

Opinion No. 198.**Schools and School Districts—Income From School Funds, Apportionment and Distribution Thereof—School Census, Collection Thereof—
State Treasurer.**

HELD: A school district having made an incorrect census report may correct the same and receive apportionment of the income on school funds on the basis of the corrected census, provided such correction is made before the apportionment and distribution is made by the State Treasurer.

February 9, 1940.

Hon. Ray N. Shannon
State Treasurer
The Capitol

Dear Mr. Shannon:

You have submitted the question whether the school district which includes the townsite of Fort Peck is entitled to receive an apportionment of the school funds for the four hundred thirty school children and youths in the schools in the said townsite.

The Supreme Court of Montana in December, 1939, in the case of Valley County v. Thomas, 109 Mont. 345, 97 Pac. (2) 345, in effect held that the United States does not have exclusive jurisdiction of the Fort Peck townsite but that the state retained concurrent jurisdiction as provided by Section 25.1, R. C. M., 1935, including the right to tax persons, corporations, etc. This decision reversed two previous decisions of the Montana Supreme Court, State ex rel. Board of County Commissioners of Valley County v. Bruce, et al., 106 Mont. 322, 77 Pac. (2) 403, affirmed by the United States Supreme Court, and State ex rel. Board of County Commissioners of Valley County v. Bruce et al., 104 Mont. 500, 69 Pac. (2) 97. Apparently relying upon the previous decisions of the Montana Supreme Court, as he had a right to do, the clerk of the school district in question in making up the school census as provided in Section 1051 Id., failed to include the four hundred thirty children and youths in the schools of the Fort Peck townsite and consequently the county superintendent did not thereafter include such children in the copy to the State Superintendent of Public Instruction.

(1051.1 Id.) We assume from your letter that the apportionment and distribution of the income from the school funds has not yet been made.

On these facts, since you have been informed of the error and of the claim of the school district before the funds have been apportioned and distributed, it is my opinion that you should accept a supplemental or corrected census of the children and youths of the school district and make your distribution accordingly for the following reasons:

The school district would have been entitled to an appropriation on this basis, if the census had been made on schedule as provided by statute, since the effect of the Supreme Court decision is to include the Fort Peck townsite as a part of the school district. The failure to make the correct census report in the time allowed by laws is not jurisdictional, provided it is made before the apportionment and distribution has actually been made. Section 5, Article XI, of the Montana Constitution provides that the income from the public school funds shall be apportioned annually among the several school districts of the state in proportion to the number of children and youths between the ages of six and twenty-one years, and this mandate should be followed so that the children of every school district will profit therefrom. Since it appears that the apportionment and distribution can yet be made so as to carry out the purpose of the Constitution, it is my opinion that it should be done despite the incorrect census, which was not the fault of the clerk, the school district or the children therein.