

No. 416

**ELECTION—VACANCY—SUPERVISOR—
SOIL CONSERVATION DISTRICT**

Held: Supervisor of Soil Conservation District holds office until successor is elected and qualifies and that if the unopposed incumbent of the office is not re-elected because no ballots are cast at the elections, there is no vacancy in the office, and a special election cannot be held.

May 16, 1942.

Mr. Truman C. Anderson
State Coordinator and Secretary
State Soil Conservation Committee
Bozeman, Montana

Dear Mr. Anderson:

You have submitted for my opinion the following question:

Is a special election proper or necessary for the purpose of electing a supervisor of a Soil Conservation District because of the fact the incumbent of the office had been a candidate to succeed himself, and at the election no votes were cast, there being no opposition?

The first problem to be considered is whether the incumbent was elected to the office of supervisor at the election without a single ballot being cast.

Section 1 of Article IX of our Constitution and Section 539, Revised Codes of Montana, 1935, provide:

"All elections by the people shall be by ballot."

Section 7 of Chapter 72 of the Laws of 1939 provides in part:

"The selection of successor to fill an unexpired term, or for a full term shall be by election."

Section 795, Revised Codes of Montana, 1935, provides:

"The person receiving at any election the highest number of votes for any office to be filled at such election is elected thereto."

The failure of the incumbent to receive a single vote by ballot precludes his election, notwithstanding the fact he was the only candidate, as he did not receive the "highest number of votes," as required by Section 795, Revised Codes of Montana, 1935.

The next problem presented is whether or not a vacancy exists.

Section 7, Chapter 72, Laws of 1939, provides:

"A supervisor shall hold office until his successor has been elected and has qualified."

The Montana Supreme Court—in *State ex rel. Jones v. Foster*, 39 Mont. 583, 104 Pac. 860—said:

"When there is a clause in the Constitution providing that an officer shall hold for a definite term and until his successor is elected and qualified, the conclusion seems inevitable that, if for any reason the people fail to elect his successor, there is no vacancy, and he is entitled to hold over."

In view of the rules and reasoning of the case of *Jones v. Foster*, a supervisor—holding office under the provisions of the State Soil Conservation District Law, Chapter 72, Laws of 1939—holds office until his successor is elected; and there is no vacancy in the office although the term of office has expired.

A special election cannot be held as Section 532, Revised Codes of Montana, 1935, provides: "Special elections are such as are held to supply vacancies in any office . . ." There is no vacancy in the office of supervisor as previously indicated.

It is my opinion, from a study of the constitution, applicable statutes and the court decisions, that a special election cannot be held to elect a supervisor under Chapter 72, Laws of 1939, when there is an incumbent of the office and no successor was elected because no ballot was cast; and it is also my opinion the incumbent holds the office until his successor is duly elected as provided by law.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General