

# The Nebraska Indian Child Welfare Act

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# Roadmap

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- Applicability of ICWA
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  - Jurisdiction
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# My background

- I do not identify as Native American
- I have had the opportunity to work with and learn from tribal members and I will share what I have learned
- The best way to understand ICWA is to work with tribal members
- My focus and experience with ICWA is in the context of foster care cases



# Background on federal ICWA

- The federal Indian Child Welfare Act (ICWA) was passed by Congress in 1978
  - Codified at 42 U.S.C. 1901-1963
  - Passed in response to concerns that Indian children were disproportionately removed from their homes and placed in non-Indian foster or adoptive homes and institutions.
    - At the time of ICWA's enactment, 25-35% of *all* Indian children had been removed from their tribes and families and placed in adoptive homes; about 90% of those adoptions were in non-Indian homes.
- Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989).
- Tribes feared for their survival



# Background on federal ICWA

## 25 U.S.C. 1901 Congressional findings

(3) that **there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children** and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that **an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and**

(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.**



# New BIA Guidelines

- The BIA published new guidelines for state courts on ICWA requirements on February 25, 2015.
- Located at 80 Fed. Reg. 10146 (Feb. 25, 2015).
- The 2015 guidelines provide additional instruction on:
  - Active efforts
  - Custody of the child
  - Imminent physical damage or harm
  - Whether the ICWA applies in a case
  - Emergency removal practices
  - Transfer of jurisdiction to tribal court
  - Requirements for the adjudication and termination stages of a case
- The new BIA Guidelines immediately superseded and replaced the old BIA guidelines and also include guidance for human service or placing agencies.





# The Nebraska Indian Child Welfare Act

- The Nebraska Legislature enacted the NICWA in 1985.
- Codified at Neb. Rev. Stat. §§ 43-1501-1516
- Similar provisions as the federal act
- N.R.S. § 43-1502
  - Purpose of Act. The purpose of the Nebraska Indian Child Welfare Act is **to clarify state policies and procedures regarding the *implementation* by the State of Nebraska of the Federal Indian Child Welfare Act, 25 U.S.C. 1901 et seq.** It shall be the policy of the state to **cooperate fully with Indian tribes** in Nebraska in order **to ensure that the intent and provisions of the Federal Indian Child Welfare Act are enforced.**



# The Nebraska Indian Child Welfare Act in 2015

- The Nebraska Legislature enacted LB 566 in 2015.
- LB 566 modifies and clarifies key procedural and substantive provisions of the NICWA.
- N.R.S. § 43-1502
  - It shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced. This cooperation includes recognition by the state that Indian tribes have a continuing and compelling interest in an Indian child whether or not the Indian child is in the physical or legal custody of a parent, an Indian custodian, or an Indian extended family member at the commencement of an Indian child custody proceeding or the Indian child has resided or is domiciled on an Indian reservation. The state is committed to protecting the essential tribal relations and best interests of an Indian child by promoting practices consistent with the federal Indian Child Welfare Act and other applicable law designed to prevent the Indian child's voluntary or involuntary out-of-home placement.





# Tribal Presence

- Four tribes have governmental headquarters within Nebraska's borders: the Omaha Tribe, the Ponca Tribe, the Santee Sioux Nation, and the Winnebago Tribe
- Several tribes have reservation land in Nebraska
  - The **Omaha and Winnebago Tribes** have reservation land in **Thurston County**; the **Santee Sioux Nation** has reservation land in **Knox County**; and the **Ponca Tribe** has 12 counties that are designated as service areas by federal law.
  - In addition, the **Oglala Sioux Tribe's Pine Ridge Reservation** extends into **Sheridan County** and the **Sac and Fox Nation** and the **Iowa Tribe's** reservation lands each extend into **Richardson County**.
- In addition, many tribal members reside in Nebraska, representing over 200 tribes

Source: Sherri Eveleth, Overview of ICWA: The Most Ignored Federal Law Ever, *Nebraska Lawyer* (August, 2005).



# Nebraska ICWA

## Disproportionality in Nebraska

- As of Nov. 2013, there were **328** American Indian children in out-of-home care in Nebraska (9%)
- Thurston County (including Omaha and Winnebago reservations) ranked **#1** in the highest rate of **children in out-of-home care** in the state
- As of 2013 we were the **2nd highest** in the country for the **greatest disproportionality** of Native American children in the foster care system.

Sources:

Voices for Children in Nebraska, *Kids Count 2014*

State Foster Care Review Office, testimony on LR 262

National Council of Juvenile and Family Court Judges “Disproportionality Rates for Children of Color in Foster Care” Report.



# Applicability of ICWA

“Child Custody Proceedings” – 25 U.S.C. § 1903(1); N.R.S. § 43-1503(3)

- (a) Foster care placements

- “Any action removing an Indian child from its parent or Indian custodian for temporary **or emergency** placement in a foster home or institution or the home of a guardian or conservator *where the parent or Indian custodian cannot have the child returned upon demand*, but where parental rights have not been terminated.”

- Any involuntary juvenile proceeding that could result in foster care placement is one that is “seeking to effect a foster care placement.” *In re Interest of Shayla H.*, 289 Neb. 473 (2014).



# Applicability of ICWA

## “Child Custody Proceedings” (...cont’d)

- **(b) Termination of parental rights**
  - “any action resulting in the termination of the parent-child relationship”
- **(c) Preadoptive placement**
  - “the *temporary* placement of an Indian child in a foster home or institution *after the termination of parental rights*, but prior to or in lieu of adoptive placement”
- **(d) Adoptive placement**
  - “the *permanent* placement of an Indian child for adoption, including any action resulting in a final decree of adoption”
- **(e) Voluntary foster care placement**
  - “a non-court involved proceeding in which the department or the state is facilitating a voluntary foster care placement or in-home services to families at risk of entering the foster care system.”



# Applicability of ICWA

- **“Parent”** – 25 U.S.C. 1903(9); N.R.S. 43-1503(14).
  - “any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.”
    - The U.S. Supreme Court recently determined that a putative father was not considered a “parent” for purposes of the ICWA , in the context of a private adoption, when the child was not ever in the father’s physical or legal custody and the father did not contribute to the care of the child. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 831 (2013).



# Applicability of ICWA

- **“Indian Custodian”**– 25 U.S.C. 1903(6); N.R.S. 43-1503(11).
  - “any Indian person who has “legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.”
  - Generally an Indian Custodian has the same rights as a parent in an ICWA case.





# Applicability of ICWA

- **“Indian child”**– 25 U.S.C. 1903(4); N.R.S. 43-1503(8).
  - Unmarried person, under the age of 18; and either (a) a **member of a tribe** or (b) **eligible for membership** in an Indian tribe and the biological child of a member of an Indian tribe.
  - State and court must investigate
  - ICWA applies prospectively from the date the Indian child’s status is established on the record. *In re Interest of Nery V.*, 20 Neb. App 798 (2013).



# Applicability of ICWA

- **“Indian tribe or tribes”** — 25 U.S.C. 1903(8); N.R.S. 43-1503(10)
  - Federally recognized tribes
  - Bureau of Indian Affairs publishes a fluid list (see 72 Fed. Reg. 13,647).
- **“Eligible for membership”**
  - the tribe has the sole power to determine membership
  - Tribes have different standards (e.g., blood quantum, lineal descent, etc.



# Applicability of ICWA

Generally speaking...

- No – divorce or separation cases
- Yes – juvenile delinquency cases w/foster care
- Yes – foster care placements
- Yes – status offenses
- Yes – guardianships
- \*But there are exceptions...



# Jurisdiction

- Tribes have **exclusive jurisdiction** over any child custody proceeding involving an Indian child who resides or is domiciled on a reservation
  - The tribe also has exclusive jurisdiction of a child who is a ward of the tribal court regardless of the child's residence or domicile.
- Tribes have **concurrent jurisdiction** with state courts as to Indian children who reside or are domiciled off the reservation

N.R.S. § 43-1504(1)&(2)



# Inquiry: LB 566

- The Court's Inquiry
  - In any case where a petition alleges the child is within the meaning of Neb. Rev. Stat. § 43- 247(3)(a), or a petition to terminate parental rights is filed, the court must inquire as to whether any party believes an Indian child is involved in the proceedings.
- The Hotline's Inquiry
  - The Child Abuse and Neglect Hotline operated by DHHS must inquire as to whether the individual calling believes an Indian child is involved in the intake. The hotline worker must immediately document the suspected involvement of an Indian child and report that information to his or her supervisor.

Neb. Rev. Stat. § 43-279.01(4); Neb. Rev. Stat. § 43-1514



# Inquiry: New BIA Guidelines

- The Court's Inquiry
  - The court is required to ask each party to the case whether there is reason to believe that an Indian child is involved in the child custody proceeding. The Court may require DHHS to provide:
    - Genograms;
    - Addresses and domicile information for the child and and his or her family; and
    - Confirmation that DHHS used active efforts to verify the child's tribal eligibility status.
- DHHS' Inquiry
  - DHHS must ask whether there is a reason to believe that child subject to a child custody proceeding is an Indian child. If the child is an Indian child, the agency must obtain verification, in writing, from all tribes that a child may be eligible for membership.



80 Fed. Reg. 10146, B.2.



# Inquiry: New BIA Guidelines

- A Court or DHHS are deemed to “reasonably know about the existence of an Indian child in a case if:
  - A party tribe, or agency provides information about the child’s eligibility
  - The child gives the agency or court reason to believe he or she is an Indian child
  - The domicile or residence of the child, parents, or Indian custodian is known to be in an Indian reservation or in a predominately Indian community
  - An employee of the agency or officer of the court is involved in the proceeding has actual knowledge that the child may be an Indian child
- *See also In re Interest of Avery S. & Izabel S.*, No. A-13-843 (2014) (Concluding that the protections of the ICWA must necessarily apply when the State should have known the children were eligible for tribal enrollment).

80 Fed. Reg. 10146, B.2



# Multiple Tribes in a Case: LB 566

- LB 566 allows for the participation of multiple tribes in a case and for one tribe to be the Indian child's "Primary Tribe."
- An Indian child's primary tribe takes precedence over other tribes in issues of transfer, placement preferences, and in filing a petition to invalidate.
- The applicable tribes get to choose which tribe is the primary tribe and if they cannot reach an agreement the court will select the primary tribe based on the child's contacts with the tribes.

- N.R.S. § 43-1504



# Notice

- “In any involuntary proceeding in a state court, where the court knows or *has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child **shall send a notice conforming to the requirements of 25 C.F.R. 23.11 to the parents, the Indian Custodian, and the Indian child’s tribe or tribes by registered mail...**
- – N.R.S. § 43-1505(1).
- When the department or the state offers the parent, Indian child, or Indian custodian services through a voluntary foster care placement or in-home services and the department or has reason to know that an Indian child is involved, the department or state shall notify the parent or Indian custodian and the Indian child’s tribe or tribes, by telephone call, facsimile transmission, email, or registered mail with return receipt requested...  
– N.R.S. § 43-1506(2).



# Notice

- **Why is notice to tribes important?**
  - Tribes have “an interest in the child which is distinct from, but on parity with the interests of the parents.” *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).
  - Allows the tribe the opportunity to assert its rights (e.g., intervention, transfer) under ICWA.



# Transfer

“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, **the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the primary tribe, absent objection by either parent**, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such primary tribe.”

- 25 U.S.C. 1911(b); N.R.S. 43-1504(2).



# Transfer

- **Who can petition to transfer?**
  - A parent, Indian custodian, or the tribe.
  - Includes a parent who is *not* a member of the tribe.
- **Who can object to transfer?**
  - Subject to the objection by either **parent**.
  - The **tribe** can decline transfer.
    - No need for an adversarial proceeding.
  - The **GAL** or other parties can raise the issue of good cause.





# Intervention

- “In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding **regardless of whether the intervening party is represented by legal counsel. The Indian child’s tribe or tribes and their counsel are not required to associate with local counsel or pay a fee to appear pro hac vice in a child custody proceeding.**”
- N.R.S. 43-1504(3).



# Placement Preferences

- The first placement preference for Indian children, for both adoptive and foster care placements under the ICWA, has always been extended family members.
- ICWA has always allowed tribes to create their own definition of extended family.
- **If no tribal law definition exists**, the ICWA defines extended family members as:
  - “a person who has reached the age of eighteen and who is the Indian child's parent, grandparent, aunt or uncle, clan member, band member, sibling, brother-in-law or sister-in-law, niece or nephew, cousin, or stepparent”
- This definition **may include *both* Indian and non-Indian relatives**
  - Legislative history indicates that, where possible, an Indian child should remain in the Indian community, but the section “is not to be read as precluding the placement of an Indian child with a non-Indian [relative] family.”
  - N.R.S. § 43-1503(5)



# Placement Preferences: LB 566

## Adoptive Placement Preferences

- 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 the following *in descending priority order*:
  - A member of the Indian child's extended family;
  - Other members of the Indian child's tribe *or tribes*;
  - Other Indian families; *or*
  - *A non-Indian family committed to enabling the child to have extended family time and participation in the cultural and ceremonial events of the Indian child's tribe or tribes.*

- N.R.S. § 43-1508(1)



# Placement Preferences: LB 566

## Foster Placement Preferences

- In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with one of the following in descending priority order:
  - A member of the Indian child's extended family;
  - Other members of the Indian child's tribe or tribes;
  - A foster home licensed, approved, or specified by the Indian child's tribe or tribes;
  - An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
  - *A non-Indian family committed to enabling the child to have extended family time and participation in the cultural and ceremonial events of the Indian child's tribe;*
  - An Indian facility or program for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs; or
  - A non-Indian facility or program for children approved by an Indian tribe.

- N.R.S. § 43-1508(2)



# Placement Preferences: LB 566

## Good Cause to Deviate

- LB 566 codifies the old BIA guidelines requirements for finding good cause to deviate from the ICWA's placement preferences.
  - Good cause to deviate includes:
    - The request of the biological parents or the Indian child when the Indian child is at least twelve years of age;
    - The extraordinary physical or emotional needs of the Indian child as established by testimony of a qualified expert witness; or
    - The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
- The burden to show there is good cause to deviate from the placement preferences must be met by clear and convincing evidence by the party urging that the preferences not be followed.

- N.R.S. § 43-1508(4)



# Active Efforts: LB 566

- LB 566 provides a definition of what constitutes active efforts. The list includes:
  - A concerted level of casework, prior to and after the removal of an Indian child, consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe;
  - A request to convene traditional and customary support and services;
  - Actively engaging, assisting, and monitoring the family's access to and progress in culturally appropriate resources;
  - Identification of and provision of information to the Indian child's extended family members concerning appropriate community, state, and federal resources
  - Identification of and attempts to engage tribal representatives;
  - Consultation with extended family members to identify family or tribal support services; and
  - Exhaustion of all available tribally appropriate family preservation alternatives.

- N.R.S. § 43-1503(1)





# Active Efforts: LB 566

- LB 566 also provides additional provisions to ensure evidence of active efforts are put before the court in every ICWA case
  - The Department or the State is required to provide a written report of its attempts to provide active efforts at every hearing involving an Indian child. 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:
    - 1) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; or
    - 2) *unite the parent or Indian custodian with the Indian child*; and
    - 3) that these efforts have proved unsuccessful.

- N.R.S. § 43-1505(4)



# Active Efforts: LB 566

- Any written evidence showing that active efforts have been made shall be admissible in a proceeding under the Nebraska Indian Child Welfare Act.
- Prior to the court ordering placement of the child in foster care or the termination of parental rights, the court shall make a determination that:
  - active efforts have been provided; or
  - *that the party seeking placement or termination has demonstrated that attempts were made to provide active efforts to the extent possible under the circumstances.*

- N.R.S. § 43-1505(4)



# Active Efforts: New BIA Guidelines

- The new BIA provides a non-exclusive list of what may be encompassed by active efforts. The list includes:
  - Engaging the Indian child and their family;
  - Taking steps necessary to keep siblings together;
  - Identifying appropriate services and actively assisting the parents in obtaining such services;
  - Identifying, notifying, and inviting representatives of the Indian child's tribe to participate;
  - Conducting a diligent search for the Indian child's extended family members;
  - Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe;
  - Offering and employing all available and culturally appropriate family preservation strategies;
  - Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
  - Notifying and consulting with extended family;
  - Provide family interaction in the most natural setting that is safe;
  - Identifying community resources including and actively assisting the Indian child's family in accessing those resources; and
  - Providing post-reunification services and monitoring.

80 Fed. Reg. 10146, A.2



# Serious Emotional or Physical Damage

- “No foster care placement may be ordered in such proceedings in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”
- “No termination of parental rights may be ordered in such proceeding in the absence of a determination, *supported by evidence beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

- 25 U.S.C. 1912(e)&(f); N.R.S. 43-1505(5)&(6)



# Serious Emotional or Physical Damage

- Serious emotional or physical damage was not proven beyond a reasonable doubt where evidence showed the mother had improved her life (housing, employment, parenting skills, etc.) even where qualified expert witness, who had not personally interviewed the mother or children, testified that the children would suffer SEPD by being removed from foster parent with whom they were attached. – *In re Interest of Phoebe S.*, 11 Neb. App. 919 (2003).



# Serious Emotional or Physical Damage: New BIA Guidelines

- Clear and convincing evidence must show a casual relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage.
- Evidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behaviors does not alone clear and convincing evidence.

- 80 Fed. Reg. 10146, D.3





# Qualified Expert Witnesses: LB 566

- LB 566 defines a Qualified Expert Witness as one of the following persons in descending priority order:
  - A member of the Indian child's tribe or tribes who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family and childrearing practices
  - A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe or tribes based on his or her knowledge of the delivery of child and family services to Indians and the Indian child's tribe or tribes;
  - A lay expert witness that possesses substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe or tribes;
  - A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe or tribes; and
  - Any other professional person having substantial education in the area of his or her specialty.
- A court may still assess the credibility of individual qualified expert witnesses.

- N.R.S. § 43-1503(15)



# Qualified Expert Witnesses

- *In re Interest of Shayla H.*, 17 Neb. App. 436 (2009).
  - Held that a caseworker, an 11 year employee of NDHHS, with a bachelor's degree, and limited knowledge and experience with Native families was *not* a QEW under ICWA.
- *In re Interest of Louis S.*, 17 Neb. App. 867 (2009).
  - Held that a witness with a law and master's degree, who had developed training for NDHHS on ICWA, was an expert with substantial education and experience.
- *In re Interest Mischa S.*, 22 Neb. App. 105 (2013).
  - Held that a caseworker with less than a year of experience with NDHHS, and a school administrator with a master's degree (both of whom had no recorded experience in working with Indian children and families) were not QEWs under the ICWA. Neither witness had established that they were qualified "to recognize serious emotional damage in a child" and neither witness testified that the children would "suffer serious emotional or physical damage."



# Qualified Expert Witnesses: New BIA Guidelines

- The New BIA Guidelines state that:
  - A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.
  - Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:
    - A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
    - A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.
    - A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
    - A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.



80 Fed. Reg. 10146, D.4

# Qualified Expert Witnesses

- Ideally, all categories of expert witnesses should have knowledge and experience with the child's Indian culture.
  - **Contact tribal social services**
  - **Nebraska ICWA Coalition** –identification, recruitment and training of QEWs with knowledge and experience in tribal customs.
  - The **BIA** shall assist in identifying QEWs upon the request of a party. Requests shall be sent to the Area Director (for Nebraska –in Aberdeen, SD). 25 C.F.R. 23.81



# Termination of Parental Rights

- ICWA applies even when the parent is non-Indian.
- What standard?
  - The Neb. Sup. Ct. held that standard for the **state law elements**(statutory grounds & best interests) and **active efforts** is **clear and convincing evidence**. *In re Interest of Walter W.*
  - The standard is **beyond a reasonable doubt** for the **serious emotional and physical damage element**. *Id.*
  - The lower standard of proof ...for the termination of parental rights to non-Indian children, as opposed to the higher standard of proof under the [NICWA] does not violate the equal protection rights of parents of non-Indian children. *In re Interest of Phoenix L. et al.*, 270 Neb. 870 (2006)



# Voluntary Foster Care: LB 566

- LB 566 adds a “voluntary foster care placement” to the list of applicable proceedings that are covered by the ICWA.
  - This only includes a non-court proceeding in which the Department or the State is facilitating a voluntary foster care placement or “in-home services” to families at risk of entering the foster care system.
- The full protections of the ICWA do not apply to this proceeding, instead only the following protections apply:
  - Active efforts
  - Notice (within 5 days of services starting)
  - Intervention (or participation in the provision of services)
  - Placement preferences
  - Additional procedural assurances for relinquishments and terminations arising out of voluntary foster care placements



Neb. Rev. Stat. §§ 43-1503(1), 43-1504, 43-1505, and 43-1506



# Voluntary Foster Care: New BIA Guidelines

- ICWA applies to voluntary proceedings
  - In all voluntary proceedings agencies and courts:
    - Must ask whether a child is an Indian child
    - Should provide the tribe notice of the proceedings
    - Must be executed in writing before a court
    - Must explain the consequences plainly to the parent
    - Must certify that the terms and consequences were clearly explained in the language of the parent
    - Must wait until 10 days after the birth of the child to validate a parent's consent.
  - The new BIA guidelines also describe what must be included in a consent document and how a parent may withdrawal consent to a voluntary foster care placement or adoption.
  - The notice, intervention, and active efforts provisions of the ICWA apply to “diversion, differential, alternative response or other program.”



80 Fed. Reg. 10146, E, and A.3

# Adoption

- After the entry of a final decree of adoption of an Indian child in any State court, **the parent** may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and **may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent.**”
- 25 U.S.C. 1913(d); N.R.S. 43-1506(4)



# Enforcement

- “**Any Indian child** who is the subject of any action for foster care placement or termination of parental rights under State law, **any parent or Indian custodian** from whose custody such child was removed, and **the Indian child’s tribe** *may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911 (jurisdiction, transfer, intervention, full faith and credit), 1912 (notice, appointment of counsel, active efforts, SEPD), and 1913 (consent, withdrawal of consent, voluntary TPR) of this title.*”

- 25 U.S.C. § 1914; N.R.S. 43-1507.



# Questions?

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