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Opinion No. 13

COUNTIES — Officers, salaries of; OFFICES AND OFFICERS — County, salaries; POPULATION — County; Section 25-605, Revised Codes of Montana.

HELD: The provisional estimate of county population issued by the Bureau of Census as Series P-26 should be the basis for determining the population of the counties of this state for purposes of Section 25-605, Revised Codes of Montana.

Mr. Christopher Buslee
Staff Attorney
Department of Community Affairs
Capitol Station
Helena, Montana 59601

Dear Mr. Buslee:

You have requested my opinion concerning the following question:

What figures should be used by counties or state agencies, when they are required by the legislature to base a computation of salary upon "population"?

You pose the problem as follows:

Section 25-605, R.C.M. 1947, provides that the salaries of certain county employees "shall be based on the **population** and taxable valuation of the county" (Emphasis added), according to a legislative determined schedule. A companion section 25-609, R.C.M. 1947, since repealed, provided that:

... the county commissioners shall, by resolution, fix salaries of the officials in conformity with the schedule in section 25-605, based on the population as shown in the last decennial federal census and on the taxable valuation of the county at the time the salaries are fixed.

The replacement section, 25-609.1, R.C.M. 1947, makes no provision regarding the method of determining population for the purpose of computing county employee salaries. As a result, there is a question among the counties as to how they are to determine their county's population.

It is mandatory that the apparent intent of the legislature must be followed so far as possible within the law. With that fact in mind, I approach the answer to your question by way of eliminating possible alternatives.

1. **Leave to the discretion of county officials what particular method will be followed in determining the census figure.** This alternative must be rejected since county officers are given no power to determine population for the purpose now under consideration. The powers of the county are limited by Article XI, Section 4, The Constitution of Montana 1972, which provides:

(1)(b) A county has legislative, administrative, and other powers provided or implied by law.

The power to determine population has not been provided the counties by the legislature. Similarly the power cannot be implied since in another instance dealing with municipal corporations the legislature saw fit to expressly grant the

power to these municipal corporations to determine population for purposes of determining classification. (Section 11-202, R.C.M. 1947). This fact, together with the fact that the legislature has seen fit to provide a state-wide standard for determining the compensation of county officials, evidences no intent on the part of the state to place the determination of population, in applying 25-605, *supra*, on a county-by-county basis.

2. **The state should conduct its own annual census to determine the population of each county.** According to the Department of Community Affairs, the cost of a special census is estimated by the United States Bureau of Census to range from \$7.50 per capita in the case of small populations to \$.40 for population of 40,000 or above. For that reason alone it is doubtful that this alternative was the legislature's intent.

3. **Designate a state agency to make current estimates based on some prescribed procedure.** While there are certain advantages to this approach which recommend it to our purpose, it suffers from a fatal defect. That is, there is no indication, either in the present legislation or in the statute now repealed, that the legislature ever intended to delegate this authority to any state agency. While this approach may be a viable alternative it is within the exclusive power of the legislature to establish.

4. **Designate the last federal decennial census as the official county.** This alternative was specifically provided for in 25-609, *supra*, now repealed. In construing the new statute (25-609.1) we start with the presumption that "the legislature intended to do what they have done", — that is — to repeal the provision providing that the decennial census should be used in determining the population of each county for the purpose of applying 25-605, *supra*. The Supreme Court, in **Brown v. Board of County Commissioners, Mont.**, 529 P.2d 358 31 St. Rept. 965, although addressing the issue of taxable valuation rather than population, interpreted the current legislative and constitutional changes as signifying an intent to make the salaries reflect the current status of the particular county.

The legislature has chosen a salary formula based on population and taxable valuation of the county. These yardsticks are fair measures of the amount of work required of these officers. But to use the taxable valuation of the previous year as appellant argues, whether it be larger or smaller, would defeat the whole purpose of the constitutional and legislative changes; it would be impossible for salaries to achieve a current and responsive level. **Brown**, 529 P.2d 358, 360.

It is apparent that a census taken as much as ten years prior to the current year will not reflect adequately the population changes within a county and thus not fulfill the intent of the legislation as expressed in **Brown, supra**.

This brings us to the alternative which I feel most closely achieves the intent of the legislature, as stated in **Brown vs. Board of County Commissioners, supra**, without containing any of the fatal defects referred to previously. In Montana, as in other states, the Bureau of Census issues an annual estimate of population by counties, which is provisional for the preceding July,

and adjusted for the same month a year earlier. These estimates, issued as Series P-26 and called Current Population Reports, are made with the assistance of a locally designated cooperative agency; in our case the Bureau of Business and Economic Research at the University of Montana. That agency furnishes certain county data which is used by the Bureau of Census to estimate the natural increase/decrease and migration components of the population. County estimates are given by rounding the figures to the nearest hundred. I find the provisional figure to be the most adequate means of determining the current population for the following reasons:

- (1) Although this figure is one year old, it is the most current figure now available and thus most closely reflects current population.
- (2) Although it represents an estimate only, this does not preclude its use since any current figure, apart from an actual census which is not practical due to its prohibitive cost, must by necessity be an estimate.
- (3) This particular figure is issued by the Bureau of Census which has traditionally been the source of county population figures in this state. Although the legislature has repealed the use of the decennial census, this is not to say that the legislature intended to preclude utilizing more current Bureau of Census figures. These estimates have been in existence for some years and the experience gained carries with it a certain guarantee of accuracy as well as permanence.

THEREFORE, IT IS MY OPINION:

The provisional estimate of county population issued by the Bureau of Census as Series P-26 should be the basis for determining the population of the counties of this state for purposes of Section 25-605, R.C.M. 1947.

Very truly yours,
ROBERT L. WOODAHL
Attorney General