Opinion No. 34.

Public Welfare—Ward Indians—Indians.

Held: Under the first class in the definition of ward Indians, one to qualify as such must be a resident within the boundaries of an Indian reservation and an Indian in fact. Under the second class the person to be a ward Indian must be a member of a tribe or nation of Indians and accorded the rights and privileges as such by treaty or federal statute.

Membership in an Indian tribe may be established in the case of incorporated tribes by recourse to their constitution and by-laws and the records of the tribe as to who are its members. As to incorporated and unincorporated tribes, membership may be established by proof of the name of the individual being on an enrollment or Indian census, the proof of receipt of supplies or annuities as a member of any tribe, the

allotment of land to the individual as an Indian and held in trust, or the inheritance of an Indian allotment which is held in trust, or the proceeds of the sale of an Indian allotment which is held in trust.

Under the second class the person in order to be a ward Indian must be, first, a member of a tribe, and second, as the result of such membership entitled to the rights and privileges of that tribe by virtue of either an Indian treaty or a federal statute.

A right or privilege granted by an Indian tribe or an Indian agency is not such a right or privilege as is necessary to qualify under the statute.

An Indian—in order to be a ward Indian—must qualify entirely under the classification adopted for the purpose of this opinion under class (a) or class (b) and the combination of a part of the qualifications of class (a) plus a part of the qualifications of class (b) does not entitle such person to be classified as a ward Indian.

April 30, 1945.

Mr. W. J. Fouse, Administrator
State Department of Public Welfare
Helena, Montana

Dear Mr. Fouse:

You have inquired what facts are necessary to constitute a person a ward Indian within the meaning of the Public Welfare Act of this state.

The Public Welfare Act, as amended by Section 3 of Chapter 129, Laws of 1939, provides that counties need not reimburse the state for funds paid out for old age assistance, aid to dependent children, or aid to needy blind for ward Indians. The amendment then proceeds to define who are ward Indians within the meaning of the act.

> "A ward Indian is hereby defined as an Indian who is living on an Indian reservation set aside for tribal use, or is a member of a tribe or nation accorded certain rights and privileges by treaty or by federal statutes."

Prior to the amendment of the act the Supreme Court of this state held that counties were not bound to reimburse the state for these classes of assistance paid to ward Indians, but did not attempt to define who were ward Indians, in the case of State ex rel. Williams v. Kamp, 106 Mont. 452, 78 Pac. (2d) 585. Subsequently the legislature, by Section 3 of Chapter 129, Laws of 1939, adopted its own definition of the term "ward Indians." This definition is controlling, even though it is contrary to the usual and ordinary meaning of the words. (Beer R. P. Association v. State Board of Equalization, 95 Mont. 30, 25 Pac. 128; State v. Jacobson, 107 Mont. 461, 86 Pac. (2d) 9.)

We find from this definition a ward Indian is (a) an Indian living on an Indian reservation set aside for tribal use, or (b) a member of a tribe or nation accorded certain rights and privileges by treaty or federal statutes. Thus it will be observed that under class (a), or the first class of persons, a person to be a ward Indian must be (1) an Indian, (2) living on an Indian reservation set aside for tribal use. Three facts are necessary to qualify under class (a): (1) determination of the boundaries of the reservation set aside for tribal use, (2) living on the reservation, and (3) the person must be an Indian.

The first fact is easy of solution. It may be determined from the records. The second condition, living on the reservation, is synonymous with residing on the reservation. The usual rules for determining residence apply. (Section 33, Revised Codes of Montana, 1935.) The third suggests inquiry as to who is an Indian.

Neither Congress nor the courts have ever attempted a precise and all-inclusive definition of the term "Indians."

Congress did, however, as a part of the act for the organization of Indian tribes (25 U. S. C. A., Section 461 to Section 479, inclusive) define the term "Indians" within the meaning of this act. The applicable provision reads:

> "The term 'Indian' as used in Sections 461, 462, 463, 464-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the

present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."

This act was enacted on June 18, 1934. The act itself does not apply to any reservation where the adult Indians did not accept the act at a special election called for that purpose. At such elections, if favorable, a constitution and by-laws were adopted and thereafter a corporate charter issued. One of the purposes of this act was to organize the Indians in each reservation into a single tribe. The Indians on five reservations have thus far under this act become incorporated tribes in Montana, namely, North Cheyenne, Blackfeet, Chippewa, Cree or Rocky Boy, Fort Belknap and the Flathead. The Indians on the Crow reservation have not become incorporated, nor have the Indians on the Fort Pevk reservation.

Under this act if the Indians reject its provisions at the elections, none of its provisions applies.

This definition is controlling as to tribes so incorporated.

As to the Indians on those incorporated reservations, no more lands are allotted in severalty to Indians (25 U. S. C. A., Section 461) and all restrictions on the conveyance of lands are continued in effect until further action by Congress (Section 462). All Indians coming within this definition are ward Indians within the meaning of the Public Welfare Act.

We now give consideration to who are Indians but are not members of incorporated tribes.

Generally speaking, persons are Indians who are members of a tribe of Indians. But there are exceptions. A negro who is adopted into a tribe does not thereby become an Indian. (Alberty v. United States, 162 U. S. 499, 40 L. Ed. 105.) The same is true with reference to a white man so adopted. (Westmoreland v. United States, 155 U. S. 545, 39 L. Ed. 255.) A white man who marries an Indian woman does not acquire any right to any tribal property, privilege or interest whatever to which any members of the tribe are entitled (25 U. S. C. A. 181). Hence a white man by marrying an Indian woman, even though he be adopted into the tribe, is not an Indian.

On the other hand, the marriage of an Indian woman to a citizen of the United States (white man or negro) does not thereby impair her right or title to any property or interest therein (25 U. S. C. A. 182).

Children of such a mariage, if solemnized before June 7, 1897, if the woman was an Indian by blood and not adoption, if recognized as a member of the tribe by it either at the date of the marriage or date of her death, have the rights and privileges to the property of the tribe to which the mother belonged at the time of her death (25 U. S. C. A. 184).

However, certain children of such a marriage take the status of the father unless the wife retains her tribal membership and her children are born in tribal environment and there reared by her. In such cases they are Indians. (Halbert v. United States, 283 U. S. 753, 75 L. Ed. 1389.)

As to whether grandchildren of such a marriage are members of the tribe depends upon the status of their father and mother and not that of their grandparents. (See Halbert case, supra.)

The rights and privileges of members of an Indian tribe, insofar as the property of the tribe is concerned, include the right to receive annuities, rations and allotments of tribal lands. (State v. Phelps, 93 Mont. 277, 19 Pac. (2d) 319.)

Indians entitled to receive supplies must be enrolled by the agent for the government (25 U. S. C. A., Section 137). Indians over eighteen years of age have the right to receive and receipt for annuities (25 U. S. C. A., Section 116). Tribal funds may be allotted to an Indian belonging to a tribe and held for him in the treasury of the United States and paid upon application therefor (25 U. S. C. A., Section 118).

Allotments of Indian lands may be made in the manner provided by law to Indians (25 U. S. C. A., Sections 331 to 335). To such lands as are allotted, trust patents are issued where the title is held in trust for the benefit of the Indian allottee for a specified period of time, usually twenty-five years (25 U. S. C. A., Section 348). This trust period has been extended in certain instances by Executive Order No. 9398.

Patents in fee are executed to the allottee at the expiration of the trust period if not extended, or earlier, in the discretion of the Secretary of Interior (25 U. S. C. A., Section 349).

Fee patents issued to the Indian allottee or his heirs may be cancelled (25 U. S. C. A., Sestion 352A) and new trust patents issued (Section 352B).

Upon the death of an allottee, his heirs succeed to his interest. The lands may be sold and the proceeds either held in trust or distributed to the heirs who are competent (25 U. S. C. A., Section 372).

A person who has not obtained a fee patent to his entire allotment or allotments or whose interest therein is still held in trust or the proceeds of which are held in trust is an Indian. (State v. Big Sheep, 75 Mont. 219, 243 Pac. 1047.)

Any person who receives allotments of supplies, annuities, allotments of tribal funds, allotments of land where the title is in trust, whether the title was received by trust patent or by inheritance, or if the proceeds of the allotment are held in trust, is an Indian.

Therefore, under the first class in the definition of ward Indians, one to qualify as such must be a resident within the boundaries of an Indian reservation and an Indian in fact.

Under the second class the person designated a ward Indian must be a member of a tribe or nation of Indians and accorded the rights and privileges as such by treaty or federal statute.

Membership in an Indian tribe may be established in the case of incorporated tribes by recourse to their constitution and by-laws and the records of the tribe as to who are its members. As to incorporated and unincorporated tribes, membership may be established by proof of the name of the individual being on an enrollment or Indian census, the proof of receipt of supplies or annuities as a member of any tribe, the allotment of land to the individual as an Indian and held in trust, or the inheritance of an Indian allotment which is held in trust, or the proceeds of the sale of an Indian allotment which is held in trust.

Under the second class the person in order to be a ward Indian must be, first, a member of a tribe, and second, as the result of such membership, entitled to the rights and privileges of that tribe by virtue of either an Indian treaty or a federal statute.

A right or privilege granted by an Indian tribe or an Indian agency is not such a right or privilege as is necessary to qualify under the statute.

An Indian in order to be a ward Indian must qualify entirely under the classification adopted for the purpose of this opinion under class (a) or class (b) and the combination of a part of the qualifications of class (a) plus a part of the qualifications of class (b) does not entitle such person to be classified as a ward Indian.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General