

Opinion No. 222.**County Commissioners—Appointments
—Sheriff—Counties—Deputy Sheriff.**

Held: The appointment by your sheriff of a deputy sheriff in addition to the under sheriff, on January 3, 1943, was legally authorized. The deputy sheriff is now legally acting and has a right to his compensation.

June 26, 1944.

Mr. W. L. Hyde
County Attorney
Mineral County
Superior, Montana

Dear Mr. Hyde:

You have requested an opinion of this office asking if the county commissioners in a seventh class county may by resolution declare the county has a population of less than 2000 and then direct that the sheriff may not have a deputy in addition to an under sheriff.

The facts as given to me by your correspondence are:

"Your county is of the seventh class; in accordance with the report of the federal census of 1940, the population of your county was in 1940 over 2100; no official census has since been taken in your county; on December 11, 1942, your county commissioners passed a resolution declaring that they were of the opinion the county had less than 2000 people and they wished to comply with Chapter 168, Laws of 1941, and therefore directed the sheriff have an undersheriff, but no other deputy; on January 3, 1942, the sheriff now in office appointed an under sheriff and one deputy; on January 4, 1942, the commissioners rescinded the resolution of December 11, 1941; that on February 9, 1944, the commissioners again passed a resolution similar to the resolution of December 11, 1941; the sheriff has at all times since January 3, 1942, and now has an under sheriff and one other deputy. Section 4875, Revised Codes of Montana, 1935, reads in part as follows:

"... The whole number of deputies allowed the sheriff is one under sheriff, and in addition not to exceed the following number of deputies: In counties of the . . . in counties of the fifth, sixth, seventh and eighth classes, one . . ."

In accordance with the above quoted section this office held in Opinion No. 15, Volume 20, Report and Official Opinions of the Attorney General, that a sheriff in a county of the seventh class, having a population of more than 2000, may, if he deems it necessary appoint one under sheriff and in addition one deputy without the authorization or consent of the board of county commissioners. Said opinion was written while the last legislature was in session and they did not see fit to amend or change the law. In regard to said Chapter 168, Laws of 1941, it is to be specifically understood that it only applies to counties having a population of less than 2000.

Your county had a population of over 2000 at the time of the last official census and I do not find any authority for your county commissioners holding a census and certainly they have no authority to arbitrarily determine that the county has a population of less than 2000, without a census. It has been the strict holdings of our court that county commissioners may only exercise such powers as the legislature has clearly given them by law or as must necessarily be implied from the powers given. Chapter 168, Laws of 1941, does not give the commissioners power to arbitrarily determine the population of counties nor does the power therein given necessarily imply that they have such power. The membership of the house of representatives of all legislative assemblies of Montana are apportioned upon and according to the official census in the various counties. (See Chapter 37, Laws of 1941.) The classification of cities are likewise determined except in special instances in which cases special provisions are made by law for the taking of a municipal census.

The Supreme Court of California in the case of *Cothran v. Cook*, 80 Pac. 699, had before it the question of the county supervisors arbitrarily determining that a certain township had increased in population and that therefore the justice of the peace should have an increase in salary. On that matter the Court held:

"At the hearing in the superior court it was admitted that the census taken by the United States in 1900 showed the population of judicial township No. 3 to be 3,233, and that no census of its population had since

been taken . . . March 11, 1903, the board of supervisors passed the following ordinance, viz.: 'An ordinance fixing and determining the population of . . . (3525) . . . It is admitted that prior to the passage of this ordinance no petition had been presented to the board of supervisors for taking the census of said township . . . and it was also admitted that the above ordinance was adopted without any census of said township having first been taken and that the population thereof, as declared by said ordinance, was based solely and alone upon the opinions of the members of said board of supervisors . . . (the ordinance was excluded when offered in evidence) . . . (without a census) . . . an ordinance of that nature is entitled to no more consideration as evidence of the population of such township than would be a similar declaration by any other body of individuals. It would have no higher rank as evidence than hearsay.'

Therefore, in answer to your inquiry, it is my opinion:

1. The appointment by your sheriff of a deputy sheriff in addition to the under sheriff, on January 3, 1943, was legally authorized.

2. The county commissioners of your county have not been given the authority by the legislature to determine the population of your county by resolution or otherwise based merely upon their judgment or opinion as to the population, and therefore have no right to order a deputy sheriff be discharged for that reason.

3. The board of county commissioners have not been authorized to order and take a census of the population of the county as a preliminary to the exercise of its powers under Chapter 168, Laws of 1941.

4. In accordance with the facts you have submitted, said deputy sheriff appointed on January 3, 1943, was legally appointed and is now legally acting and has a right to his compensation.

Sincerely yours,
R. V. BOTTOMLY
Attorney General