

Opinion No. 21

**LIVESTOCK; Herd District; establishment of—LIVESTOCK; Herd District; petition for; filed with county clerk and recorder—LIVESTOCK; Herd District; creation of; land subject to—LIVESTOCK; Herd District; establishment of; addition and withdrawal of names on petition, time for—LIVESTOCK; Herd District; Area; altering district; qualifying basis for—
Sections 11-614, 16-2911, 16-2917, 19-102, 46-1501, 46-1507 and 93-401-15, Revised
Codes of Montana, 1947**

- Held:**
- 1. The petition for the creation of a herd district must be filed with the county clerk but need not be recorded.**
 - 2. The boundaries of a proposed herd district can not overlap an existing district.**
 - 3. The term "government section" as used in the herd district law is land lying within lines marked by government survey.**
 - 4. Not more than fifteen per cent (15%) of the tract of land proposed for withdrawal from the herd district can be under cultivation.**

5. **When a change of time for a herd district is sought the area of the district at the time the petition for change is presented is the area which is to be used as the qualifying basis for the petition.**
6. **Land owners may withdraw or add their names to the petition to organize or change a herd district up until the hour set for hearing the petition.**

August 10, 1959

Mr. Tom Darland
Sheridan County Attorney
Plentywood, Montana

Dear Mr. Darland:

Following are my opinions on the questions you ask regarding the Herd District Law.

Must the county clerk record the petition for creation of a herd district filed with her office?

Section 16-2917, RCM, 1947, provides that the county clerk must take charge of and safely keep, or dispose of, **according to law**, all books, papers, and records which may be filed or deposited in his office.

The herd district law does not require that the petition for creation of a herd district law be filed for record or be processed by the clerk in the manner he handles instruments for recording. (See Sec. 16-2911, RCM, 1947.)

The law does not specify how the clerk will handle the petition. It refers to his participation in creating the district as follows: (Sec. 46-1501 (b)).

"and upon presentation and filing of such petition . . . with the clerk and recorder in the county . . ."

To file is to deposit for orderly systematic safekeeping (State v. Lewis, 22 So. 327, 328, 49 La. Ann. 1207). The filing is the actual delivery to the clerk without regard to any action that he may take thereon (Brooks v. Edwards, 231 Pac. 83, 84, 107 Okla. 239). Since the clerk must take charge of the herd district petition according to law and the herd district law with reference to his duties charges only that the petition be presented and filed with him, such filing may be done according to usual practice. No specific acts are demanded of him in processing the petition.

Moreover, the legislature has, in another situation, distinguished between filing and recording as being distinct and separate functions

of the clerk. Regarding small and irregular tracts of land under Section 11-614, RCM, 1947, it was held in (25 Opinions of the Attorney General 18) that the legislature replaced a requirement that the plat be recorded for one that the plat be filed.

The petition for creation of a herd district must be filed with the county clerk. It need not be recorded.

You ask whether the proposed boundaries of a herd district can overlap an existing district. The term district as it appears in the herd district law is used in its ordinary sense. It has not been specially defined and nothing in the act indicates that it is used in a special sense.

Section 19-102, RCM, 1947, provides:

"Words and phrases used in the codes or other statutes of Montana are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, as amended, are to be construed according to such peculiar and appropriate meaning or definition."

The definition of a district in *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514, is not clearly in point since it pertains to the jurisdiction of justices of the peace. Yet, for that purpose it agrees that the term district refers to a portion of territory.

The ordinary meaning of district has been best stated by the Supreme Court of Nevada as follows:

"In its ordinary meaning, word 'district' is commonly and properly used to designate any one of the various divisions or subdivisions into which the state is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, school, or road district, depending upon connection in which it was used. *State ex rel. Schur v. Payne*, 63 P. 2d 921, 925, 57 Nev. 286."

That is the sense in which the term "district" is used in the Montana herd district law. Since a district is a division of the state for some governmental purpose, it follows that overlapping would confuse and possibly defeat the administration of the purpose. Therefore, it appears that the legislature did not intend to permit overlapping of herd district boundaries.

You ask what is meant by the term "government section" as used in Section 46-1501, RCM, 1947 of the Herd District Law.

Again, the term is not specially defined by the herd district act. Its only judicial definition was given in a Virginia case as follows:

"Government section or other government subdivision is land lying within lines as surveyed and marked upon ground by government survey." *Danill v. Florida Industrial Co.*, 166 S.E. 712.

That is the sense in which our legislature used the term "government section." No reason is apparent why we should consider that it means land owned by the government. To so hold would virtually prevent statutory withdrawal of land from the district since not every district would contain eighteen sections of governmentally owned land and it would be administratively complicated to obtain the government's signature to a withdrawal petition. For these reasons it appears that the legislature intended the term "governmental section" to mean a section which has been officially surveyed and marked.

You ask how much of a tract of land proposed for withdrawal from the herd district can be under cultivation. The language of the statute answers that question. Section 46-1581 (c), RCM, 1947, provides that the petition to withdraw land from the district shall set forth "that less than fifteen per cent (15%), of the lands included in such tract is in actual cultivation." No exception to that statutory requirement is provided.

Where a herd district is enlarged by annexation of adjoining land does the district retain its original boundaries for the purpose of changing the time or period when the herd district shall be in effect?

Section 46-1501 (a), RCM, 1947, provides:

". . . Upon petition of any owner or possessor of lands lying contiguous and adjoining any herd district theretofore created, and upon like hearing and notice as hereinabove provided for, such lands shall be included in said herd district and become a part thereof . . ."

Section 46-1507, RCM, 1947, authorizes changing the time of year or period when the herd district will be in effect. It provides in part:

". . . Upon the presentation and filing with the clerk and recorder of such county, a petition signed by the owners or possessors of fifty-five per centum (55%) of the land in such district."

The language of the statute indicates that the district it speaks of is the district as it exists at the time of the petition for change. Nothing in the section indicates that the district can be divided into areas with different legal requirements for each area. To hold that when a change of time for the district is sought only the district as it was initially constituted will be considered would require the interpolation of language. For example, we would have to supply words to the statute so that it would read:

“ . . . a petition signed by the owners or possessors of fifty-five per centum (55%) of the land in such district **as it was originally constituted.**”

Section 93-401-15, RCM, 1947, prohibits the inserting of words to reach a particular construction.

The legislature may have intended that a petition of a herd district be signed by owners of the land within the original boundaries of the district, but it did not say that in the statutory language used and its “intention must be gathered from language used by the lawmakers.” (See *Green v. City of Roundup*, 117 Mont. 160, 157 Pac. (2d) 1010.)

It is therefore my opinion that the area of the district at the time the petition for change is presented is the area to be used as the qualifying basis for the petition.

You ask whether there is any time limitation for the addition or withdrawal of names to create a district or change the time of the year when the law is in effect.

Regarding the petition to organize the district the herd district law expressly allows withdrawal of names. Section 46-1501 (b), RCM, 1947, provides, “. . . , and no person shall be permitted to withdraw his name after the hour set for hearing same.”

No express provision is made for adding names to herd district petitions or for withdrawing names from a petition to change the time of a herd district, and I find no cases on this point. However, creation and changing of a herd district is analogous to the creation and changing of an improvement district. The consent of the property owners burdened is required to be manifested by their signatures on a petition. The sufficiency of the petition is jurisdictional (*Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454).

Being analogous I believe the general rule governing withdrawal of names to the improvement district petition is applicable. McQuillin states the rule as follows:

“Petitioners may be allowed to withdraw their consent or signatures at any time before the municipal authorities have acted on the petition by notice to the proper officers, and this even though the petition is thereby rendered insufficient for want of the requisite number of signers.” *The Law of Municipal Corporations* §37.50, 3rd Edition.

The same rule on principle should apply to the addition of names in these situations.

For the reasons given above it is my opinion that:

1. The petition for the creation of a herd district must be filed with the county clerk but need not be recorded.

2. The boundaries of a proposed herd district can not overlap an existing district.
3. The term "government section" as used in the herd district law is land lying within lines marked by government survey.
4. Not more than fifteen per cent (15%) of the tract of land proposed for withdrawal from the herd district can be under cultivation.
5. When a change of time for a herd district is sought the area of the district at the time the petition for change is presented is the area which is to be used as the qualifying basis for the petition.
6. Land owners may withdraw or add their names to the petition to organize or change a herd district up until the hour set for hearing the petition.

Very truly yours,
FORREST H. ANDERSON
Attorney General