> Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character."

See also cases annotated in 89 A. L. R. at page 138.

Specifically answering your questions:

(1) Although the authorities are not in accord, it seems to me the better view is that there is a vacancy in the case of all members of the board at present. See authorities cited in State v. Williams, *supra*. I am of the opinion that you are authorized by law to make immediate appointments to fill unexpired terms in the membership of said board; two terms to expire January 6, 1946, and two terms to expire January 6, 1948. I do not believe that the appointments to first expire are invalid because of the unlikelihood of approval by the Senate of such appointments, for otherwise upon the death or resignation of a member prior to the approval of his appointment by the Senate, such appointment might be invalid from inception.

(2) I am of the opinion that the Governor should report his appointment to the senate in the next special or regular session for approval. In the meantime as above stated, the appointments are valid.

OFFICIAL OPINION NO. 110

October 2, 1945.

Hon. Milton Matter, Director
Indiana Department of Conservation,
Indianapolis, Indiana.

Dear Sir:

I have your letter submitting nine instruments and inquiring as to the legality and effect thereof. These each purport to be an agreement relating to the operation of public service privileges and facilities at some state park. The contracts submitted may be divided into two general classes or types

according to wording and subject matter. In one group may be included the following:

1. Clifty Falls State Park, dated 1-1-44.
2. Turkey Run State Park, dated 1-1-44.
3. Indiana Dunes State Park, dated 5-1-44. (Duneside Inn and Cabins.)
4. Brown County State Park, dated 11-14-44.
5. Indiana Dunes State Park, dated 11-14-44. (Dunes Arcade and the Pavilion.)

Each of these contracts provide they shall be for a term of two years and purport to grant a "license and concession" for the operation of such public facilities and services as lodging, eating and/or other activities in the park. The so-called licensee is given full maintenance for himself and family, and an annual salary. The salary is payable out of gross earnings of the business conducted, if sufficient, but is guaranteed in any event. Provision is then made so that if the receipts are sufficient and there are profits, that the "licensee" will receive sums in addition to the stated salary. It is required that the "licensee" shall furnish bond at the cost of the enterprise to insure the faithful performance of the contract. Provisions are included for accounting between the parties, keeping of books and verification of accounts.

The commission is required to furnish all permanent equipment, while expendable supplies and current equipment is to be furnished from the revenues of the enterprise. Electricity and water are to be paid as an operating expense of the enterprise, and the enterprise is required to pay 10% of the cost of the equipment furnished by the state into an equipment depreciation and replacement fund.

The contracts provide that the licensee is required to conduct the "* * * enterprise in an efficient and business-like manner and the commission reserves the right at all times to direct the licensee in the methods of operation of said business within the limits of good hotel and restaurant practice.", and also the commission retains the right to approve prices to be charged.

Each of these contracts contains substantially the following clause:

"This license and concession is not intended and shall not be construed to vest in the licensee any title of the State or property rights on said premises or any part thereof, and the Commission does not, by this instrument, relinquish or convey in any degree its duty and right to operate and manage this park for the use of the public, and to make rules and regulations therefor, including the charge of admission for entrance into the park, the regulation of public conduct, and all other matters pertaining to said park authorized by law. The said rules and regulations insofar as they shall pertain to the concessions licensed herein shall be reasonable in consideration of the purposes and uses for which the State is maintaining said park."

The remaining contracts submitted may be put in one group. They are as follows:

6. McCormick's Creek State Park, dated 1-5-38.
7. Spring Mill State Park, dated 6-1-39.
8. Pokagon State Park, dated 12-30-39.
9. Shakamak State Park, dated 1-1-41.

Each of these contracts is for a term of five years, and each, except that at Shakamak State Park, grants to the so-called licensee an option to renew for an additional five years. The contract at Shakamak State Park grants to the so-called licensee the first opportunity to re-license. In each the "licensee" agrees to pay 10% of the gross income derived from the operation of these enterprises to the state in quarterly installments, and the contract makes provisions for audit and for the keeping and verification of records. In each the licensee agrees to furnish all necessary furniture, fixtures and equipment, supplies and other articles necessary in the proper function of the concession and the state agrees to keep the buildings and equipment owned and furnished by it in a good state of repair. All risks of loss or damage to his property are to be borne by the licensee, and all net profits of the enterprise are evidently to be retained by him.

The state retains control over the prices to be charged and reserves the right of the public to use the park. Paragraph 13, above quoted, in connection with the first group of contracts,

is substantially repeated in each of these contracts. Assignment without consent of the state is prohibited. There is an option to cancel or terminate upon violation of the terms, and there is a requirement that the licensee shall peacefully vacate the premises upon termination or cancellation of the agreement.

These four contracts numbered 6, 7, 8 and 9 were each exactly as follows:

> "IN WITNESS WHEREOF, the parties hereto have duly executed and sealed these presents the day and year first above written.
>
> STATE OF INDIANA
> DEPARTMENT OF CONSERVATION.
>
> (sgd.) V. M. SIMMMONS
>
> _____
>
> V. M. Simmons, Commissioner.
>
> _____
>
> Licensee.
>
> On the last line is the name of the other party.

The above agreements were executed at different times and each purports to be executed by the Department of Conservation. I, therefore, wish to refer to the pertinent statutes relating to that department during the period involved.

The Statutes

Chapter 60, page 375, of the Acts of 1919, created an administrative department to be known as "The Department of Conservation," composed of four members appointed by the Governor, not more than two of whom shall belong to the same political party (Section 2.). The Commission appointed a director who "shall have power with the approval of the commission, to appoint, and remove for cause, chiefs of divisions, and, upon the recommendation of said chiefs, to appoint and remove all assistants, inspectors and employees thereof" (Section 3). Chiefs of divisions, and all assistants, inspectors and *employees* were to "each receive a compensation to be de-

termined by the commission, upon recommendation of the director, subject to the approval of the Governor." (Section 5.)

Section 6 of the Act provided that the commission should organize by electing one of its members chairman, who shall hold office for one year, and "Three members shall constitute a quorum to do business." Section 12 of this Act, as amended in 1921, made six divisions in the Department of Conservation, one of which was called "Lands and Water." Section 18 of the Act, as amended in 1929, provided:

> "The department of conservation shall have the following powers, duties and authority:
>
> "1. To have the care, custody and control of the several preserves and parks owned by the state, other than the state forest reserves."

There are provisions relating to certain specifically named parks not involved in your request, but the above quoted part of Section 18 contains the entire authority vested by the Legislature in the Department of Conservation over state parks.

In 1933, the Legislature passed what was called the "State executive-administrative act." (Chapter 4, p. 7.) This act created eight divisions of the executive, including the administrative department of the state. Number seven was the "Department of Public Works." By Sec. 6 the Governor was authorized to appoint each officer, employee or servant of the executive, including the administrative department, and the tenure or service of each was to continue at the pleasure and discretion of the Governor, with certain exceptions not pertinent here. By Sec. 9 the Governor was specifically authorized in his discretion "to assign and/or reassign, transfer and/or retransfer, the, and/or any administrative power, duty or function, of whatsoever name, nature, kind or character now prevailing, or prevailing under any act passed at the seventy-eighth session of the General Assembly of the State of Indiana to such one, or more, of said eight departments defined in Section 2 hereof; and all such powers, duties and functions shall continue without lapse, diminution or abatement to and in such department." Section 16 provided that the Department of Public Works shall be in charge of the Board of Department of Public Works, which shall consist of the Governor, Lieutenant-Governor and three other persons, one of whom

shall be designated by the governor as the chief administrative officer thereof.

Section 26 of said Act provided:

> "That whenever any division of the executive including the administrative department of the State of Indiana, be the same a person, body or organization of whatsoever character, is referred to or designated in any law, contract or document, such reference or designation shall be deemed to refer to and include the department organized hereunder to which the powers, duties and functions thereof are assigned and transferred, or the appropriate authority therein, so far as such law, contract or document pertains to matters which are by reason of such assignment and transfer placed within the supervision and jurisdiction of the department to which such assignment and transfer is made."

Section 30 of said Act repealed all laws in conflict.

The above Act was repealed by the General Assembly of 1941, but as four of the instruments submitted by you were executed during the effective period of said Act, it is necessary to determine the authority and jurisdiction of the subject during such period. By an executive order of Paul V. McNutt, Governor, effective April 15, 1933, all the "powers, duties and functions" of the Department of Conservation were transferred to the Department of Public Works.

The "State executive-administrative act" and the executive order above referred to were repealed by Chapter 4, page 8, of the Acts of 1941. The repeal was made effective May 1, 1941. (See, also, pages 31 and 124 of the 1941 Acts.) Thus, from April 15, 1933, until May 1, 1943, whatever powers and functions the prior statutes had vested in the Conservation Department were in the Department of Public Works, but they were not enlarged by the transfer. After May 1, 1941, the powers, duties and functions of the Department of Conservation became as under prior valid legislative enactments.

Tucker v. State (1941), 218 Ind. 614.

In 1945 the Legislature gave the Indiana Department of Conservation authority "to construct, rent, lease, license or

operate public service privileges and facilities in any state park or parks" (Section 12 of Chapter 353). See Opinions Attorney General No. 64, 1945. Prior to 1945 the Legislature had not conferred such authority by statute upon any public officer, board or commission.

In fact, at the 1943 session of the General Assembly there was introduced a bill (H. B. No. 447) conferring power upon the Department of Conservation to "rent, lease or operate public service privileges and facilities in any state park or parks." This bill failed to pass. While in no way determinative, this indicates that the Legislature considered that the Conservation Department did not have power to rent or lease public service privileges and facilities in the state parks and was unwilling at that time to confer such power on the Commission by legislative enactment.

As above shown, the only provision in the statutes at the times the agreements in question were executed conferring jurisdiction over state parks upon the Department of Conservation, or the Board of Works as the transferee of its powers, which I have found is that set forth above, giving it the "care, custody and control" of the parks owned by the state. Prior to 1945 there was no statute giving it the authority to rent, lease or license any privileges, concessions or facilities in any state park. Furthermore, from 1933 to May 1, 1941, the powers, duties and functions of the Department of Conservation in the "care, custody and control" of the state parks was in the Board of the Department of Public Works. It is, therefore, necessary to consider the authority of the Board of the Department of Public Works during its existence from April 15, 1933, to May 1, 1941, and of the Department of Conservation from then until March 2, 1945, to make such contracts.

Authority of Public Boards and Officers to Contract

In 1884 the Supreme Court of Indiana had before it the question of the power of the State Auditor to contract in reference to the lands of the State in the case of McCaslin *et al.* v. The State *ex rel.* Auditor of State, 99 Ind. 428, and at pages 439 and 440 said:

> "It is manifest, we think, that the question of the sufficiency of this paragraph of answer is wholly de-

pendent upon the response which must be given to this further question, namely, was the alleged agreement of the auditors of state with the appellant Margaret McCaslin a valid and binding agreement as against the State? Were the auditors of state authorized and empowered to bind the State by any agreement in relation to the land in controversy? It needs no argument to show that these questions must be answered in the negative. The General Assembly of the State, as we have seen, had authorized the sale, not the exchange, of the land, and had authorized the Governor and the commissioners of the house of refuge, not the auditor of state, to sell the same for cash or on credit. The auditor of state had nothing whatever to do with the sale of the land, and any agreement he may have made in relation thereto with the appellants, or either of them, was and is absolutely void, and of no binding force against the State of Indiana. This proposition is so plain and so manifestly right that it hardly needs the citation of any authority in its support. *A State officer can only deal or contract in relation to the property of the State, when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized, is void as against the State.* * * *." (Our emphasis.)

The case of Julian v. State (1889), 122 Ind. 68, was an action in *quantum meruit* for the value of appellants' services as attorneys in the prosecution of certain actions on behalf of the State, alleging an employment by the Attorney General with the approval of the Governor, Secretary, Auditor and Treasurer of State, and the performance of the employment. The question turned on the authority of the Attorney General to make contracts of employment. The court said in this regard at page 72:

"It is a well-settled doctrine that officers of the State exercise but delegated power, and this is particularly true of the attorney general. His office is created by statute, and he, as such officer, can only exercise such power as is delegated to him by statute. A contract

made with the attorney general is void unless he is expressly or impliedly authorized by statute to make such contract. State v. Portsmouth Savings Bank, 106 Ind. 435; Platter v. Board, etc., 103 Ind. 360, and authorities there cited."

The Court also said at page 73:

"It is also well settled that all who deal with officers exercising statutory powers, and whose authority is limited by statute, are charged with notice of the scope of such officers' authority. Honey Creek School Tp. v. Barnes, 119 Ind. 213; Pierce v. United States, and Dover, etc., Savings Bank v. United States, 19 U. S. (L. C. P. Co. ed.), p. 169, at bottom (The Floyd Acceptances, 7 Wall. 166.)"

and it was held that no express statutory authority was given to the Attorney General to make such a contract and it was invalid.

In the case of State v. Portsmouth Savings Bank (1886), 106 Ind. 435, the question of the authority of state officers to dispose of the state land was before the court, and it is said at p. 450 of the opinion:

"* * * Public officers have no authority to dispose of the State's lands except such as is conferred upon them by positive statutes. Any sales of such lands by them without such statutory authority are void as against the State, unless they are in some proper way ratified by the State. McCaslin v. State *ex rel.*, 99 Ind. 428; Brown v. Ogg, 85 Ind. 234; Vail v. McKernan, 21 Ind. 421; Skelton v. Bliss, 7 Ind. 77; Ferris v. Cravens, 65 Ind. 262; Whiteside v. United States, 93 U. S. 247; Hull & Argalls v. Marshall County, 12 Iowa 142."

It was held that public officers cannot do indirectly what they could not do directly and that the state's land could not be disposed of in any way except in pursuance of law, and that the purchasers were bound to take notice of the lack of authority.

Statutes relating to the authority of public officers over the state's land must be strictly construed. In the case of Tolleston Club v. Lindgren (1906), 39 Ind. App. 448, the Court said at page 452:

> "* * * Manifestly it was the intention of the legislature that the land should be sold under the act of 1852 for not less than $1.25 an acre. The only authority the public officers had to sell the land was that given them by this statute. Such a statute should be strictly construed. State v. Portsmouth Sav. Bank (1886), 106 Ind. 435, 451. * * *"

In the case of Matthews v. Goodrich (1885), 102 Ind. 557, the effect of a release or conveyance of state land to the United States was before the court, and in holding it invalid the Court said at page 569:

> "If the governor could reconvey the land to the United States without a particular recital of power, as to which we make no decision, he could not so reconvey without authority from the Legislature. His general authority as an officer of the State included no such power. The learned and careful counsel for the appellees have not been able to refer to any statute conferring such authority, and we have not been able to find such a statute * * *."

In the case of Terre Haute, etc., R. Co. v. State (1902), 159 Ind. 438, the Court said at page 466:

> "It is probable that the right of the Attorney-General or the Treasurer of State to demand an accounting would have been implied if the law had been silent. But there is no basis for an inference here. A specific provision for an accounting, and to whom it shall be made, having been written in the law, no other can be implied. A public officer is a creature of the statute, and has no power but that expressly conferred, and necessarily implied, to enable him to carry out some specific duty, and if at any time down to 1847 the Attorney-General, Treasurer, or other officer of State, had attempted to settle, and give acquittance to appel-

lant, the act would have been void, and would have concluded no one. McCaslin v. State *ex rel.*, 99 Ind. 428, 439, Platter v. Board, etc., 103 Ind. 360-378; State v. Portsmouth Sav. Bank, 106 Ind. 435-451."

In the case of Snoddy v. Wabash School Township of Fountain County (1896), 17 Ind. App. 284, at page 287, it is said:

> "Upon the subject of the promises of school townships, the Supreme Court, in Honey Creek Tp. v. Barnes, 119 Ind. 213, says: 'School townships are corporations with limited statutory powers, and all who deal with a trustee of a school township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law.' * * *"

In the case of State *ex rel.* Shuler, Trustee v. Board of Commissioners of Fountain County (1896), 147 Ind. 235, at page 236, it is said:

> "The school and civil township are of very limited powers and the law declared in this State concerning the power of school township applies with equal force to civil townships. The authority of the trustee is purely statutory. His acts create no binding obligation against the civil or school township unless they are authorized by law, and all who deal with him must at their peril ascertain the extent of his authority."

In the case of Lund v. Board of Commissioners of County of Newton (1910), 47 Ind. App. 175, at page 179, it is said:

> "The board of commissioners, like other statutory officers, is without power to make any contracts for the expenditure of money, except such as are conferred upon it by statute."

In the case of Silver, Burdett & Co. v. Indiana State Board of Education *et al.* (1904) 35 Ind. App. 438, at pages 453 and 454, it is said:

> "The state board of education and the state board of school book commissioners are creatures of legisla-

> tive enactment. They exist by virtue of the statute, and they have no power, and cannot exercise any authority, except that which is conferred upon them by statute. They may be regarded as agents of the State, by virtue of which they act for the State in the interest of all the people. The scope of their agency is prescribed by statute, and by the statute they are commissioned to do specific things and are directed as to the manner in which these must be done. Beyond the bounds of the statute they cannot go, and they can bind the State only while acting within their authority. * * *"

In the case of Hord v. State (1907), 167 Ind. 622, the Court cites numerous authorities upon the authority of a public officer to contract, and said at page 631:

> "It is evident that, under the issue raised upon the complaint herein, the onus is upon appellant to show that Attorney-General Michener, the supposed agent of the State, in making the contract, was exercising the power conferred, either expressly or impliedly, upon him by the statute. Such a statute, if any, must be regarded as the letter of his special agency in the matter, and beyond it he could not go and thereby bind the State or create any liability against it. This proposition is well settled by the authorities. (Citing cases.)
>
> "It is an equally well-settled rule that all persons dealing with public officers, whose power or authority to represent and bind the State, or some subordinate municipality thereof, depends upon or is limited by statute, are charged at their peril with notice of the scope of the power of such officers under such statute. (Citing cases.)"

In the case of Daily v. State *ex rel.* (1909), 171 Ind. 646, at page 652, the Court said:

> "As we said in Sherrick v. State (1906), 167 Ind. 345: 'The legislature must prescribe all the duties the Auditor of State will be permitted to exercise.' His

> duties and powers, except such only as are necessarily implied to enable him to render obedience to some express command of the General Assembly, are expressed, defined and given publicity by and through the public laws of the State. All are required to take notice of the length and breadth of the auditor's authority. 'Every one having dealings with them (public officers) is charged with the legal limitations of their agency.' Tiedeman, Commercial Paper, Sec. 136."

In the case of New York Central R. Co. v. Public Service Co. (1922), 191 Ind. 627, at page 635, the Court said:

> "In this state it has been held that the State Board of Tax Commissioners is a body of special statutory powers, and acts outside of its granted powers are absolutely void. State Board Tax Commrs. v. Belt R., etc., Co. (1921), ante 282, 130 N. E. 641, and cases there cited.
>
> "The same rule holds as to the Public Service Commission. It is created and its duties defined by statute. Its powers and duties are conferred and limited by the statute, and where power is given it to do a certain thing in a certain manner, the manner prescribed is the measure of the power given. When it is given authority to do a certain thing, the duty is imposed on it by statute to do such thing, and it has no authority to delegate its power to any one else."

In the case of Department of Ins. v. Church Members Relief Assn. (1940), 217 Ind. 58, at page 60, the Court said:

> "* * * When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of acquiescence, or consent, or approval of the doing of it by a ministerial officer, can create a right to do the thing which is unauthorized or forbidden. The administrative officers of the state, as well as the appellee, were bound by the statute. The insurance department had no power to authorize or acquiesce in the issuance

> of policies unauthorized or forbidden by the statute. An estoppel against the state cannot arise out of the unauthorized acts of state officers. Platter v. Board of Com'rs. (1885), 103 Ind. 360, 381, 2 N. E. 544, 556, 557; Sandy v. Board of Com'rs. (1909), 171 Ind. 674, 677, 87 N. E. 131, 132; Ness v. Board of Com'rs., etc., *et al.* (1912), 178 Ind. 221, 232, 98 N. E. 33, 1002; 21 C. J. Sec. 193, p. 1191; 19 American Jurisprudence Sec. 66, p. 818."

Additional authorities that invalid contracts with the state may not be ratified and that an estoppel against the state cannot arise out of the unauthorized acts of its officers, include:

Silver Burdett & Co. v. Indiana State Board of Education *et al.* (1904), 35 Ind. App. 438, 462;
First National Bank v. Van Buren School Township (1910), 47 Ind. App. 79, 86;
D. V. Turnpipe Co. v. Board of Commissioners of Bartholomew County (1880), 72 Ind. 226, 234;
Wrought Iron Bridge Co. v. Board of Commissioners (1897), 19 Ind. App. 672, 677;
Clinton School Township v. Lebanon National Bank (1897), 18 Ind. App. 42, 45;
Jessup v. Hinchman (1921), 77 Ind. App. 460, 465;
Ford Motor Co. v. Dept. (1945), — U. S. —, 65 S. Ct., 347, 352-353.

Upon the question of the powers of the director of the Department of Conservation, the Supreme Court of this state, in the case of State *ex rel.* Lieber *et al.* v. Sloan *et al.* (1926), 197 Ind. 556, at page 560 said:

> "The appellee questions the right of the relator in the capacity of the Director of the Department of Conservation to intervene. The Department of Conservation was created by Ch. 60, Acts 1919, p. 375. The status of such department is administrative only, and is a branch of the administrative arm of the government of the state (S.1). This department is admin-

> istered by a commission of four members in whom vest all the powers and duties delegated to this department of the administrative branch of the government. This commission is without the power to delegate any of its powers and duties to any officer or agent it may employ, either as directed by the act itself, or as any inherent power which the commission might seek to take. The commission thus constituted has power to appoint a director, who is the executive officer of the department, and whose appointment is not limited or extended to any definite period of time, but who may be removed at any time without pretext by the commission. He is in no sense a member or part of the commission itself, which solely represented this department; and, as such director, does not have the power to sue and is not capable of being sued as such officer. Wherefore he is without standing as a relator in the name of the Department of Conservation. * * *"

In Lingo-Leeper Lumber Co. v. Carter (1932), 161 Okla. 5, the Court quotes with approval from 59 C. J. 172 as follows:

> "Public officers have and can exercise only such powers as are conferred on them by law, and the state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, * * *."

In the case of Jobe v. Urquhart (1912), 102 Ark. 470, at page 484, the Court said:

> "* * * In the first place, as against the State, no one can acquire vested rights in a void contract. Ordinarily, all contracts with the State must rest upon some legislative enactment, or be specially provided for by law, and no agent or officer has the power to bind the State by contract independent of a special or general statute authorizing the same. In this respect the law governing the contracts of the State is different and not so general in its application as the law regulating contracts between individuals. A void contract

> is in legal effect no contract. By it no rights are divested. From it no rights can be obtained. The law treats the contract as a *nudum pactum*, and the courts cannot breathe life and vitality into a void contract, forsooth it may point to a moral. * * *".

Boards Must Act in Session

It is also well settled that the powers of board and commissions may not be exercised by the individual members separately. Their acts are official only when done by the members convened in session upon a concurrence of at least a majority, and with at least a quorum present.

In 42 American Jurisprudence, at page 389, Sec. 74, it is said:

> "The powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts are official only when done by the members convened in session, upon a concurrence of at least a majority, and with at least a quorum present. * * *"

This question was considered and passed upon by the Indiana Supreme Court in the case of Terre Haute Gas Corporation v. Johnson (1942), 221 Ind. 499, 45 N. E. (2nd) 484.

In that case the Court recognizes the rule as above stated and further held that all members of the board must have a fair opportunity to participate in its action or the action is void.

See also:

Campbell v. Brackenridge, 8 Blackf. 471;

Potts v. Henderson, 2 Ind. 327;

Board of Com'rs. Cass County v. Ross, 46 Ind. 404;

Board of Com'rs Franklin County v. Bunberg, 111 Ind. 143;

Columbus, C. & I. C. Rw. Co. v. Board of Com'rs Grant Co., *et al.*, 65 Ind. 427.