

MAR 27 2006



United States Department of the Interior



OFFICE OF THE FIELD SOLICITOR

P.O. Box 2245

Palm Springs, CA 92263

July 28, 2005

MEMORANDUM

TO: Pacific Regional Director, Bureau of Indian Affairs

FROM: Field Solicitor, Palm Springs *Robert McCarthy*

RE: Transfer Jurisdiction Under the ICWA

By memorandum dated July 15, 2005, you requested an opinion regarding the authority for transfer of jurisdiction from a state court to a tribal court under the Indian Child Welfare Act ("ICWA"), 25 U.S.C. 1901 *et seq.* More specifically, you ask whether such authority is limited by "Public Law 280", a statute which extended state courts' jurisdiction to "all Indian country" within California and certain other states. Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588, 589 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. 1360).

Subsection 1911(a) of the ICWA provides for exclusive tribal court jurisdiction over certain child custody proceedings where the child is domiciled on the tribe's reservation, "except where such jurisdiction is otherwise vested in the State by existing Federal law." The "existing Federal law" proviso in § 1911(a) has been interpreted to include Public Law 280. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 n.16 (1989). Subsection 1918 of the ICWA permits a tribe in a Public Law 280 state to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. Indeed, in a recently decided case of first impression for the federal courts, the Ninth Circuit Court of Appeals held that tribes in Public Law 280 states can "reassume" exclusive jurisdiction under § 1911(a) only after petitioning the Secretary. *Doe v. Mann*, 2005 U.S. App. LEXIS 14544 (9th Cir., July 19, 2005).

Under § 1911(b) of the ICWA, state courts must transfer certain child custody cases to tribal courts unless either the parents or tribe object, or there exists good cause to decline transfer. Subsection 1911(b) does not contain any language limiting this transfer jurisdiction in Public Law 280 states, as does § 1911(a). *Doe v. Mann* did not address the issue of transfer jurisdiction under § 1911(b). The only reported decision to directly address whether a tribe needs to petition the Secretary to reassume jurisdiction transfer jurisdiction under § 1911(b) found no such requirement. *In the Matter of CRH*, 29 P.3d 849 (Alaska 2001). In *CRH*, the Alaska Supreme Court concluded that the transfer jurisdiction under § 1911(b) is the same in both Public Law 280 and non-Public Law 280 states. The court noted the absence of any reference to Public Law 280 in § 1911(b), as well as the "good cause exception" which provides "checks on tribal transfer jurisdiction."

The decision of the Alaska Supreme Court in *CRH* is consistent with the longstanding position of the Office of the Solicitor that a tribe in a Public Law 280 state does not have to submit a petition under § 1918 of the ICWA to reassume transfer jurisdiction under § 1911(b). The decision of the Ninth Circuit Court of Appeals in *Doe v. Mann* is not inconsistent with this position.