

**Opinion No. 36-1480**

December 7, 1936

**BY:** FRANK H. PATTON, Attorney General

**TO:** Mr. Claude T. Smith Assistant District Attorney Aztec, New Mexico

{\*37} We have your letter of November 30th with regard to the office of Probate Judge in San Juan County. The facts as they appear in your letter are as follows:

Mr. Bergin was elected to the office of Probate Judge at the general election, November 3, 1936, but since the election has died. The present incumbent of the office, Mrs. Burdick, was appointed to her position by the County Commissioners about a year ago upon the resignation of the then Probate Judge, Mr. Whitehead. You ask whether or not there will be a vacancy in this office on January 1, 1937.

This office had occasion to consider a similar question with regard to the office of County Treasurer in one of the counties of the State and in that instance held that where the person elected to office dies before qualifying for the office that the present incumbent holds over until a successor to the deceased person is appointed by the Board of County Commissioners.

We held in the previous case that a vacancy would exist within contemplation of Section 33-4233 of the 1929 Code after January 1st of the year when the person elected to the office would ordinarily have taken office. Our decision in the {\*38} previous case referred to was based upon the decision of our Supreme Court in the cases of Haymaker vs. State ex rel. McCain, 22 N.M. 400, and State vs. Blancett, 24 N.M. 433.

Under the set of facts you submitted to us, we are of the opinion that after January 1, 1937, a vacancy will exist in the office of Probate Judge of San Juan County and that the Board of County Commissioners may appoint a person to fill this vacancy. The present incumbent of the office will, of course, continue to hold the office until an appointment is made by the Board of County Commissioners.

There is some question as to whether or not a vacancy exists between the general election of November 3, 1936, and January 1, 1937, under the facts presented by you but we do not presume to pass upon this question at the present time.

By: J. R. MODRALL,

Asst. Atty. Gen.