

Term	Federal ICWA (25 USC §§ 1901-1963); NM Children’s Code (Sec. 32A-1-1 <i>et seq.</i> ); and BIA Guidelines for State Courts and Agencies (2015)
<b>Applicability</b> ICWA § 1903(1)	In <i>child custody proceedings</i> (foster care placement, termination of parental rights, pre-adoptive and adoptive placement) involving an <i>Indian Child</i> . ICWA § 1903(1). There is no so-called “existing Indian family doctrine,” so courts <i>should not consider</i> the extent of the child’s or parent’s connections to the tribe or whether the Indian parent ever had custody of the child. The court must ask in every child custody proceeding whether the child is or could be an Indian child. <b>BIA Guidelines for State Courts and Agencies A.3, 80 Fed. Reg. 10150 (Feb. 25, 2015).</b>
<b>Indian child, defined</b> ICWA § 1903(4); Ch. C. § 32A-1-4(K)	Any unmarried person who is under 18 <i>and</i> is <i>either</i> : (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe <i>and</i> is the biological child of a member of an Indian tribe. <b>ICWA § 1903(4); Ch. C. § 32A-1-4(K).</b>
<b>Jurisdiction</b> ICWA § 1911(a)	Tribal court has <i>exclusive jurisdiction</i> over any child custody proceeding involving an Indian child residing or domiciled within the reservation, and over an Indian child who is ward of tribal court notwithstanding the child’s residence/domicile. <b>ICWA § 1911(a).</b> When Indian child resides or is domiciled <i>off</i> the reservation, tribe and state have concurrent—but presumptively tribal—jurisdiction. <b>Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).</b> ( <i>See Right to Transfer</i> )
<b>Right to intervene</b> ICWA § 1911(c)	Indian custodian and tribe have right to intervene any time in foster care or TPR proceedings, including placement preferences. <b>ICWA § 1911(c).</b>
<b>Right to counsel</b> ICWA § 1912(b); Ch. C. § 32A-4-10	If indigent, parent or Indian custodian has right to court-appointed counsel in any removal, placement, or termination proceeding. Court may appoint counsel for Indian child, if in best interest of child. <b>ICWA § 1912(b); Ch. C. § 32A-4-10.</b>
<b>Right to request transfer to Tribal Court</b> ICWA § 1911(b); Ch. C. § 32A-1-9(D)	In cases of <i>concurrent</i> jurisdiction, State Court <i>shall</i> transfer proceedings to tribe’s jurisdiction upon petition of Indian child’s parent, Indian custodian <b>or</b> tribe, unless: (1) parent or Indian custodian objects; or (2) the tribe declines transfer; or (3) good cause exists to deny transfer. <b>ICWA § 1911(b); BIA Guidelines C.3; Ch. C. § 32A-1-9(D).</b> In cases of <i>exclusive tribal</i> jurisdiction, the case should be transferred to tribal court without delay even if a parent objects. <b>Miss. Band, 490 U.S. at 53.</b>
<b>Good cause not to transfer</b> ICWA § 1911(b)	Burden is on party opposing transfer to show that good cause exists <i>not</i> to transfer. <b>BIA Guidelines for State Courts and Agencies C.2.</b> State courts may <i>not</i> consider the following as reasons not to transfer: proceedings at an advanced stage, transfer results in change of placement, the child’s contacts (or lack thereof) with the tribe or reservation, socio-economic conditions or perceived inadequacy of tribal social services or judicial systems, or tribal court’s prospective placement for the child. <b>BIA Guidelines C.3.</b>
<b>Right to review reports</b> Ch. C. § 32A-4-33(B)(10)	All records/information concerning party to abuse/neglect proceeding shall be disclosed only to persons or entities of a tribe specifically authorized to inspect records according to ICWA. <b>Ch. C. § 32A-4-33(B)(10).</b>
<b>Right to extra time to prepare</b> ICWA §1912(a); <i>Marlene C., 2011-NMSC-005</i>	No foster care placement or TPR proceeding shall be held until at least 10 days <i>after</i> receipt of notice by parent <i>or</i> Indian custodian <i>and</i> the tribe or BIA. Court shall grant 20 additional days to parent, Indian custodian or tribe, upon request, to prepare for proceeding. <b>ICWA §1912(a).</b> In NM, the 10-day custody hearing under § 32A-4-18 is an emergency proceeding (under <b>ICWA § 1922</b> ) and is not subject to ICWA’s 10-day notice requirement. <b>State ex rel. CYFD v. Marlene C., 2011-NMSC-005, ¶ 34.</b>
<b>Emergency removal</b> ICWA § 1922; Ch. C. § 32A-4-16	ICWA permits <i>emergency removal</i> of Indian child residing or domiciled <i>on</i> reservation, but temporarily located <i>off</i> reservation, or <i>emergency placement</i> in foster care, in order to prevent imminent physical damage or harm to child. When no longer necessary to prevent imminent damage or harm, the removal or placement terminates, and CYFD shall expeditiously begin custody proceedings, transfer the child to the tribe’s jurisdiction, or restore child to parent or Indian custodian. <b>ICWA § 1922; Ch. C. § 32A-4-16.</b>

<b>Custody &amp; investigation</b> Ch. C. §§ 32A-4-6(C) & -22(I); <i>Marsalee P.</i> , 2013-NMCA-062	When taking child into custody, CYFD shall make reasonable efforts to determine whether child is an Indian child. <b>Ch. C. § 32A-4-6(C)</b> . CYFD shall investigate whether the child is eligible for enrollment as a member of an Indian tribe, and if so, shall pursue enrollment on the child’s behalf. <b>Ch. C. § 32A-4-22(I); <i>State ex rel. CYFD v. Marsalee P.</i>, 2013-NMCA-062.</b>
<b>Notice</b> ICWA § 1912(a); Ch. C. § 32A-1-14(B)	In <i>involuntary</i> proceedings involving an Indian child, including in foster care/adoptive placement/TPR case, CYFD <i>shall</i> notify parent or Indian custodian, <i>and</i> Indian child’s tribe of proceedings. If identity/location of parent or Indian custodian and tribe cannot be determined, notice must be sent to Sec. of Interior (BIA). <b>ICWA § 1912(a)</b> . In NM, notice is also required in adoption proceedings. <b>Ch. C. § 32A-1-14(B)</b> .
<b>Placement Preferences – Foster Care, Pre-adoption</b> ICWA §§ 1903(2) & 1915(b); Ch. C. § 32A-4-9	Foster care or pre-adoptive placement: child must be placed in the least restrictive setting that most approximates family, meets child’s special needs, and is within reasonable proximity of his/her home. Absent good cause, preference <i>shall</i> be given to: 1) a member of <i>child’s extended family</i> , as defined by law/custom of child’s tribe or, absent law or custom, shall be person age 18 or older who is child’s grandparent, aunt/uncle, brother/sister, brother/sister-in-law, niece/nephew, first/second cousin, or stepparent; 2) a foster home licensed, approved or specified by the child’s tribe; 3) an Indian foster home licensed or approved by authorized non-Indian licensing authority; <i>or</i> 4) an institution for children approved by an Indian tribe or operated by Indian organization which has a program suitable to meet child’s needs. <b>ICWA §§ 1903(2) &amp; 1915(b); Ch. C. § 32A-4-9.</b>
<b>Placement Preferences – Adoption</b> ICWA §§ 1903(2) & 1915(b); Ch. C. § 32A-5-5(A)	Adoptive placement: absent good cause, preference <i>shall</i> be given to: 1) a member of child’s extended family, as defined by law/custom of child’s tribe or, absent law or custom, shall be person age 18 or older who is child’s grandparent, aunt/uncle, brother/sister, brother/sister-in-law, niece/nephew, first/second cousin, or stepparent; 2) other members of the Indian child’s tribe; <i>or</i> 3) other Indian families. <b>ICWA §§ 1903(2) &amp; 1915(a); Ch. C. § 32A-5-5(A)</b> .
<b>Good Cause Not to Follow Placement Preferences</b> ICWA § 1915(a); Ch. C. §§ 32A-4-9 & 32A-5-5(A)	Any party asking for a departure must prove good cause by <i>clear and convincing evidence</i> . Good cause must be based on: request of parents, request of child, or the extraordinary physical or emotional needs of the child, however, these extraordinary physical and emotional needs cannot include ordinary bonding or attachment that might have occurred in the current placement or the fact that the child has been in the current placement for an extended period. <b>ICWA § 1915(a); BIA Guidelines F.4; Ch. C. §§ 32A-4-9 &amp; 32A-5-5(A)</b> .
<b>Different order of placement preferences</b> ICWA § 1915(c)	If the child’s tribe established a different order of preference by resolution, CYFD or court shall follow that different order so long as it is the least restrictive setting appropriate for the child; also when appropriate, the child’s or parent’s preference shall be considered. <b>ICWA § 1915(c)</b> . Placement within child’s own tribe is preferred. <b>BIA Guidelines F.1.</b>
<b>Custody Hearing</b> Ch. C. § 32A-4-18(I)	Court shall determine whether child is an Indian child, tribal affiliation, residence or domicile on or off reservation for jurisdiction/transfer; whether notice requirements were met; and whether placement preferences were followed. <b>BIA Guidelines A.3 &amp; B.1</b> ; NM Child Welfare Handbook, Ch. 13.8. Although not required at this stage, the court should also consider whether active efforts were made to prevent the breakup of the family.
<b>Adjudicatory Hearing</b> ICWA § 1912(d)-(e); <i>Marlene C.</i> , 2011-NMSC-005	<i>Burden of proof: clear and convincing evidence</i> . At foster care placement, court must find that <i>active efforts</i> were made to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family and such efforts proved unsuccessful, including testimony of <i>qualified expert witnesses</i> that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child. <b>ICWA § 1912(d)-(e); <i>CYFD v. Marlene C.</i>, 2011-NMSC-005, ¶ 36</b> . Clear and convincing evidence requires proof of a <i>causal relationship</i> between conditions in the home and serious emotional or physical damage to the particular child

	who is subject of the proceedings. The determination <i>cannot</i> be based only on evidence of community or family poverty, single parenthood, the custodian’s age, crowded/inadequate housing, substance abuse, or nonconforming social behavior. <b>BIA Guidelines D.3.</b>
<b>Active Efforts</b> ICWA § 1912(d); <i>Yodell B., 2015-NMCA-___ (No. 33,990, Dec. 21, 2015)</i>	Active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family are <i>required in every</i> ICWA case, <b>ICWA § 1912(d)</b> , and must be proved by clear and convincing evidence. <i>CYFD v. Yodell B., 2015-NMCA-___ (No. 33,990, Dec. 21, 2015)</i> . ASFA does <i>not</i> alter ICWA’s active efforts requirement: even where ASFA may relieve the State from proving reasonable efforts, active efforts are required. Active efforts constitute more than reasonable efforts and include identifying appropriate services (including community-based services); actively assisting parents to overcome barriers to obtaining services; inviting representatives of the child’s tribe to participate in services and proceedings; accounting for the tribe’s social and cultural conditions and way of life; offering/employing all available and culturally appropriate family preservation strategies; notifying and consulting with the child’s extended family members to provide family structure and support for the child, to assure cultural connections, and to serve as placement resources for the child. <i>Yodell B., 2015-NMCA-___</i> . This list is not exhaustive; the court should think creatively to ensure that culturally appropriate services are provided. <b>BIA Guidelines A.2.</b>
<b>Term. of Parental Rights, Permanent Guardianship</b> ICWA § 1912(d)-(f); Ch. C. §§ 32A-4-29(I) & -32(E)	Burden of proof – <i>beyond a reasonable doubt</i> . In any proceeding involving ICWA, grounds for termination or permanent guardianship shall be proved beyond a reasonable doubt and a court must find that <i>active efforts</i> were made to provide remedial and rehabilitative services designed to prevent breakup of Indian family and such efforts proved unsuccessful, including testimony of a <i>qualified expert witness</i> that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child. <b>ICWA § 1912(d)-(f); Ch. C. §§ 32A-4-29(I) &amp; -32(E).</b>
<b>Qualified Expert Witness (QEW)</b> ICWA § 1912(e)-(f)	Characteristics of person(s) presumed to meet QEW requirements (in descending order): (1) member of child’s tribe recognized by tribal community as knowledgeable in tribal customs pertaining to family organization/childrearing; (2) member of another tribe recognized to be a QEW by the child’s tribe based on their knowledge of delivery of child and family services to Indians and to the child’s tribe; (3) layperson recognized by the tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards/childrearing practices in the Indian child’s tribe; (4) professional having substantial education and experience who can demonstrate knowledge of the prevailing social and cultural standards/childrearing practices of the tribe. Court or any party may request assistance of child’s tribe or BIA to locate QEW. <b>ICWA § 1912(e)-(f); BIA Guidelines D.4.</b>
<b>Vol. placement or termination</b> ICWA § 1913(c)	In <i>voluntary</i> proceedings for termination of parents rights to or adoptive placement of an Indian child, consent of parent may be withdrawn for any reason at any time prior to the entry of final decree of termination or adoption, and child must be returned to parent. <b>ICWA § 1913(c).</b>
<b>Invalidation of proceedings</b> ICWA § 1914	Any Indian child, any parent or Indian custodian from whose custody the child was removed, and Indian child’s tribe may petition any court of competent jurisdiction to invalidate the foster care placement or termination of parental rights, by showing violations of <b>§ 1911 (jurisdiction), § 1912 (pending proceedings), or § 1913 (parental rights).</b> <b>ICWA § 1914.</b>
<b>Return of custody</b> ICWA § 1916	When final adoption decree of Indian child is vacated/set aside, or adoptive parents voluntarily consent to TPR, court shall grant petition for return of child by a biological parent or prior Indian custodian unless not in child’s best interest. <b>ICWA § 1916.</b>
<b>Improper removal</b> ICWA § 1920	When an Indian child has been improperly removed from parent or Indian custodian or improperly retained in custody, court must return child to parent or Indian custodian unless return would subject child to substantial and immediate danger or threat of immediate danger. <b>ICWA § 1920.</b>
<b>IGAs</b> ICWA § 1919(a); Ch. C. § 32A-1-8(E)	Some tribes may have Intergovernmental Agreements with the state that specifically address child custody proceedings. <b>ICWA § 1919(a).</b>