

Opinion No. 44-4574

September 11, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. David W. Carmody, District Attorney, Santa Fe, New Mexico

In your letter dated September 5, 1944, you state that in connection with your official duties, you desire to know in general the definition of an Indian and in particular whether an individual is an Indian or not who is in the following circumstances:

He is the son of a full-blooded Pueblo Indian father and a fullblooded Spanish-American mother. He lives upon pueblo lands under the jurisdiction of the pueblo and pays no taxes other than registration fees on his truck.

There does not seem to be any state or federal statutory definition of an Indian and ordinarily each case must be determined upon its own merits. Some courts have held that a mixed blood Indian whose mother is an Indian living on the reservation follows the status of the mother and is himself an Indian. However, the common law rule which is followed by many, if not most, of the state and federal courts is that the condition and status of the offspring of a union between a citizen of the United States and one who is not a citizen, namely, an Indian living with his people in a tribal relation, is that of the father. In this connection see *Ex Parte Reynolds* Fed. cs. 11719 (5 Dillon 394), and *U.S. vs. Ward* (C. C.) 42 Fed. 320.

In *State vs. Phelps* 19 Pac. 2d 319, 93 Mont. 277, the same rule is recognized in this language:

"Presumptively, a person apparently of mixed blood, residing upon a reservation and claiming to be an Indian, is in fact an Indian."

The amount or percentage of mixed blood is not always the determining factor in arriving at a definition of an Indian. In the case entitled *Ex Parte Pero*, 99 Fed. 2d 28 the court discusses three tests sometimes used by courts in determining the status of Indians which are (1) preponderance of blood, (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian.

From the facts contained in your letter and the foregoing authorities, I am of the opinion that the particular person mentioned by you would be held to be an Indian by the courts.