

Opinion No. 24-3787

October 29, 1924

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Mrs. Soledad Chacon, Secretary of State, Santa Fe, New Mexico.

Indians Not Taxed Cannot Vote in New Mexico.

OPINION

{*172} It is reported to the Secretary of State that certain members of registration boards in McKinley county are insisting upon registering Indians living upon the reservation and inquiry is made whether Indians not taxed can vote in New Mexico.

This office has heretofore held in a memorandum opinion that Indians not taxed can not vote. The legal advisor of both the Democratic and Republican State Committees have reached the same conclusion, and a written agreement reciting this understanding has been signed by the State Chairman of both parties. Hon. J. O. Seth, an eminent lawyer of this state, has written an elaborate opinion for the New Mexico Tax Payer's Association in which he concurs with the views of this office. In view of the unanimity of opinion on the question it does not seem necessary to indulge in a lengthy discussion here.

The recent act of Congress conferring citizenship upon Indians probably amounted to nothing more than a recognition of the status which was already theirs. Franchise does not necessarily follow citizenship. In some states aliens with first papers can vote. The qualifications of voters at all elections whether local, state or national are fixed by the states themselves. The Federal government can not fix the qualifications of voters, -- it merely adopts the electors of the states. There is no such thing as a "Federal elector."

The only control of the Federal government over the states in the matter of qualifications of voters in the familiar provision of the 15th amendment of the United States constitution which says that franchise shall not be denied on account of race, color or previous condition of servitude. The constitution of New Mexico in determining the qualifications of voters in New Mexico excludes Indians not taxed and at first blush this provision of our State {*173} constitution might be considered a violation of the 15th amendment just mentioned. This is not so however. Indians not taxed are denied the vote not because of their race but because they do not pay taxes, -- or in other words because of their status as wards of the government. The recent act of Congress conferring citizenship did not affect the wardship of the Indian and he still remains a ward of the United States. It is true that the non-taxpaying test does not apply to other citizens, but all non-Indians are potential tax payers, -- that is, they must pay taxes if they acquire property. The Indian on the other hand cannot be a tax payer no matter how much property he acquires because he is a ward. The franchise is denied the

Indian by our state Constitution for much the same reason that the vote is also denied a minor. Both are citizens but neither is allowed to vote because of his status which is one of dependence.

It should be observed that "Indians not taxed" are recognized as a distinct class in the Constitution of the United States and are not counted in determining the representation of the states in Congress. If New Mexico had four million of Indians not taxed we would still be entitled to but one representative in Congress.

In my opinion the provision in our state constitution excluding Indians not taxed is valid and cannot be abrogated by any act of Congress. These Indians must not be registered or voted and, in my opinion, persons responsible for registering or voting them or attempting to register or vote them are liable to criminal prosecution under our election law.