

Opinion No. 96**Elections, Primary — Candidates — Counties — Offices and Officers—
Constitution.**

Held: (a) Where a County will be classified as a fourth-class County before the general election and a County Auditor will be chosen at the general election, petitions for nomination for the office of County Auditor may be accepted for the coming primary.

(b) The term of office for County Auditor is two years in accordance with the provision of Art. XVI, Section 6, Constitution of the State of Montana.

March 6th, 1950.

Mr. Robert F. Swanberg
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion on the following:

The assessed valuation of Missoula County now exceeds \$15,000,000.00 and next September will be classified as a fourth-class

County by our Board of County Commissioners. Following such classification, the office of County Auditor will come into existence on the first Monday in January, 1951.

1. May Petitions for Nominations for the office of County Auditor be accepted for the coming primary election, when the action of the Board of County Commissioners classifying Missoula County as a fourth-class County will not come until September?

2. If the answer to the preceding question is no, shall the office be filled in the manner specified in Opinion Numbers 327 and 331, Volume 17, Attorney General's Opinions?

3. Is the term of office of County Auditor, four years, as provided by Section 4825, R. C. M., 1935, or is said term limited to two years as provided by Article XVI, Section 6 of the Montana Constitution?

Section 16-3201 Revised Codes of Montana, 1947, (Section 4824, R. C. M., 1935) states:

"The office of county auditor is hereby created and the same shall exist in all counties of the State of Montana of the first, second, third and fourth classes. Provided, however, that in counties of the fifth class where a County Auditor has been elected he shall hold office until the expiration of his present term, but not longer."

Section 16-3203, Revised Codes of Montana, 1947, (Section 4825, R. C. M., 1935) states:

"There shall be elected in and for each county of the class named in the preceding section, at the general election to be held in November, 1892, and quadrennially thereafter, some male person to serve as county auditor of the county for which he shall be elected for the term of four years, and until his successor shall be elected and qualified, the term to begin on the first Monday in January succeeding his election. No person shall be eligible to the office of county auditor of any county within the State who shall not have arrived at the age of twenty-one years, and who shall not have been, for at least two years next preceding his election, a bona fide resident of the county for which he shall be elected or appointed."

The "preceding section" must be taken to be a reference to Section 16-3201 since Section 16-3201 was enacted as Section 1 of the Laws of 1891 and Section 16-3203 was enacted as Section 2 of the Laws of 1891.

Thus, it can be asserted that the office of county auditor is an office intended to be filled by election. Opinions numbered 327 and 331 of Volume 17 of the Attorney General's opinions deal with the question of the filing of office of county auditor by election or appointment in Lewis and Clark County upon the county's reaching the requi-

site valuation to make it a county of the fourth class. The Attorney General held that the office of county auditor should be filled at the general election following the creation of the office. This conclusion was based upon the constitutional provision that the people are entitled to elect their own officers. Moreover, Section 16-3203, cited *supra*, makes it mandatory that there be elected in each county of the classes named in Section 16-3201, some male person to serve as county auditor of the county.

Since it is clear, therefore, that the office of county auditor for Missoula County will be filled at the general election to be held in November, 1950, the sole remaining question is whether or not candidates for that office can be nominated by the primary nominating election method, or whether some other method of nomination must be utilized. Opinion number 119 of Volume 22 of the Opinions of the Attorney General, ruled that in a case where it is not yet known what the form of government of the county would be, no one could file for offices not yet in existence at the time of the primary election. The opinion was written in regard to the situation in Petroleum County where the county was to vote in the primary election on the question of whether or not they would remain under a managerial form of government or return to the form of elected officials. The Attorney General in that opinion pointed out that there was certainty at the time of the primary election that any of the offices of which candidates would be nominated would come into existence since upon the decision of the voters at that same primary would rest the question of whether or not the various offices would be filled by elected officials or remain appointive under the managerial system.

From the facts presented in your request I take it that there is no question whatsoever but that the County of Missoula will be a fourth-class county at the time of the general elections. *State ex rel. Jau-motte v. Zimmerman* (1937) 105 Mont. 464, 73 Pac. (2d) 548, dealt with the problem of the county board's duty in regard to reclassification, the court held that the statute requiring the various boards of county commissioners to make an order designating the class to which the counties belong was directory rather than mandatory, and further held that the reclassification statute operates automatically. The court stated at page 474:

"Here the classification depends upon the assessed valuation of property rather than upon the difference in the population. The principle, however, is the same, the assessed valuation of the property in the county as shown by the records in an even-numbered year being analogous to the legal ascertainment of the population at a designated time."

This statement is made with reference to the Court's quotation from 15 C. J., Section 163, pages 498, 499:

"Except where it is specifically provided that counties are not by operation of law reclassified under a new census, but remain

in the old classification until reclassified by the legislature, statutes classifying counties according to population for the purpose of fixing salaries of county officers operated automatically to place a county in a certain class on the last census showing it to have the required population; but such statutes do not so operate merely on the county attaining such population, but only on the legal ascertainment of the fact by the census bureau, and they will not be allowed to operate so as to change an officer's compensation during his term in violation of constitutional provisions."

The court concluded that the order of the board merely gave formal expression to a status.

Section 23-902, Revised Codes of Montana, 1947, (Section 632, R. C. M., 1935), states:

"On the third Tuesday of July preceding any general election (not including special elections to fill vacancies, municipal elections in towns and cities, irrigation district and school elections) at which public officers in this state and in any district or county are to be elected, a primary nominating election shall be held in accordance with this law in the several election precincts comprised within the territory for which such officers are to be elected at the ensuing election, which shall be known as the primary nominating election, for the purpose of choosing candidates by the political parties, subject to the provisions of this law, for senator in Congress and all other elective state, district and county officers, and delegates to any constitutional convention or conventions that may hereafter be called, who are to be chosen, at the ensuing election wholly by electors within this state, or any subdivision of this state, and also for choosing and electing county central committeemen by the several parties subject to the provisions of this law."

Thus it is shown that the purpose of the primary nominating election is to choose candidates for county officers who are to be chosen at the general election.

Section 23-910, Revised Codes of Montana, 1947 (Section 640, R. C. M., 1935), states:

"(1) Any person who shall desire to become a candidate for nomination to any office under this law shall send by registered mail, or otherwise, to the secretary of state, county clerk, or city clerk, a petition for nomination, signed by himself, accompanied by the filing fee hereinafter provided for, and such petition shall be filed and shall be conclusive evidence for the purpose of this law that such elector is a candidate for nomination by his party. . . ."

Referring to Section 23-902, *supra*, it is evident that the offices under this law referred to in Section 23-910, include county officers who are to be chosen at the ensuing general election.

Inasmuch as a county auditor will be chosen at the general election in 1950, it seems apparent that petitions for nominations for the office may be accepted for the coming primary election.

It is therefore my opinion that where a county will be classified as a fourth-class county before the general elections and a county auditor will be chosen at the general election, petitions for nomination for the office of county auditor may be accepted for the coming primary election.

The answer to your first question eliminates any necessity for an answer to your question number 2.

With reference to your question number 3 regarding the term of office of county auditor, it needs no citation of authority to state that where a conflict arises between a statute and the Constitution, the latter being the supreme law of the State must necessarily govern.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.