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MEMORANDUM

TO: Ronald M. Jaeger, Area Director
Bureau of Indian Affairs, Sacramento

FROM: William M. Wirtz, Assistant Regional Solicitor
Pacific Southwest Region, Sacramento

SUBJECT: Decedent Options under the Hoopa-Yurok Settlement Act

You have informally requested a Solicitor's opinion on the following matters as they pertain to the HOOPA-YUROK SETTLEMENT ACT of Oct. 31, 1988, P.L. 100-580, 102 STAT. 2924:

1. Can a decedent, whose name was published on the Yurok settlement roll, make an election pursuant to section 6 of the Settlement Act?

2. If the decedent can make the election, who would be the authorized representative to make the election?

3. Would the BIA be required to give notice of this option?

4. To whom would the notice be given?

5. Would this party have appeal rights on behalf of the decedent?

According to the information supplied to me there are sixty-six (66) decedents who have been placed on the settlement roll. Nine of them were able to make an election with fifty-seven (57) dying prior to having made an election. All decedents were alive on Oct. 31, 1988, the date of enactment of the Act. No other specifics were supplied as to dates of death.

Section 5. (a) (A) of the Act directs the Secretary of the Interior ". . . to prepare a roll of all persons who can meet the criteria for eligibility as an Indian of the reservation and--(A) who were born on or prior to, and living upon, the date of enactment of this Act;" The language utilized herein is clear and unambiguous: however, it appears to contradict the expectations of the Senate committee. ". . . The Committee expects the Secretary to place on the roll the names of all living Indians of the Reservation held

qualified in the Short cases. . ." [Senate Report 100-564 at pp. 21]

The legislative history and the general intent of the Act appear to support the concept that only those qualified persons who are living at the time the roll is published should be included on the roll. Nevertheless, the clear expressions of congress must be followed. It is therefore my opinion that the BIA correctly placed the sixty-six decedents (66) on the roll.

Having established that decedents who had timely filed are entitled to be on the roll, the next question to be resolved is whether the heirs or the estate are entitled to elect an option under the Act. The Department of the Interior, pursuant to the General Allotment Act, 25 U.S.C. Section 348, applies the law of the State in which the property is located. "However, while obligated to apply State laws of descent or inheritance, the determination and settlement of all other questions or controversies concerning the heirship to allotted and other restricted Indian lands is vested solely in the Secretary, uncontrolled by the laws of a State or court decisions construing State law." Estate of Ellen Phillips, 85 I.D. 438, 439 (1978). For example, in the Estate of Daniel J. Pierre, 84 I.D. 68, (1977), where the will of an Indian allottee gave a power of appointment over the leasehold estate of his allotment, the Board found that the appointment was an authorization to act as an executor of decedent's estate. The Board then held that such an appointment would be a usurpation of power belonging to the Secretary of the Interior which is invalid under Federal Law.

In this case the trust funds are generally from the Hoopa/Yurok Reservation which lies wholly within the State of California. The California laws of descent and distribution therefore apply to the probate of the sixty-six decedents. However, California laws on the appointment of executors and administrators of estates do not apply, as that would amount to a usurpation of power belonging to the Secretary. It is therefore my opinion that no executor or administrator appointed under California law would have the authority to make the option election for the heirs of the decedent.

Pursuant to California law, "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will or in the absence of such disposition, to the persons who succeed to his estate . . . subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration." [Cal. Prob. C. 300] In other words, title does not come from the court's decree of distribution. The decree merely sets forth in writing what the law proscribes.

Although title vests in the devisee or legatee, it is subject to the possession of the executor or administrator and control of the

Probate Court. [Cal. Prob. C. 300]. And, except in a few situations by statutory exception, none of which apply herein, proceedings in administration are necessary before the heirs or beneficiaries under the will can gain possession of the property and transfer title thereto. [Estate of Strong, (1898) 119 C. 663, 665]. Similarly, the probate of a will is necessary before it can be given effect. [See Reed v. Hayward, (1943) 23 c. 2d 336, 339]. What this means is that if an option were available it could be exercised only by the executor or administrator of the estate and not by the heirs. This precludes the heirs from directly exercising the option under California law.

The Settlement Act funds are primarily derived from accounts held in trust by BIA and (for the lump sum payment) from appropriated funds. In either event the BIA has referred all such decedents' estates to the Interior Office of Hearings and Appeals. The Department of the Interior regulations for the probate of Indian estates do not include a means of establishing administrators or executors of estates as the property being probated is already held in trust for the Indian by the BIA. [See 43 CFR Part 4, Subpart D]. It therefore appears that the Office of Hearings and Appeals lacks authority to establish administrators or executors of the estate as their authority is limited to those created by statute and regulation.

The election options are covered in section six (6) of the Act. Generally speaking, the Yurok enrollees are given the choice of two options, Yurok Tribal Membership or lump sum payment. Section 6 (a) (3) provides some insight into the election process concerning the election on behalf of the enrollees by third parties, parents or guardians. This election, which is allowed to parents or guardians, is extremely limited. It can be applied only where the minor is the member of another Tribe and that Tribe does not allow dual enrollment. There is no similar paragraph which allows for an option to be made by an administrator or executor of an estate. Congress obviously had taken into consideration the appointment of third parties to make option elections as with the case with minors, its silence concerning decedents in both the Act and the legislative history indicates that congress had no intention of allowing third party representation. For this reason it is my opinion that the Act does not allow the appointment of administrators or executors to act on behalf of decedents.

Other sections support this conclusion. Section 6 (a) (4) (B) of the Act sets the date by which time the election of an option must be made. Probate of the estates to determine heirship would be required prior to this date to enable the heirs to make the options. This would be difficult at best and would probably result in delay of implementation of the Act. Additionally, allowing heirs to elect could result in reversing the election of a decedent if he had, for example, elected to be a Yurok and his heirs timely opted for the lump sum payment. There is no requirement to give

notice to the heirs or the estates of an election option as none exists. Further there appears to be no procedure for an appeal by the heirs as the action or inaction of the BIA does not fit within the description of adverse enrollment action as defined in 25 C.F.R. section 62.4 (a).

William M. Wirtz
Assistant Regional Solicitor