

## Understanding Active Efforts under ICWA: Nebraska Law and Best Practice

Terri Yellowhammer

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## Why do I care about this topic?

- American Indian mother/daughter/community member
- Attorney specializing in ICWA for the past 10 years
- Former Guardian Ad Litem on ICWA cases in Hennepin/Ramsey counties
- ICW Consultant for MN Department of Human Services
- Former tribal judge

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## Federal Responsibility and Indian Tribes: A Government to Government Relationship

- 25 U.S.C. §1901, in part:
    - Congress has responsibility toward Indian tribes and their resources
    - alarming high percentage of Indian families are broken up by the removal of their children, our greatest resource
- (note: MN one of the worst offenders, at 35%)

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## Overview

- Sovereignty of Indian nations often misunderstood in context of ICWA –
- “all children are the same”
- “ICWA is discriminatory”
- “why should a child be considered Indian if they have mixed heritage, or don't look Indian or have contact with their tribe?”  
(existing Indian family exception)

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## Spirit and Intent of the Indian Child Welfare Act

- “Without our relatives, we cease to exist”  
--quote from Indian grandma, Minneapolis, MN
- Push toward ICWA began as a grassroots effort by Indian people to stop what some viewed as a continued pattern of the theft of Indian children that began in earnest, in the boarding school era

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## What has happened since ICWA was enacted in 1978?

- States enact their own laws
- Tribal governments grow
- Tribal child welfare infrastructure expands
- Tribal and state/county social services form necessary relationships

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## Nebraska AE requirement

- Neb. Rev. Stat. 43-1505(4): Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

--mirrors the federal requirement

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## NDHHS Program Memo: Title 390, Protection and Safety, #7-2005

### ➤ ACTIVE EFFORTS

Active efforts must be made to keep the Indian family together. Active efforts means that everything possible must be done to help the family resolve the problems that led to neglect or abuse, including referral to services that are sensitive to the family's culture.

The worker must involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian caregivers.

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## Nebraska cases

- AE is "separate and distinct from the reasonable efforts provision"

In re Interest of Sabriena B.

- Is reviewed on a case-by-case basis

In re Interest of Walter W.

- Unclear at which point during a case Active Efforts requirement ends

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### What are Active Efforts?

- BIA Guidelines – efforts shall involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian caregivers.

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### 25 U.S.C. §1901

- (5) that the states, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

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### Minnesota Tribal/State Agreement – what we learned:

- Problems meeting AE can range from:
  - distrust on both sides (state/tribal workers)
  - historically poor relationship between state/tribal caseworker
  - communication differences/expectations
  - lack of/diminishing state resources
  - fear /distrust of tribal participation in case decisions

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### Minnesota Tribal/State Agreement

- AE means a rigorous and concerted level of case work and concrete services and access to services
- Higher standard than reasonable efforts
- Local Social Service Agency must seek guidance from the Indian child's tribe
- Includes providing services to extended family
- AE are required throughout the LSSA's involvement with the family (life of the case)

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### Best Practices and Active Efforts

- Require good relationships!
- So...how do we build them?

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### Scenarios and Challenges

- 1. Caseworker A has an ICWA case and is having difficulty getting an answer from 2 tribes in which the child might be eligible for membership. The caseworker finally contacts someone but the tribe is out of state and does not have the resources to actively participate. How does the caseworker meet the state's AE requirement?

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## Scenarios and Challenges, Part 2

- 2. Jane is a caseworker supervisor. She has had a good relationship with the neighboring tribe, with whom there are a fair number of cases. One of Jane's caseworker's, Linda, has been working with the tribe to provide AE on a case. One day Linda states to Jane that there appears to be a conflict in the case, as she has learned that the tribal foster provider is related to the tribal SS director. Linda asks Jane what she should do to ensure that AE is met under these circumstances. What should Jane tell Linda?

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## Resources

- Minnesota Tribal State Agreement 2007:  
<http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG>
- ICWA/MIFPA Social Worker Checklist:  
<http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5224-ENG>
- ICWA Active Efforts Best Practices:  
<http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5572-ENG>

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## Questions?

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- Miigwetch/Pilamayayeye/Thank you

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