

Opinion No. 43-4265

April 10, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. S. T. Jernigan, Chief, Division of Liquor Control, Santa Fe, New Mexico

We have your letter of April 7, 1943, wherein you request an opinion of this office concerning whether or not an Indian is still a ward of the Government after he becomes a member of the military forces of the United States, and is still subject to Section 1203 of Chapter 236 of the 1939 Session Laws (Section 61-1013 New Mexico 1941 Compilation), which prohibits the sale of alcoholic liquors to any Indian who is a ward of the United States Government.

27 Am. Jur. Indians, Section 46 states:

"It is well settled that Congress, in pursuance of the long established policy of the government, has the right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage, the question being purely political. * * *"

A similar question to the one you propose was raised under a Federal Statute (Title 25, Section 241 U.S.C.A.) which prohibits the sale of liquor to Indians who are wards of the Government. This statute has read substantially the same since 1877, with only minor enactments so far as the point now involved is concerned.

It was held in the case of U.S. v. Hurshman, 53 F. 543, that an Indian in the armed forces who was a ward of the United States Government at the time of entering the armed forces is within the meaning of the statute. The Court stated:

"But, when an Indian enlists in the military service, the officers of Indian affairs are only partially relieved of their charge concerning him, and but temporarily deprived of power to control his person. While he is in the army, said officers continue to be charged with the duty of caring for his family and property and interests as a member of his tribe, and upon his discharge from the army their right to control him will be fully restored. I consider that the principle applicable to the case of an Indian who, by absenting himself from his home for pleasure or profit, temporarily places himself beyond the physical power of his superintendent or agent, should be applied to this case. Neither the Indians themselves, the officers of the army who induce them to enlist, or officers of the interior department who consent to it, have any power to change the laws; and no act of either, affecting for the time being the actual situation of an Indian, can change his status from that of a ward of the nation."

Also see in connection with this problem the case of U.S. v. Holliday 3 Wall. (U.S.) 407, 18 L. Ed. 182; Farrell v. U.S. 110 F. 942; U.S. v. Belt, 128 F. 168.

In view of the above, it is my opinion that an Indian who is now serving in the armed forces of the United States who was, at the time of his induction, a ward of the Government, continues to be a ward of the Government, and therefore under both the State Statute and the Federal Statute, it continues to be a crime to sell any alcoholic beverages to such an Indian.

Trusting that the foregoing sufficiently answers your inquiry, I am

By HARRY L. BIGBEE,

Asst. Atty. General