Therefore, it is my opinion that all receipts from trout licensing fees are to be used in accordance with the provisions of Section 1 (f) for the propagation of trout in Indiana. It is my further opinion that no transfer of funds as provided for in the last paragraph of the statute can be made from moneys received for trout licensing fees.

OFFICIAL OPINION NO. 12
February 13, 1958

Mr. Edwin Steers, Sr.
Member, State Election Board
108 East Washington Building, No. 1108
Indianapolis 4, Indiana

Dear Mr. Steers:

This is in reply to your request for an Official Opinion concerning the filling of a vacancy in the office of a county commissioner. The correspondence which is attached to your letter reveals the following factual situation:

While serving a three-year term as county commissioner from Center District [Porter County] running from 1 January 1955 to 31 December 1957, to which he had previously been elected, Otto W. Gibbs in the 1956 election ran for and was elected to the same office for the three-year term running from 1 January 1958 to 31 December 1960.

On 1 January 1957 Mr. Gibbs, at the swearing in ceremonies at the court house for all of the persons elected to office in the 1956 election, presented himself and with the others verbally took his oath of office and subscribed and swore to this oath on the back of his certificate of election as county commissioner for the term running from 1 January 1958 to 31 December 1960.

On 1 April 1957 Mr. Gibbs died in office.

On 16 April 1957, the two remaining county commissioners elected or appointed Frank A. Ferguson to
fill and serve out the unexpired term of Mr. Gibbs ending 31 December 1957 and to fill and serve out the unexpired term to which Mr. Gibbs had been elected running from 1 January 1958 to 31 December 1960, and Mr. Ferguson qualified by taking his oath.

On 20 January 1958 the same two other Commissioners again took action, appointing Mr. Ferguson.

Continuously ever since 16 April 1957, Mr. Ferguson has been acting and performing his duties as a county commissioner under the belief that his term runs to 31 December 1960.

Based on the above facts you ask whether Mr. Ferguson's appointment is for the full term from 1 January 1958 to 31 December 1960, or whether it is necessary for a commissioner to be elected to this office in the general election of 1958, which election would be to fill the unexpired term of the office until 31 December 1960.

The statute which provides for the filling of a vacancy in the office of County Commissioner is Acts of 1945, Ch. 261, Sec. 1, as found in Burns' (1948 Repl.), Section 26-601, which act reads in part as follows:

"* * * Whenever a vacancy shall occur in the office of commissioner; or whenever a commissioner who has qualified shall die or resign before the commencement of the term for which he was elected and no general election will occur between the time of such death or resignation and the beginning of such term, the commissioners in office at any time after the occurrence of such death or resignation so producing such vacancy or prospective vacancy, wherein such vacancy or prospective vacancy in the office of commissioner shall occur for any reason, shall elect some qualified elector to fill such vacancy or prospective vacancy, from and after the time of commencement of such term, who shall serve for the remainder of the term, or for the entire term as the case may be, for which the person so dying or resigning was originally elected or appointed; provided, however, in case of a tie, the auditor of the county shall cast the deciding vote. The commissioners
now in office shall serve out their terms of office respectively and until their successors are elected and qualified."

It is clear from the terms of the above act that if the person who is elected to the office of commissioner has qualified and died before commencement of the term for which he was elected and no general election has occurred between the time of his death and the beginning of the term, the commissioners in office shall elect some qualified elector who shall serve for the entire term for which the person so dying was originally elected.

Under your facts, the incumbent Mr. Gibbs ran for re-election to the office of commissioner in 1956 and was elected for the three-year term running from 1 January 1958 to 31 December 1960. On 1 January 1957 Mr. Gibbs took his oath of office for said term, which oath was subscribed on the back of his election certificate, all of which was prescribed by law, as found in 1 R. S. 1852, Ch. 20, Sec. 4, same being Burns' (1948 Repl.), Section 26-605, and which reads as follows:

"Each person elected as such commissioner shall, on receiving a certificate of his election, take the usual oath of office; which oath, being certified on the back of such certificate, under the hand and seal of the person administering the same, shall be sufficient authority for such commissioner to act as such."

Also, in State ex rel. Elliott v. Bemenderfer (1884), 96 Ind. 374, the court held that compliance with the above statute duly qualified the person elected to the office of County Commissioner. Therefore, I conclude that Mr. Gibbs was elected and duly qualified as his own successor at the time of his death.

As Mr. Gibbs died during his first term of office, there was a vacancy created which necessitated the election by the commissioners of a qualified person to fill the remainder of the term as authorized by Burns' 26-601, supra. This was done by the commissioners in electing Mr. Ferguson to fill out the remainder of the unexpired term of Mr. Gibbs ending 31 December 1957.

However, it is necessary to determine whether or not a vacancy was created in the office for the term from 1 January 50
1958 to 31 December 1960 because, without such a vacancy, the remaining commissioners are not empowered under Burns' 26-601, supra, to elect a qualified person to the office, for the full term.


When a person has been duly admitted to an office, the right to exercise the powers of said office continues during the prescribed term and until his successor is elected and qualified. In other words, the right of an officer to continue in office after his prescribed term is a contingent and defeasible right, which right is defeated by the election and qualification of his successor, and if the successor who has been duly elected and qualified dies before the commencement of his term, a vacancy is thereby created for that term.

In support of the preceding, our Supreme Court, in State ex rel. Elliott v. Bemenderfer, supra, examined a factual situation very similar to the one you present in your question. In this case, one McVitty was duly elected to the office of commissioner and after his election, and within the ten days after receiving his certificate of election, he took the oath of office, which oath was endorsed on the back of his election certificate. However, McVitty died prior to the commencement of his term of office and the board of commissioners declared that a vacancy existed by reason of his death and elected one Bemenderfer to fill the vacancy. The relator contended that since McVitty died before his term of office commenced he had never qualified and the relator could therefore hold over as no successor to the office had been elected and qualified. The court, in holding that a vacancy had occurred in the office, which vacancy was legally filled by the board of commissioners, said, at page 375:

"* * * A vacancy resulted for the reason that a successor to the relator had been duly elected and qualified, and this having taken place his right to hold over terminated. It can not be legally possible that when the right to an office has once been destroyed or terminated, the subsequent death of the person who had been elected and who had duly qualified, revives the right which the election and qualification had put
an end to, for the right to hold over exists only in cases where there is no legally elected and qualified successor. When the rights of the successor vest, those of the incumbent terminate, and they do vest after election and qualification according to law. * * *"

It was similarly held in Gosman v. State ex rel. Schumacher (1885), 106 Ind. 203, that a vacancy existed where a clerk of the circuit court had been elected and qualified but died before the commencement of his term of office, the court saying at page 206:

"The right to hold over is not defeated or terminated by the election of a successor. The successor must have been elected and qualified. Appointment is not the equivalent of election in the constitutional sense. Speed v. Crawford, 3 Met. (Ky.) 207. Election and qualification are essential to vest the right to the succeeding term in the officer elect. Until these occur it remains contingently in the incumbent, and while an existing title remains in him no vacancy exists. Accordingly, in Commonwealth v. Hanley, 9 Pa. St. 513, where a successor to the clerk of the Orphans' Court, after having been elected, died before the commencement of his term, without having qualified, it was held no appointment could lawfully be made. Where, however, a successor has been elected and qualified, the right of such successor to the ensuing term vests immediately, and the contingent right of the incumbent is thereby defeated. In such a case the death of the officer elect before the commencement of the term for which he was elected, does not revive the right of the incumbent to hold over. A vacancy results. The title to the office for the succeeding term having vested in another, the owner of the term having died, and the contingent right of the incumbent having effectually ended, the office can only be filled by a resort to the means provided for supplying the vacancy. State ex rel. v. Bemenderfer, 96 Ind. 374; State v. Seay, 64 Mo. 89 (27 Am. R. 206)."

As stated earlier in this Opinion, Mr. Gibbs had been duly elected and qualified pursuant to law as his own successor and by reason thereof, and based on the above authorities, his
contingent right to hold over after 31 December 1957 had been defeated. Thus, at the time of his death there was created a prospective vacancy in the term to which he had been elected beginning on 1 January 1958 to 31 December 1960. The creation of this vacancy empowered the then commissioners to elect a qualified person to fill the office for the entire term, pursuant to Burns' 26-601, supra.

It is true that had Mr. Gibbs failed to qualify as his own successor, the person appointed to fill out the remainder of his first term would have held over until the general election in November of this year, inasmuch as the commissioners could not have made an appointment for the full term in the absence of a vacancy in the office. However, as has been pointed out, a vacancy did occur which prevented the appointee from holding over until his successor was elected and qualified.

Therefore, in answer to your question it is my opinion that, pursuant to Burns' 26-601, supra, the second appointment of Mr. Ferguson to the office of County Commissioner was for the full term from 1 January 1958 to 31 December 1960.

OFFICIAL OPINION NO. 13
February 14, 1958

Hon. John W. VanNess, Chairman
Public Service Commission
401 State House
Indianapolis, Indiana

Dear Mr. VanNess:

I am in receipt of your letter of January 14, 1958, in which you request an Official Opinion upon the question of application of certain portions of Burns' (1951 Repl.), Section 55-101, and which request further reads as follows:

"This Section states that 'The power and the authority is hereby vested in the railroad commission (public service commission) and it is hereby made its duty to supervise all railroad—train service and accommodation.'