

Opinion No. 18-2079

January 22, 1918

BY: MILTON J. HELMICK, Assistant Attorney General

TO: Honorable W. E. Lindsey, Governor of New Mexico,.

Office of County Commissioner May Be Made Vacant by Change of Boundaries of Counties.

OPINION

We have your favor of the 21st instant, to which is attached an affidavit reciting in substance that W. A. Berryhill, who was elected a County Commissioner of Chaves County, resided in that portion of Chaves County which was cut off and made a portion of the new County of Lea, and that the said Berryhill has continued to reside in the new County of Lea. On the theory that the statements contained in the affidavit are true, you ask whether or not a vacancy exists in the office of County Commissioner in Chaves County, presumptively filled at this time by Mr. Berryhill. In other words, you wish to know whether Mr. Berryhill's office of County Commissioner was forfeited when his place of residence was included within the new County of Lea.

Under the Constitution of this State, it is required that all county officers shall be residents of the political sub-division for which they are elected or appointed, and, hence, residence is a primary qualification for holding the office of County Commissioner. I do not believe there is much doubt regarding the question you ask. On the formation of a new county, the County Commissioners of any other counties from which the new county is formed, who reside within the limits of such new county, cease to be County Commissioners of the old county, unless they remove within the latter. Such is the general rule, as stated in 11 Cyc. at page 353. In the case of *State v. Choate*, 11 Ohio 511, it was held that the legislature may change the boundaries of a county, and when such change places an Associate Judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the county for which he was appointed, he forfeits his office. The case of *State v. Walker*, 17 Ohio 135, is directly in point on the question you ask. In that case it was held that, on the formation of a new county, the County Commissioners of any of the counties from which the new county is formed, who reside within its limits, cease to be Commissioners of the old county, unless they remove within it. The Supreme Court of New Mexico, in the case of *Territory v. Albright*, 12 N.M. 293, considered a similar question with reference to a County Assessor of Bernalillo County, who resided within the limits of the newly created County of Sandoval. The court held that he was not disqualified as Assessor of Bernalillo County, but the holding of the court was based entirely on the proposition that under the laws of the Territory of New Mexico, at that time, no residence qualification was required of a County Assessor. Such, of course, is not the case under the present Constitution of New Mexico, as we have pointed out above.

It is our conclusion, in answer to your question, that Mr. Berryhill, not having removed into the County of Chaves, is not qualified to act as County Commissioner of said county.