



ICWA: By the numbers

**Hon. Patrick Runge,
Winnebago Tribal Court**

**How many federally
recognized tribes are
located in Nebraska?**

- a. 0**
- b. 4**
- c. 6**
- d. 562**

ANSWER: b. 4

They are:

- ❖ **Winnebago (Ho-Chunk)**
- ❖ **Omaha**
- ❖ **Ponca Tribe of Nebraska**
- ❖ **Santee**

**562+ is the number of federally
recognized tribes in the United
States**

**How many reservations
are there in Nebraska?**

- a. 0**
- b. 2**
- c. 3**
- d. 4**

ANSWER: C

**Three Nebraska tribes
have reservations:**

- Omaha**
- Santee**
- Winnebago**

Which tribe has service areas?

- a. Ponca Tribe of Nebraska**
- b. Winnebago**
- c. Santee**
- d. Omaha**

ANSWER: a

- **The Ponca Tribe of Nebraska has 15 service areas**
- **The service areas are located in Nebraska, Iowa, and South Dakota.**

Mary Smith says she is a Cherokee. How do you know if she is a member of the Cherokee tribe?

a. She drives a Cherokee SUV

b. She has enrollment papers from Cherokee Tribe

a. She was born in Cherokee, IA

ANSWER: b

- **43-1503(3): “Indian means any person who is a member of an Indian tribe...”**

Who determines if a child is an Indian child, that is, if a child is a member or eligible for membership of a federally recognized tribe?

- a. The state court**
- b. The parents**
- c. The tribe**
- d. The tribal court**

ANSWER: c. the tribe

- **43-1503(4) "Indian child means an unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."**

How old must an Indian child be before the child can be relinquished?

- a. 48 hours**
- b. 72 hours**
- c. 10 days**
- d. 21 days**

ANSWER: c. 10 days

- **43-1506(1): ...consent given prior to, or within ten days after, birth of the Indian child shall not be valid.**

Where must the relinquishment of an Indian child occur?

- a. Juvenile court**
- b. County court**
- c. District court**
- d. Juvenile court or county court**

ANSWER: d. Juvenile court or county court

- **43-1506(1):** “When any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.”

What efforts must be made to prevent the removal of an Indian child from his/her Indian custodian?

- a. Active efforts**
- b. Reasonable efforts**
- c. Everything possible**

ANSWER: Active efforts

- **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.”

So, what makes efforts “active?”

- **A very good question, and one the Nebraska Supreme Court is grappling with right now. (*In re Walter W*)**
- **Arguments are being made as to whether “active” efforts means something more than “reasonable” efforts. Hopefully we will get clarification from the Supreme Court with a ruling in this case.**

Both sides of the story

- **An argument for there being a difference is that, if there isn't, why would the language be different?**
- **An argument against there being a difference is that it puts DHS in the position of appearing to provide greater services to ICWA children than to non-ICWA children.**

Knowing what we don't know

- **Even the burden of proof at an ICWA termination hearing is in question.**
- **ICWA says the burden is beyond a reasonable doubt. But is that for the termination itself, or for the state providing active efforts (whatever that may end up meaning)?**

Knowing what we do know

- The Nebraska Supreme Court has said that “active efforts” is “separate and distinct” from “reasonable efforts.” What those are, hopefully, will be expanded by the Court in *Walter W.*
- Right now, all we can do is use the examples of active efforts the Supreme Court has decided, compare the facts in those cases to the case in question, and argue by analogy.

Knowing what we do know, more

- **The Nebraska DHHS policy manual states that active efforts means that “everything possible” must be done to avoid an Indian family breakup, and that active efforts means DHS must remove “every and all barrier” to rehabilitation.**

Knowing what we do know, even more

- **Other states, such as Iowa, Minnesota, and Alaska, give distinct definitions as to what is expected of a caseworker to satisfy “active efforts,” which usually involves providing services that would be unique to Indian children, such as exploring relative placements and ensuring culturally relevant services are provided.**

Until then?

- **It's a tough call, but until we get firm guidance from the Supreme Court as to the meaning of active efforts, it's always best policy to err on the side of providing more services to an ICWA family.**

What is the preferred placement setting of an Indian child under ICWA?

- a. A member of the child's extended family**
- b. Other members of the Indian child's tribe**
- c. Other Indian families**
- d. All of the above**
- e. A and B**

ANSWER: d. all of the above

- **43-1508(1): "In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (a) A member of the child's extended family;(b) Other members of the Indian child's tribe; or (c) Other Indian families."**

NDHHS has placed the child in what it believes to be the least restrictive setting, the child's Indian extended family.

However, the child's tribe has selected a non-relative Indian foster home as its preferred placement. Does NDHHS have to follow the tribe's preference?

ANSWER: No, however:

- **43-1508(3): "...if the Indian child's tribe shall establishes a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child"**

Placement Preferences/Active Efforts

- **Family Group Conferences (FGC):**
- **help locate relatives and other potential placements**
- **learn tribal preferences**
- **learn tribal social and cultural practices**
- **facilitate consultation and communication**

When an Indian child is adopted, where are the adoption records filed?

- a. The court where the adoption occurred**
- b. The NE Department of Health and Human Services**
- c. The U.S. Secretary of the Interior**
- d. All of the above**

ANSWER: d. All of the above

- **43-1516 "Any state court entering a final decree or order in any Indian child placement after September 6, 1985, shall provide the Secretary with a copy of such decree or order..."**

**Can an Indian
custodian withdraw
consent to a termination
of parental rights or
adoptive placement?**

ANSWER: Yes

43-1506(2): "Any parent or Indian custodian may withdraw consent to a foster care placement under state law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian."

MEPA & ICWA

- **MEPA does not apply to Indian children**
- **ICWA and MEPA require a record of the placement decisions**

ASFA & ICWA

- **The provisions of ASFA are interfaced with ICWA**
 - **ASFA timeframes are applicable to ICWA**
 - **The circumstances which merit a finding that reasonable efforts are not required usually meet the threshold for not requiring active efforts.**

Ethics & ICWA

- **“It shall be the policy of the state to cooperate fully with the tribes of Nebraska to ensure that the intent and provisions of the Federal Indian Child Welfare Act are enforced.” 43-1502**

Ethics & ICWA

- **Parents, tribes, courts see**

**Through the
eyes of the
child**

Resources

- **Indian Child Welfare Act Checklists for Juvenile and Family Court Judges**, National Council of Juvenile and Family Court Judges, June 2003
- Nebraska Commission on Indian Affairs 402-471-3475
- Omaha Tribal Council 402-837-5391
- www.poncatrbe-ne.org
- www.santeedakota.org
- www.winnebagoTribe.com
- www.nicwa.org