Opinion No. 65-194

October 11, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. Herbert J. Taylor, State Representative, P.O. Box 268, Gallup, New Mexico

QUESTION

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Are Indian Allotment landholders property owners for purposes of voting in school bond elections?

CONCLUSION

Yes:

OPINION

*{*315}* ANALYSIS

In order to be eligible to vote in a school bond election a person must be a qualified elector of the school district and must be an owner of real estate within the district. Article IX, Section II, New Mexico Constitution.

While this office has not had occasion to pass on this particular question, we have dealt with related inquiries. Opinion No. 6143 (1955) was concerned with the issue of whether the purchaser of land under a real estate contract was the owner for purposes of a tax exemption. The Opinion noted that the authorities are not entirely in accord on this question. However, we adopted the view expressed as follows in 156 ALR 1302:

"It is submitted that the rule recognizing equitable ownership as sufficient for this *{*316}* purpose constitutes the preferable rule of law, despite the principle of strict construction of tax exemption against an allowance of an exemption, at least where the vendee is given possession under the contract . . ."

We also pointed out that a veteran who has purchased property on an executory contract with legal title remaining in escrow pending the final payment under the purchase contract is the beneficial **owner** for purposes of taxation.

In the situation which you pose we have even stronger reasons for concluding that the allottees are owners for purposes of Article IX, Section 11. First, we are not dealing with a tax exemption provision where, as noted, the doctrine of strict construction often

applies. Second, the allottees, while not actually having legal title, have something more than the usual equitable title.

The court recognized this in the case of **United States v. Oklahoma Gas and Electric Co.,** 127 F.2d, affirmed in 318 U.S. 206, noting that land allotted in severalty to a restricted Indian is no longer part of the reservation nor is it tribal land but the virtual fee is in the allottee with certain restrictions on the right of alienation.

This same principal was expressed in the case of **Eastman v. United States,** 28 F. Supp. 807. There the court pointed out that through an allotment, an Indian allottee acquires an equitable title to the land, and, though the government retains the legal title in trust for the Indian, the title of the Indian, except for the limitation against alienation, is in reality a title in fee simple. See also **Oklahoma vs. Texas,** 258 U.S. 574.

The reasoning underlying such holdings is that the Indian allottee's equitable title will in due time ripen into legal title. **O'Quinn v. Joiner,** Okl., 166 Pac 142. When it does so ripen, the issuance of the patent is simply a ministerial duty. **Bailess v. Paukune,** 344 U.S. 171.

We should mention that our conclusion is the same whether we are dealing with either trust allotments or restricted allotments. Trust allotments are those in which a certificate or trust patent declaring that the United States will hold the land for a designated period of time in trust for the allottee. Restricted allotments are those in which a patent issues at once conveying the land to the allottee and imposing a restriction upon its alienation for a designated period of time. **United States v. Bowling,** 256 U.S. 484.