

**New Counties, When Created—Electors of New County,
Where Entitled to Vote.**

Where the period between the election for the creation of a new county and the time when the law prescribes that the creation of the county becomes effective, comes subsequent to an ensuing election, the electors residing within the new county continue as residents of the old county and as such are entitled to vote for the officers of the old county.

July 9, 1920.

Mr. Stewart McConochie,
County Attorney,
Lewistown, Montana.

Dear Sir:

I have your letter of recent date with reference to the creation of Judith Basin country, and particularly regarding the right of those electors residing within that portion of Fergus county, which will be embraced in the new county, if the election is favorable to its creation, to vote in Fergus county at the general election to be held in November.

As I understand the situation, a petition was presented to the commissioners of Fergus County asking that an election be held for the purpose of submitting the question of creating Judith Basin County to the electors residing in that portion of Fergus proposed to be included within the boundaries of the new county, and the petition being sufficient, on the hearing the board of county commissioners ordered an election which will be held on August 24th, at the same time the primary nominating election is held. If the vote at such election is favorable the board of county commissioners of Fergus County, after canvassing the vote, will, in accordance with the provisions of Sec. 4 Chap. 226 Sess. Laws 1919, enter a resolution on the minutes of the board declaring the territory formed and created as a new county, causing a copy of such resolution to be filed in the office of the Secretary of State, and ninety days after such copy is filed in the office of the Secretary of State, Judith Basin County will be fully created and the organization thereof completed. If the vote is favorable, the copy of the resolution will probably be filed in the office of the Secretary of State about September 1st, and the ninety day period will expire about December 1st, so that about December 1st this portion of Fergus County will cease to be a part of Fergus County, and will be a separate and distinct county.

The question is, whether or not the electors residing within the portion of Fergus County proposed to be included within Judith Basin County, shall be permitted to vote as electors of Fergus County at the general election in November, if, at the election to be held on August 24th, the vote shall be favorable to the creation of the new county. If they are permitted to vote as electors of Fergus County, they will be

permitted to vote for officers of Fergus County, when they will cease to be electors of such county and will be electors of Judith Basin County within thirty days after such general election.

Assuming that the election to be held on August 24th will result in a vote favorable to the creation of Judith Basin County, it is necessary to determine the status of that portion of Fergus County, which will be included within Judith Basin County, and the electors residing in such portion, during the ninety day period immediately following the filing of the copy of resolution in the office of the Secretary of State, and when such status is determined, the question is answered. If immediately on the canvass of the vote cast at the election on August 24th, the adoption of the resolution by the board and the filing of the copy in the office of the Secretary of State, Judith Basin County becomes a fully created and organized county, then the territory embraced within its boundaries has ceased to be a part of Fergus County, and the electors residing within its boundaries are no longer electors of Fergus County. On the other hand if Judith Basin County does not become a fully created and organized county until ninety days after the filing of the copy of the resolution in the office of the Secretary of State, so that it is a separate and distinct entity, and has a corporate existence as a county separate and distinct from that of Fergus County and the electors residing within its boundaries are electors of Fergus County. In the case of *Los Angeles County v. Orange County*, 32 Pac. 316 an expression is found which seems to be applicable here. There Orange County was created by an act of the legislature which was approved on a certain date, but under the provisions of the act Orange County did not become fully created and organized until a certain date thereafter. During the period between the date of the approval of the act and the date when Orange County expended certain money on the roads situated in that part of such county embraced within the boundaries of Orange County when it became fully created and organized Los Angeles County presented a bill to Orange County for the money so expended. It was held that Orange County was not liable for the payment of such amount, the court saying in the course of the opinion:

"The items for which the present action is brought were expenditures made between the date of the passage of the act and the organization of the new county, but during all that time the territory within which these expenditures were made was a portion of Los Angeles County."

In the case of *Whitehead v. Galloway* 153 Pac. 1101, involving the creation of a new county, the supreme court of Oklahoma, used this language:

"A mere statutory authorization for the organization of a county does not create a county. A county cannot exist without first having been organized. Until it has been organized it has not attained the dignity of even a quasi public corporation. It is not an intangible entity. It is not a county."

In *Ryan v. Evans*, 49 Tex., which also involved a new county, the court said:

"The fact that it was declared that 'a new county' with certain boundaries 'is hereby established', did not have the effect to create a new county; because in the same declaration it was contemplated and provided that certain things should be done, in organizing it, which were necessary to be done in order to separate its territory from the jurisdiction of the two counties from which it was taken, and give it a distinct identity as a county, a body corporate, constituting one of the civil and political divisions of the state."

In Corpus Juris, p. 405, it is said that the creation of new counties by the division of old ones does no more than provide for the organization of such counties, and until the new county is actually organized and its officers qualified, the territory remains subject to the jurisdiction of the old county, while at page 415, it is said that a county is not organized until it has within itself the necessary means of performing its functions independently of any other county, with its lawful offices and machinery for carrying out the powers and performing the duties belonging to that class of corporate bodies.

In Section 4 of Chapter 226 Session Laws 1919, we find the following language:

"Said board shall forthwith cause a copy of said resolution duly certified, to be filed in the office of the Secretary of State, and ninety (90) days from and after the date of such filing said new county *shall be deemed fully created and the organization thereof shall be deemed completed*, and such officers shall be entitled to enter immediately upon the duties of their respective offices upon qualifying in accordance with law and giving bonds for the faithful performance of their duties, as required by the laws of the State."

The plain meaning of this language is that until the ninety days have fully expired, the new county is not only not fully organized, but it is not even fully created, and it is only when the ninety days have expired that it becomes both fully created and completely organized.

It therefore follows that not being a fully created and completely organized county until the expiration of the ninety days, the territory embraced within its boundaries during the ninety day period is a portion of the old county subject to the jurisdiction of the old county in every way, and the electors entitled to all of the privileges and rights to which electors of the old county are entitled.

It is true that it looks somewhat unreasonable to permit the electors residing within the portion of the old county which will be embraced within the new county when it is fully organized and created, to vote for candidates for county offices, when such electors will cease to be residents and electors of the old county before the officers elected in the old county will qualify and take office, but on the other hand to refuse to permit them to vote as electors of Fergus County would deprive them of their right to vote for state officers, and for Congressmen. The new county until the expiration of the ninety day period,

will have no machinery for holding elections, and will be wholly unable to hold any election in November, and there is no provision of law providing or even authorizing separate ballots for State officers, or for Congressmen, so that the result would be that unless permitted to vote as electors of Fergus County the electors residing in the territory which will be embraced within the new county will be entirely deprived of their right to vote for State officers and Congressmen.

I am, therefore, of the opinion that, so far as the general election to be held in November is concerned, all proceedings and acts with reference to the creation of the new county must be regarded as merely preliminary steps to the creation of such county, which will not be fully created and completely organized until the expiration of the ninety day period, and that during such ninety day period the electors residing in that portion of Fergus County which will be embraced within the county of Judith Basin, must be regarded as residents and electors of Fergus County, and it is their right and privileges to vote at the general election in November, for officers for Fergus County, State officers and Congressmen.

Respectfully,

S. C. FORD,

Attorney General.