

Opinion No. 18.

**Officers—Appointment of — Governor
Powers of.**

HELD: The members of the State Highway Commission are appointed by the Governor, without the consent of the Senate.

January 15, 1937.

Hon. W. D. Lasby
House of Representatives
The Capitol

Dear Mr. Lasby:

You have submitted the following questions:

"1. What is the term of office of appointees to the Highway Commission made by former Governor Holt, to end of legislative assembly or until successors qualify?"

"2. Must Senate confirm such appointments?"

"3. May present Governor make new appointments and submit same to Senate for confirmation?"

We shall answer them in order.

1. On December 23, 1936, Governor Holt made the following appointments: D. L. O'Hern for the term ending April 1, 1939; Fred A. Fligman for the term ending April 1, 1937 and Thomas O. Collins for the term ending April 1, 1939.

2. Relative to your second question, Section 7, Article VII of the Montana Constitution provides as follows:

"The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If during a recess of the senate a vacancy occur in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office." (Blackface ours.)

Section 1783, R. C. M. 1935, provides:

"There is hereby created a commission to be known as the state highway commission to consist of three members to be appointed by the governor and each of said members shall be a citizen of the United States and of the state of Montana."

It is my opinion that since the appointment of the State Highway Commission is provided for in said Section 1783, the appointment of said members of the Highway Commission is made

by the Governor without consent of the Senate. Said section provides that the Governor shall "appoint". In interpreting Section 7, Article VII of the Constitution, the Supreme Court of Montana, speaking by Mr. Justice Holloway, said in the case of *In re Terrett*, 34 Mont. 325, 333, 86 Pac. 266:

" * * * the power to appoint or delegate the appointing power is reserved to the people, acting through the legislature, in every instance, except in those enumerated in the Constitution."

That reserved power, so far as concerns the State Highway Commission, was delegated by the legislature to the Governor by said Section 1783. To say that the Governor may only "nominate, and by and with the consent of the senate, appoint" the members of the State Highway Commission, would be disregarding the plain mandate of the legislature, which said in said section that the "governor shall appoint" the said members of the State Highway Commission. Our position is supported by the authorities which have had occasion to construe similar constitutional provisions. An identical constitutional provision in Idaho was considered in *Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785, where the court said, p. 786 (Pacific Reporter):

"Again, the Constitution (section 6, art. 4), provides that the Governor 'shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for.' The Constitution itself provides the method of selection of the legislature, executive, and judicial officers named in the Constitution. The framers of the Constitution, however, could not foresee what offices might 'be created by law' subsequently enacted, and so they provided that such offices should be filled by the Governor, unless the appointment or election should be 'otherwise provided for.' The Legislature in this case has 'otherwise provided.' They have clearly exercised their constitutional right in naming and designating the person or officer who shall make these particular appointments. This question has received frequent consideration by the

courts, and they have almost invariably reached the conclusions we have indicated. *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, and note at page 125; *State ex rel. Sherman v. George*, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, and note, 29 Am. St. Rep. 586; *Ross vs. Board*, 69 N. J. Law, 291; 55 Atl. 310; *In re Terrett*, 34 Mont. 325, 86 Pac. 266; *In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88."

See also 46 C. J. p. 950, Section 63, Note 30, and cases cited.

If we are correct in our interpretation of the Constitution and the statute, then the fact that a vacancy occurred during the recess of the Senate is of no consequence for by the express words of the Constitution the interim appointments by the Governor do not apply to "such office", that is, State Highway Commission.

3. From what we have said in answer to your second question, your third question, of course, should be answered in the negative.