VEP; accessed Nov. 13, 2007.

In Oregon, the percentage of the voting-eligible population that is registered to vote has decreased, as indicated in the table below. The decrease has been more significant in off-year elections than in presidential-election years. Turnout among the voting-eligible population is significantly lower than the overall turnout of registered voter. However, it does increase steadily in the presidential years of 1996, 2000, and 2004, while holding virtually steady in off-year elections.

Oregon Voting Statistics, 1996-2006

| Year | VEP* | Registered Voters | % of VEP Registered | Votes Cast | Registered Voters Turnout | VEP Turnout |
|------|-----------|-------------------|---------------------|------------|---------------------------|-------------|
| 1996 | 2,309,051 | 1,962,155 | 85% | 1,399,180 | 71.3% | 60.6% |
| 1998 | 2,258,015 | 1,965,981 | 87% | 1,160,400 | 59% | 51.4% |
| 2000 | 2,364,437 | 1,954,006 | 82.6% | 1,559,215 | 79.8% | 65.9% |
| 2002 | 2,495,739 | 1,872,615 | 75% | 1,293,756 | 69.1% | 51.8% |
| 2004 | 2,626,437 | 2,141,249 | 81.5% | 1,851,671 | 86.5% | 70.5% |
| 2006 | 2,726,737 | 1,976,669 | 72.5% | 1,399,650 | 70.8% | 51.3% |

* VEP = Voting Eligible Population

Source: United States Election Project, George Mason University

Turnout of registered voters in Montana has lagged behind Oregon since 1998, the election cycle before vote by mail went into effect for all Oregon elections. However, turnout as a percentage of the voter eligible population was higher in Montana in the two election cycles before Oregon’s voting procedures changed. Starting in 2000, it was lower – until the 2006 election, when a hotly contested U.S. Senate race topped the ballot.

Montana Voting Statistics, 1996-2006

| Year | VEP* | Registered Voters | % of VEP Registered | Votes Cast | Registered Voters Turnout | VEP Turnout |
|------|---------|-------------------|---------------------|------------|---------------------------|-------------|
| 1996 | 645,052 | 590,751 | 91.6% | 417,232 | 70.6% | 64.7% |
| 1998 | 636,030 | 639,241 | 100.5%** | 338,733 | 53% | 53.3% |
| 2000 | 668,044 | 698,260 | 104.5%** | 417,916 | 59.9% | 62.6% |
| 2002 | 684,572 | 624,548 | 91.2% | 340,272 | 54.5% | 49.7% |
| 2004 | 708,691 | 638,474 | 90.1% | 456,096 | 71.4% | 64.4% |
| 2006 | 716,985 | 649,436 | 90.6% | 411,061 | 63.3% | 57.3% |

* VEP = Voting Eligible Population

Source: United States Election Project, George Mason University

** Voter registration figures for 1998 and 2000 were artificially high because the state could not remove inactive voters from its lists.

However, in Montana, a higher percentage of the voting-eligible population is registered to vote, and less of a gap exists between the turnout of the voting-eligible population and that of all registered voters. In fact, the difference between the turnout by registered voters and by the voting-eligible population varied only slightly from election to election in Montana, while the gap grew steadily in Oregon for election cycles of similar type. It’s less clear how mail-only balloting has affected turnout among Oregon’s American Indian population. Oregon consolidated many of its precincts after vote by mail was instituted, so pre-mail and post-mail balloting comparisons are difficult. However, county clerks in several counties that contain a precinct in which half or more of the voters are tribal members provided turnout statistics for those precincts. Turnout increased in

some precincts, but not in others. County clerks did not have information available on the voting age population to determine how the number of registered voters compared to the number of those people eligible to vote.

The table below shows the voter turnout in the precinct in each county having the greatest Native American population, compared to the overall turnout for the county.

Voting in Selected Tribal Precincts in Oregon, 1996-2006

| Year | Jefferson County | | Lincoln County | | Polk County | | Yamhill County | |
|------|------------------|--------|----------------|--------|-------------|--------|----------------|--------|
| | Precinct | County | Precinct | County | Precinct | County | Precinct | County |
| 1996 | 39.8% | 70.3% | 67.2% | 71.5% | 59.1% | 74.4% | 64.8% | 72.6% |
| 1998 | 26.7% | 57.3% | 62.5% | 63% | 50.2% | 62% | 56.4% | 62.8% |
| 2000 | 40.5% | 78.1% | 79.9% | 82.4% | 63.8% | 78.4% | 74.7% | 82.9% |
| 2002 | 34.4% | 70.8% | 69.3% | 72.2% | 52.9% | 70.6% | 66.3% | 74.7% |
| 2004 | 62.9% | 84.2% | 83.9% | 86.3% | 75.2% | 84.6% | 90.4% | 90% |
| 2006 | 44.4% | 71.8% | 69.6% | 75.6% | 54.9% | 68.5% | 66.2% | 73.4% |

Although the turnout in tribal precincts is generally lower than the overall county turnout, turnout in the tribal precincts as a percentage of overall county turnout has remained relatively steady or increased since mail ballots went into effect, for election cycles of similar type.

Turnout in Oregon Tribal Precincts as a Percentage of Overall County Turnout

| Year | Jefferson County | Lincoln County | Polk County | Yamhill County |
|------|------------------|----------------|-------------|----------------|
| 1996 | 56.6% | 94% | 79.4% | 89.3% |
| 1998 | 46.6% | 99.2% | 81% | 89.8% |
| 2000 | 51.9% | 97% | 81.4% | 90.1% |
| 2002 | 48.6% | 96% | 74.9% | 88.8% |
| 2004 | 74.7% | 97.2% | 88.9% | 100.4% |
| 2006 | 61.8% | 92.1% | 80.1% | 90.2% |

Looking Beyond the Turnout

In addition to questions about voter turnout and the effect of mail ballot elections on minority populations, members of the work group participating in the HJR 46 study raised issues about accessibility; mail delivery, especially to high-density or multi-unit housing complexes; and reactivation of voters who had been placed on the inactive list because their registration had lapsed.

In response to those concerns, John Lindback, director of the Oregon Elections Division, offered the following information about Oregon’s experiences:

Accessibility: Oregon did not use AutoMark machines in the last election because of unresolved issues with the vendor. Based on a U.S. Department of Justice recommendation, election officials instead used a system in which sight-impaired voters could go to a county elections office and have the ballot read to them over a telephone system. State and county officials say the alternative

phone system available in 2006 was not heavily used. The state also is looking into an alternative format ballot that could be put on CD or e-mailed to voters with disabilities and be read out loud on their home computers. A computer would be available for this purpose in each county elections office, as well.

Mail Delivery: The state and counties have found the U.S. Postal Service to be “a motivated partner” in mail ballot elections. The Postal Service works closely with counties on mail delivery issues. Lindback noted that the largest number of returned ballots are probably sent back because people have moved and haven’t updated their addresses, for either registration or mail delivery purposes. He also said college students pose special issues no matter what type of election is held, as they need to be educated about registration practices and encouraged to vote.

Oregon also has addressed the issue of homeless people and those people, particularly retirees, who travel extensively and don’t have a permanent home address. State law allows people to describe the physical location of their residence on their registration form; ballots are then held at the county elections office, and those voters may come to the office to obtain the ballots.

Reactivation of Voter Registration: Oregon does not keep statewide statistics on changes in voter status, but election officials said county reports indicate that voters are active in keeping their registrations up to date. In addition, when ballots are returned as undeliverable, counties send out notifications to people who have provided forwarding addresses. And voters are able to update their registrations via mail or at the Department of Motor Vehicles when they change addresses.

Experiences Outside of Oregon: Absentee Ballot Fraud

While Oregon’s experience generally receives positive reviews from those participating in it and those studying it, cautionary tales involving mail voting exist, as well.

Project Vote, which describes its mission in part as working “to engage low-income and minority voters in the civic process,”⁸ has compiled some examples of fraud in absentee balloting, which in many states is the closest thing to mail ballot elections. Those examples, published in a July 9, 2007, policy brief, include:

- A 1997 Miami mayoral election that was overturned when a Florida appeals court found absentee ballots cast for the Republican incumbent had been fraudulently cast. The court threw out all 4,740 absentee votes cast in the race.

⁸ “Our Mission,” *Project Vote* [on-line]; available at <http://projectvote.org/about-us.html>; accessed Oct. 20, 2007.

- Two men convicted of absentee ballot fraud in a 2003 run-off election in Tallahatchie County, Miss., for providing money and beer to encourage voters to vote absentee.
- A 2005 Benton Harbor, Mich., recall election in which a community leader was convicted of fraud for unlawfully possessing absentee ballots and trying to influence absentee voters with payments. The results of the recall election were overturned, and the city commissioner involved was reinstated to office.

Mail ballot supporters point to the signature verification process as an important safeguard in preventing fraud. Last year in Seattle, for example, King County election workers became suspicious when they noticed that many voter registration forms looked as if they had been signed by the same person. Seven people working for the Association of Community Organizations for Reform Now (ACORN) were charged with felonies for submitting nearly 1,800 fraudulent voter registration forms, allegedly using names from phone directories, newspaper articles, and baby-naming books. Three of the seven have pleaded guilty, while charges are pending against the others.⁹

In addition, some studies say little conclusive evidence of widespread voter fraud exists in any type of election system. A report by a Barnard College political science professor said records showed that between 2002 and 2005, only 24 people were convicted of or pleaded guilty to illegal voting in federal elections.¹⁰ And a Brennan Center for Justice report maintained that most anecdotal reports of voter fraud are proven false or overstated, while others “often turn out to be the result of common clerical errors, incomplete information or faulty assumptions. Most allegations of voter fraud simply evaporate when more rigorous analysis is conducted.”¹¹

Legal Issues

Legal challenges to voting by mail have been unsuccessful, with perhaps the most significant challenge made to Oregon’s all mail ballot system. The Voting Integrity Project filed a civil rights action in federal court after passage of the 1998 initiative.¹² The plaintiffs argued that Oregon’s law violated federal elections law by allowing voting to be conducted over a substantial period of time, rather than only on Election Day. The U.S. District Court in Oregon ruled in favor of the state, and the Voting Integrity Project appealed the decision to the 9th U.S. Circuit Court of Appeals.

⁹ Associated Press, “Guilty Plea in KingCo voter registration fraud,” *The Bellingham Herald*, Oct. 26, 2007, [on-line]; available from <http://www.bellinghamherald.com/northwest/v-print/216910.html>.

¹⁰ Lorraine C. Minnite, “The Politics of Voter Fraud,” *Project Vote* [on-line]; available from http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Key_Findings_Final.pdf; accessed Nov. 12, 2007.

¹¹ “The Truth about ‘Voter Fraud,’” *Brennan Center for Justice*, September 2006 [on-line]; available from http://www.brennancenter.org/stack_detail.asp?key=97&subkey=38347; accessed Nov. 12, 2007.

¹² 259 F.3d 1169.

The appeals court upheld the Oregon law in July 2001. The court noted that the Voting Integrity Project had made a strong case in arguing that federal law sets the first Tuesday after the first Monday in November as *the* election day. But it also said passage of that law in the early 1870s was designed in part to address situations in which some states held the polls open for several days and some states held elections in different months.

It also noted that an earlier U.S. Supreme Court decision defined “election” for purposes of the federal election statute as “the combined actions of voters and officials meant to make a final selection of an officeholder.” That decision came in a challenge to a Louisiana law that allowed federal elections to be decided at the October primary if a candidate won a majority of the votes in that election.

Because Oregon’s vote is not final until Election Day, the court determined that the voting system fell within federal law.

In addition, the appeals court said its final decision was swayed by the history of absentee voting, first allowed during the Civil War so soldiers could vote.

“What persuades us of the proper outcome in this difficult case” the court wrote in its decision, “is the long history of congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue. We find it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting.”

The case was appealed to the U.S. Supreme Court, which declined in April 2002 to hear the matter, effectively ending the lawsuit.

The California Supreme Court also issued a ruling in a 1983 legal challenge to a mail ballot election approved by the San Diego City Council for a special election on the signing of a lease.¹³

The trial court in that case denied a request for a preliminary injunction before the election, and the state Supreme Court affirmed that ruling.

The plaintiff had contended a mail ballot election would violate the state constitutional requirement for a secret vote. Unless voters were required to cast their votes in private, they might show their ballot to another person and perhaps be subject to coercion or fraud, the plaintiff argued.

¹³ 34 Cal.3d 225, 666P.2d 975.

But the high court concluded: “The secrecy provision of the California Constitution was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting.”

In Montana

The HJR 46 work group raised concerns that allowing optional mail balloting for federal elections could create constitutional equal protection issues because Montanans may be using different voting systems for the same election. Staff Attorney David Niss analyzed the constitutionality of using different voting methods in different counties, specifically addressing a scenario in which a pilot project required mail ballot elections for all elections in a specified number of counties.

His legal memorandum concluded that the legislation would not pose equal protection problems or violate the state constitutional prohibition on special legislation, because it would not prohibit anyone from voting and because a rational basis exists for establishing mail ballot elections for only a limited number of counties on a trial basis.

2007 Municipal Elections: Many Montanans Mail Their Votes

An increasing number of Montana’s municipal elections were held by mail this fall. Eighty municipalities conducted general elections by mail ballot only, while another six non-municipal elections were held by mail. The locations ran the gamut, from Billings and Missoula to Lima, Big Sandy, Baker, Brockton, and Rexford.

By comparison, about 60 mail ballot elections were held in the 2005 municipal elections and about 45 in 2003.

Four of the state’s largest cities – Billings, Bozeman, Helena, and Missoula – conducted their city elections by mail this fall, for the first time. The tables below provide information on various aspects of their general-election experiences.

Mail Ballot Turnout and Non-Delivery Rates, November 2007

| City | Ballots Mailed | Ballots Counted | % Voting | Ballots Not Delivered | % Undeliverable |
|----------|----------------|-----------------|----------|-----------------------|-----------------|
| Billings | 54,672 | 28,416 | 52% | 4,777 | 8.7% |
| Bozeman | 15,756 | 7,050 | 44.7% | 2,252 | 14.3% |
| Helena | 14,058 | 8,655 | 61.6% | 585 | 4.2% |
| Missoula | 51,409 | 23,681 | 46.1% | 4,919 | 9.6% |

Turnout in all four cities far exceeded past municipal elections.

In both Missoula and Bozeman, officials felt that the large number of university students contributed to the number of ballots that could not be delivered, because many students change residences at the end of the academic year and forget to – or don’t know that they should – update their addresses with the elections office. Thus their ballots often

can't be delivered, if no forwarding address was provided or the forwarding order has expired.

Only a small number of the ballots that were returned were rejected by election officials for reasons allowed under law, including instances in which the voter failed to sign the return envelope, the signature didn't match the signature on the voter registration card, or the ballot came in after Election Day.

Mail Ballot Rejection Rate, November 2007

| City | Ballots Received | Ballots Rejected | % Rejected |
|----------|------------------|------------------|------------|
| Billings | 28,939 | 523 | 1.8% |
| Bozeman | 7,086 | 38 | 0.5% |
| Helena | 8,802 | 147 | 1.7% |
| Missoula | 24,217 | 359 | 1.5% |

While all the cities made places of deposit other than the elections office available for voters, most voters returned their ballots by mail.

Method of Mail Ballot Return, 2007

| City | Returned by Mail | Returned to Place of Deposit | % Returned by Mail |
|----------|------------------|------------------------------|--------------------|
| Billings | 27,927 | 1,012 | 96.5% |
| Bozeman | 5,658 | 1,426 | 79.8% |
| Helena | Didn't track | Didn't track | Didn't track |
| Missoula | 20,931 | 3,286 | 86.4% |

Clerks and recorders provided the following information about the places of deposit they set up for the elections:

- Billings had four additional places of deposit, with an AutoMark machine available at each site. No one used the AutoMarks.
- Missoula had five additional places of deposit, each with an AutoMark machine available; 877 voters returned their ballots to one of the five sites, and one person used the AutoMark available at the elections office.
- Bozeman had two additional places of deposit available on Election Day; 215 voters returned their ballots to one of those sites, and no one used an AutoMark machine.
- Helena set up a place of deposit at the local shopping mall on the weekend before the election. The county did not specifically track the number of ballots returned by mail and to the two places of deposit – the county elections office

and the mall – but officials estimated that about 50 ballots were returned at the mall location. No one used the available AutoMark machines.

A Few Glitches Along the Way

While turnout increased in all four elections, the cities experienced a few setbacks as they put mail ballots into use for these elections:

- In Helena, ballots for the Helena Citizens Council included only the candidates running in a voter's precinct rather than the full slate of candidates for each of the council's several districts. The districts are made up of more than one precinct.¹⁴ The city will hold a separate mail ballot election later this year, using corrected ballots. Lewis and Clark County Clerk and Recorder Paulette DeHart has said the new election will cost an additional \$5,000 to \$7,000.¹⁵
- In Missoula, 178 voters living in one City Council ward received ballots for candidates in a different ward, apparently because of an error that occurred while ballots were being placed in envelopes by the elections staff.¹⁶ New ballots were mailed to those residents well before the election, while the old ballots were voided in the county's computer system.
- Bozeman ballots in the primary election were forwarded to people who had moved and left a forwarding address, although state law prohibits the forwarding of mail ballots. When election officials were made aware of the problem, they worked with the Postal Service to ensure that for the general election, ballots mailed to people with forwarding addresses were instead returned to the county election administrator.¹⁷

Questions for Montana

The increasing use of absentee ballots in Montana has led to the creation of a system in which county election officials administer not only Election Day voting at polling places, but also a significantly large absentee-voting process that is, in many respects, the equivalent of a mail ballot election. This hybrid system has raised questions about whether there are more efficient ways to administer elections.

Conducting all elections by mail is seen by some as one way to improve efficiency. The experiences of other states and the concerns of Montanans involved and interested in elections bear consideration in any discussion of expanding the use of mail ballot elections. The members of the work group participating in the House Joint Resolution

¹⁴ Larry Kline, "Citizens Council ballots are invalid," *Helena Independent Record*, Oct. 23, 2007

¹⁵ Larry Kline, "City Election Getting Great Voter Turnout," *Helena Independent Record*, Nov. 3, 2007.

¹⁶ Keila Szpaller, "Ballots sent to wrong residents," *Missoulian*, Oct. 17, 2007.

¹⁷ Telephone interview, Nov. 13, 2007.

46 raised the following issues they felt should be included in any legislative consideration of expanded use of mail ballot elections:

- **Accessibility.** Any change should ensure that accessible voting systems and accessible places of deposit are available to Montanans who are blind, disabled, or mobility-impaired. Those who cannot vote at home will still need access to a place to vote and to AutoMark machines, and not all courthouses are accessible.
- **Effect on minorities.** Mail ballot elections may lead to lower levels of participation among minorities or low-income people.
- **Mail delivery issues.** A certain percentage of mail ballots will be returned as undeliverable, causing these voters to be moved to the inactive list if they fail to respond to later notifications they receive if they left a forwarding address. Delivery issues to certain areas – particularly multi-unit dwellings such as college dormitories, apartment complexes, and nursing homes – and to homeless people need to be examined and addressed because ballots will be mailed to all voters, not just those who have asked to vote by mail as absentee voters.
- **Reactivation of voters removed from the registration list.** The state may need to consider ways to more actively reach voters who are removed from the list if their ballots were undeliverable.
- **Outreach to voters:** Because voting by mail would be a significant change for many voters, counties may need to advertise the change more heavily and this could create additional costs.

Following the November 2007 municipal elections, the Secretary of State's Office polled election administrators who conducted mail ballot election to gather information about the practices they followed, the voter turnout in comparison to past non-mail ballot elections, the number of inactive voters who reactivated their registrations, and other issues involved in their use of mail ballots. Results of the survey may address some of the questions raised by the work group.

Options for Expansion

Oregon Elections Director John Lindback advises states and local governments considering mail-only elections to: "Go slowly. Break the population in with it."¹⁸

He notes that Oregon phased in its vote by mail system over a nearly 20-year period, starting with small local elections and then allowing mail ballot elections for ballot issues

¹⁸ Telephone interview, Oct. 10, 2007.

in statewide elections before expanding to include statewide candidates and, finally, requiring that all elections be held by mail ballot.

Montana put its vote by mail laws into place in 1985, and they have changed little since then. Over time, more elections have been held by mail, as evidenced by this fall's 86 municipal mail ballot elections. Despite the increased use of mail ballot elections and the increased interest among election administrators in conducting more elections by mail, concerns remain among some groups that such elections could leave some voters behind or open the door to fraud.

Because of these concerns, participants in the HJR 46 work group did not reach consensus on whether Montana should expand or require the use of mail ballot elections. Instead, they agreed on four options that the State Administration and Veterans' Affairs Interim Committee should consider:

- Make no change to the current law, keeping in place the system that allows voting jurisdictions to opt for mail ballot elections in certain smaller elections.
- Introduce legislation that would give counties the option of conducting more or all of their elections by mail.
- Introduce legislation for a pilot project that would require selected counties to conduct all their elections by mail for a specified time period and to track information on mail delivery of ballots, the number of ballots that were undeliverable, voter turnout, accessibility issues, costs, and other items to give legislators a better picture of the potential benefits and drawbacks of wider use of mail ballot elections.
- Introduce legislation requiring all elections to be conducted by mail.