

Indian Family Protection and Indian Child Welfare Acts Implementation:

Summary of Key Provisions in State Law that Apply to New Mexico Abuse/Neglect Proceedings, Including Brief Citation to Federal Law When Needed

References	<p>Indian Family Protection Act, Section 32A-28-1, et seq. (IFPA) NM Children’s Code (Ch. C.), Section 32A-1-1 et seq. (In addition to IFPA) NM Children’s Court Rules and Forms (Ch. Ct. Rule or Ch. Ct. Form), Rule Set 10. Indian Child Welfare Act, 25 USC §§ 1901-1963(ICWA). Federal Final Rule (Final Rule), 25 CFR Part 23, effective for all proceedings initiated on after Dec. 12, 2016. Bureau of Indian Affairs Guidelines for Implementing the Indian Child Welfare Act (Guidelines), issued December 2016, https://bia.gov/cs/groups/public/documents/text/idc2-056831.pdf.</p>
Purpose & Liberal Interpretation IFPA generally ICWA § 1902; <i>Marlene C.</i> , 2011-NMSC-005	<p>Congress adopted ICWA “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.” ICWA § 1902. “When construing ICWA,” the court must resolve all “ambiguities liberally in favor of the Indian parent and the tribe in order to effectuate the purpose of the Act, which is to prevent the unnecessary removal of Indian children.” <i>State ex rel. CYFD v. Marlene C.</i>, 2011-NMSC-005, ¶ 19.</p> <p>IFPA codifies into State law the federal protections for tribes and their children and families and strengthens and surpasses the requirements of previously existing law. The passage of IFPA was tribally led and based on the lived experience of tribal workers, tribal leadership, other practitioners and impacted families. Subsequent to the passage of IFPA, in <i>Haaland v. Bracken</i>, 599 U.S. ____ (2023), the United States Supreme Court upheld ICWA, rejecting Petitioner’s arguments that Congress did not have the power to enact the law. The Court did not address the challenges to ICWA’s placement preferences holding that Petitioners did not have standing to raise the challenges.</p>
General Notes IFPA generally § 32A-28-40	<p>IFPA applies to every Indian Child whether the child is a member of a tribe located in New Mexico or another state. Tribes outside of New Mexico may not be familiar with IFPA, but will be familiar with ICWA and, therefore, some education for out of state tribes might be necessary. IFPA must, to the greatest extent possible, be read in harmony with ICWA. § 32A-28-40(A).</p> <p>IFPA governs child custody proceedings involving an Indian child and provisions of the Children’s Code are supplemental to and in harmony with IFPA. If provisions of the Children’s Code or other law conflicts with IFPA provisions, IFPA provisions apply. § 32A-28-40</p>
Applicability IFPA § 32A28-40; ICWA § 1903(1); <i>Final Rule</i> § 23.103; <i>Guidelines B.2</i> .	<p>IFPA governs all child custody proceedings involving Indian children. § 32A-28-40(B).</p> <p>See also, ICWA § 1903(1); Final Rule § 23.103; Guidelines, B.2. In determining whether ICWA applies, the court shall not consider factors like the parents’ or the Indian child’s participation in tribal cultural, social, religious, or political activities; the relationship between the Indian child and his or her parents; whether the parent ever had custody of the child; or the Indian child’s blood quantum. Final Rule § 23.103; Guidelines B.2. “If ICWA applies at the commencement of the proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.” Final Rule § 23.103; Guidelines B.2.</p>

<p>Indian Child</p> <p>IFPA §§ 32A-28-40; 32A-28-6 ICWA § 1903(4); Final Rule, §§23.107 & 23.108; Guidelines B.1 & B.7; Rule 10-315; Ch. Ct. Form 10-520.</p>	<p>Definition</p>	<p>An “Indian Child” is an Indian, or a person whom there is reason to know is an Indian, under 18, who is not married or emancipated. § 32A-1-4(O). An “Indian” is a person, whether an adult or a child, who is a member of an Indian tribe or eligible for membership in an Indian tribe. § 32A-1-4(N). A tribe has the sole right to determine membership and membership eligibility - defined by the Indian tribe’s custom, tradition and practice. § 32A-28-6.</p> <p>See also, ICWA § 1903(4); Guidelines B.1 (political relationship to the tribe). Guidelines B.1 and B.7. (determinations of membership and eligibility for membership are determinations that Tribes make as sovereigns and state courts must defer to the Tribe’s determination; the Tribe’s determination may be provided in writing or by testimony at a hearing, or by other appropriate methods).</p>
	<p>Duty to Inquire</p>	<p>At the beginning of every proceeding, the court must make a written determination as to whether IFPA applies to the case. The court must determine at the commencement of any hearing a child custody proceeding whether the child is an Indian child by asking, on the record, each individual present whether that individual knows or has reason to know that the child is an Indian child. § 32A-1-14.1 (B) & (C).</p> <p>See also, Final Rule, § 23.107; Guidelines B.1; Ch. Ct. R. 10-315; Ch. Ct. Form 10-520.</p>
	<p>Duty to determine, reason to know</p>	<p>A court has reason to know a child is an Indian child if: (1) an Indian tribe asserts the child may be eligible for membership; (2) any party in the proceeding, officer of the court involved in the proceeding or an Indian organization informs the court that the child is an Indian child; (3) any party at the hearing, officer of the court present at the hearing, Indian tribe or Indian organization informs the court that information has been discovered indicating that the child is an Indian child; (4) the child indicates to the court that the child is an Indian child; (5) the court is informed that the domicile or residence of the child, the child’s parent, the child’s guardian or the child’s Indian custodian is on a reservation or in an Alaska native village; (6) the court is informed that the child is or has been under the jurisdiction of a tribal court; (7) the court is informed that the child or the child’s parent possesses an identification card or other record indicating membership in an Indian tribe; (8) testimony or documents presented to the court indicate that the child may be an Indian child; or (9) any other indicia provided to the court or within the court’s knowledge indicate that the child is an Indian child. § 32A-14.1(D).</p> <p>See also, Ch. Ct. Rule 10-315; Guidelines B.1. (encouraging expansive interpretation of facts and urging further investigation into the child’s status early in the case if any of the factors are or may be present).</p>
	<p>Effect on Proceedings (cont. pg. 3)</p>	<p>If there is reason to know that a child is an Indian child, but the court does not have sufficient information to determine whether the child is an Indian child, the Court must (1) treat the child as an Indian child until the court determines on the record that the child is not an Indian child, and (2) require CYFD or another party to submit a report, declaration or testimony on the record that CYFD or other party made active efforts to identify and work</p>

	<p>Effect on Proceedings (cont. from pg. 2)</p>	<p>with all of the Indian tribes of which there is reason to know the child may be a member or eligible for membership to verify whether the child is an Indian child. § 32A-1-14.1(E).</p> <p>See also, Guidelines B.1; Ch. Ct. Rule 10-315; Ch. Ct. Form 10-520.</p> <p>If no individual at the hearing knows or has reason to know that the child is an Indian child, the court must instruct each party to inform the court immediately if the individual later receives information that provides reason to know that the child is an Indian child. § 32A-1-14.1(C).</p> <p>See also, Guidelines B.1.; Ch. Ct. Rule 10-315; Ch. Ct. Form 10-520</p>
<p>Child Custody Proceeding, defined</p> <p>§ 32A-28-2(C); Final Rule § 23.103; Guidelines, B.2.</p>		<p>“Child custody proceedings” include: (1) an action for foster care placement; (2) an action for termination of parental rights; (3) an action for guardianship or adoptive placement; (4) voluntary placement; (5) an action pursuant to the Family in Need of Court-Ordered Services (FINCOS) Act; (5) investigations; and, (6) other preliminary activities preceding the formal initiation of action. § 32A-28-2(C).</p> <p>See also, Final Rule § 23.103; Guidelines, B.2 (child custody proceedings)</p>
<p>Emergency removal, emergency proceeding (cont. pg. 4)</p> <p>§ 32A-28-11 ICWA § 1922; Ch. C. § 32A-4-16</p>		<p>IFPA provides for CYFD to file for temporary emergency removal of a child who is a resident of or domiciled on a reservation but temporarily located off a reservation. The Department provides notice of the emergency removal to the tribe, parents, guardians, and Indian custodian within 24 hours of filing the petition. The State court has temporary emergency jurisdiction if the child is present in this state and has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child is subjected to or threatened with abuse or neglect. The State court’s child custody determination remains in effect until an order is obtained from a tribal court. If a child custody proceeding is not started in tribal court, the Department can file an abuse and neglect petition. If a State court is informed that a proceeding has been commenced in, or a child custody determination has been made by, a tribal court with jurisdiction, the State court must immediately communicate with the tribal court. IFPA § 32A-28-11. The IFPA emergency removal provision should be read in conjunction with IFPA § 32A-28-7, which provides for exclusive jurisdiction in the tribe over child custody proceedings involving a child who is resident of or domiciled on a reservation, except when jurisdiction is otherwise vested in the state by federal law or pursuant to a tribal-state agreement.</p> <p>Under ICWA, an emergency proceeding is any court action that involves an emergency removal or emergency placement of an Indian child residing or domiciled off reservation, as well as to Indian children residing or domiciled on reservation, but who are temporarily located off reservation. ICWA § 1922; Ch. C. § 32A-4-16; Final Rule § 23.2; Guidelines, C.1.</p> <p>When an Indian child is subject of an emergency proceeding, the State court must take certain steps to ensure that the removal or placement does not last longer than the emergency, including making findings on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child, holding a prompt hearing whenever new information indicates that the emergency situation has ended, and determining at every hearing during the emergency proceeding whether the emergency removal or placement is still necessary to prevent imminent damage or harm. When the emergency removal</p>

<p>Emergency removal, emergency proceeding (cont. from pg. 3)</p>	<p>or placement is no longer necessary to prevent imminent physical damage or harm, the removal or placement must be terminated immediately with one or more of the following actions: (1) CYFD initiating a child custody proceeding subject to ICWA, (2) transferring the child to the tribe’s jurisdiction, or (3) restoring the child to parent or Indian custodian. Final Rule § 23.113; Guidelines, C.3. An emergency proceeding should not continue for more than 30 days absent specified court determinations because the “full suite of due process and ICWA protections” do not generally apply to emergency proceedings. Final Rule § 23.113; Guidelines C.5.</p>	
<p>Jurisdiction ICWA § 1911(a); Holyfield, 490 U.S. 30 (1989).</p>	<p>The Tribal court has exclusive jurisdiction over any child custody proceeding involving an Indian child residing or domiciled within the reservation of the Indian tribe. IFPA § 32A-28-7(A).</p> <p>In a child custody proceeding involving a child not domiciled or residing within the reservation of the child’s tribe, the state and tribal court have concurrent jurisdiction. IFPA § 32A-28-7(B); see also, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989). (See Right to Transfer)</p>	
<p>Jurisdiction and Transfer IFPA § 32A-28-7(E); ICWA § 1911; Final Rule §§ 23.118 & 23.119; Guidelines C.3, F.5 & F.6; Ch. C. § 32A-1-9(D); Holyfield, 490 U.S. 30 (1989)</p>	<p>Concurrent jurisdiction, good cause not to transfer</p>	<p>In cases of concurrent jurisdiction, if the Indian child’s tribe accepts jurisdiction, State court shall transfer proceedings to tribe’s jurisdiction upon oral or written motion of Indian child’s parent, guardian, Indian custodian, or tribe, unless: (1) either parent objects; or (2) good cause exists to deny transfer. IFPA § 32A-28-7(E) See also, ICWA § 1911(b); Guidelines C.3; Ch. C. § 32A- 1-9(D). Burden is on party opposing transfer to show, on the record, that good cause exists not to transfer. All parties and the child’s tribe even if the tribe has not formally intervened, have an opportunity to present facts and legal arguments. Good cause must be established by clear and convincing evidence. IFPA § 32A-28-7(F). State courts shall not consider the following as reasons not to transfer: (1) proceedings at an advanced stage if the parent, guardian, Indian custodian or Tribe did not receive notice until an advanced stage; (2) timing of tribe’s intervention; (3) prior proceedings for which transfer was not sought; (4) prediction about whether transfer could result in a change of placement; (5) the child’s cultural connections (or lack thereof) with the tribe or reservation; (6) consideration of any perceived inadequacy of a tribe’s judicial system; (7) consideration of perceived socio-economic conditions within the tribe or reservation or (8) a delay in placing a child with the child’s extended family members or adult relatives, regardless of the stage of the proceeding. IFPA § 32A-28-7(G). The basis for any state court decision to deny transfer should be stated orally on the record and in a written order. IFPA § 32A-28-7(H); see also, Final Rule § 23.118; BIA Guidelines F.5.</p>
	<p>Tribal exclusive jurisdiction</p>	<p>When an Indian child is under the jurisdiction of the tribal court, the Indian tribe retains exclusive jurisdiction notwithstanding residence or domicile. IFPA § 32A-28-7(A). In cases of tribal exclusive jurisdiction, the state court has temporary emergency jurisdiction if the child has been abandoned or it is necessary in an emergency to protect the Indian child. A determination under the temporary emergency jurisdiction provision remains in effect until an order is obtained from a tribal court. IFPA § 32A-28-11; see also ICWA § 1911(a); Final Rule § 232.110; Guidelines F.1.</p> <p>In cases of exclusive tribal jurisdiction, the case should be transferred to tribal court without delay even if a parent objects. Miss. Band, 490 U.S. at 53.</p>

	Timing	Transfer is available at any stage, even at a late stage of the proceeding. IFPA § 32A-28-7(D) ; see also, Guideline F.2.
	Transferring the case	If the state court authorizes the transfer, the court: retains jurisdiction until the tribal court exercises jurisdiction and confirms that the tribe has received all required information; expeditiously transfers all records related to the proceeding, including all pleadings and the court record; and, directs CYFD to coordinate with tribal court and tribe to minimize disruption in services to the family, and expeditiously provide at no cost enumerated records and documents. IFPA § 32A-28-7(I) ; see also Final Rule on § 23.119 ; Guidelines F.6.
Right to counsel IFPA § 32A-28-5 ICWA § 1912(b) ; Ch. C. § 32A-4-10		ICWA and the Abuse and Neglect Act provide that, if indigent, the parent or Indian custodian has right to court-appointed counsel in any removal, placement, or termination proceeding. The court may appoint counsel for an Indian child, if in best interest of child. ICWA § 1912(b) ; Ch. C. § 32A-4-10 . IFPA requires that, in its notice of a child custody proceeding, CYFD notify the parent, guardian and Indian custodian of their right to court-appointed counsel if that person is unable to afford counsel. IFPA § 32A-28-5
Right to intervene IFPA § 32A-28-14 ICWA § 1911(c)		The tribe has a right to intervene any point in a child custody proceeding. IFPA § 32A-28-14(A) . In any proceeding subject to IFPA for foster care placement, guardianship placement, adoptive placement or termination of parental rights to an Indian child, the child’s relative or extended family member, the guardian or Indian custodian may file a motion to intervene at any point in the proceeding. When determining whether to permit intervention, the court must consider the person’s rationale for the proposed intervention and whether the intervention is in the best interest of the child. § 32A-28-14(B) ; see also, ICWA § 1911(c) .
Right to review reports IFPA § 32A-28-39		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 IFPA. IFPA § 32A-28-39 .
Right to extra time to prepare ICWA §1912(a) ; Ch. Ct. Rule 10-312 ; Marlene C., 2011-NMSC-005		No foster care placement or TPR proceeding shall be held until at least 10 days after receipt of notice by parent, guardian or Indian custodian and the tribe or BIA. Court shall grant 20 additional days to parent, guardian, Indian custodian or tribe, upon request, to prepare for proceeding. § 32A-28-13(E) ; see also, ICWA § 1912(a) . The court can review a removal of an Indian child at an emergency custody proceeding before the expiration of the waiting periods to determine the appropriateness of the removal and potential return of the child. § 32A-28-13(F) . This review would be at the 10-day custody hearing under § 32A-4-18 . See also, State ex rel. CYFD v. Marlene C., 2011-NMSC-005, ¶ 34 (custody hearing is an emergency proceeding (under ICWA § 1922) and is not subject to ICWA’s 10-day notice or “extra-time to prepare” requirements. Instead, the notice and timing requirements apply to the adjudication); but see Ch. Ct. R. 10- 312(E) .
Custody & investigation IFPA §§ 32A-28-43 ; 32A-2nd 8-6 Guidelines B.8 ; Ch. C. §§ 32A-4-6(C) & -22(I) ; Marsalee P., 2013-NMCA-062		When taking child into custody, CYFD shall make active efforts to determine whether there is reason to know the child is an Indian child. § 32A-28-43(A) . CYFD shall work with the parent, the guardian, the Indian custodian and the tribe to establish membership at the direction of the parent or tribe. § 32A-28-6 ; see also, State ex rel. CYFD v. Marsalee P., 2013-NMCA-062 ; accord Guidelines B.8.

<p>Notice of the Proceeding</p> <p>IFPA §§ 32A-28-12; 32A-28-5; 32A-28-2(C); 32A-28-11</p>	<p>CYFD must provide notice to the tribe within 24 hours of initiating an investigation involving an Indian child, notifying the tribe. IFPA § 32A-28-12(A). If the Department must notify the tribe before filing a petition of the results of the investigation, including active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have been unsuccessful, resulting in the Department’s intention to file the petition. IFPA § 32A-28-12(D). After filing a child custody proceeding, when the court knows or has reason to know that an Indian child is involved, CYFD notifies by certified mail, return receipt requested, the parent, guardian, Indian custodian, and tribe of 1) the pending proceedings; 2) right of parent, guardian, Indian custodian and tribe to intervene and to petition the court for transfer to tribal court, 3) right of parent, guardian or Indian custodian to court-appointed counsel if the court determines that person is unable to afford counsel, 4) right of tribe to participate in the proceeding whether or not the tribe intervenes. IFPA §§ 32A-28-5(A); 32A-28-2(C) (definition of “child custody proceeding”). CYFD must notify the tribe, parents, guardian and Indian custodian within 24 hours of filing a petition for temporary emergency removal where CYFD demonstrates that child is a resident of or domiciled on a reservation but temporarily located off a reservation. § 32A-28-11.</p>	
<p>Placement Preferences</p> <p>ICWA §§ 1903(2) & 1915; Final Rule §§ 23.130 - 23.132; Guidelines H.1 – H.5; Ch. C. § 32A-4-9 & 32A-5-5(A); Ch. Ct. Rule 10-318; Casey J., 2015-NMCA-088</p>	<p>Foster Care Placement</p>	<p>Child must be placed in the least restrictive setting that most approximates family, taking into consideration the child’s sibling attachment, meets child’s special needs, if any, and is within reasonable geographic proximity to the child’s home, extended family members or siblings; and is in accordance with the order established by the tribe by any means. If the tribe has not established placement preferences, preference shall be given, in order of preference, to: 1) a member of child’s extended family, 2) a foster home licensed, approved or specified by the child’s tribe; or 3) a foster home licensed or approved by a licensing authority in New Mexico and in which one or more of the licensed or approved foster parents is an Indian. an Indian foster home licensed or approved by authorized non-Indian licensing authority. A child under three months cannot be placed outside the placement preferences. IFPA §§ 32A-28-21 & 32A-28-ICWA §§ 1903(2) & 1915(b) (establishes an additional preference for foster care placement not provided for in IFPA); Final Rule § 23.131; Guidelines H.2. IFPA does not set forth placement preferences specific to adoptive placements. (Cf ICWA §§ 1903(2) & 1915(a); Final Rule § 23.130; Guidelines H.1. If a child is not in a preferred placement, the court must hold hearings no less than every six months. IFPA § 32A-28-21(D). Before the permanency plan of a child is changed to adoptive or other permanent placement, CYFD must conduct monitoring at least every 30 days to determine whether a placement that comports with the preferences is available and make active efforts to identify a placement that aligns with the preferences. IFPA § 32A-28-21(C).</p>
	<p>Good cause to depart from placement preferences, permissible and impermissible consideration</p>	<p>Any party seeking a departure must prove good cause not to follow the placement preferences by clear and convincing evidence. The court’s determination of good cause must be made in writing and should be based on the considerations set forth by IFPA. IFPA § 32A-28-21; see also, ICWA § 1915(a); Final Rule § 23.132; Guidelines H.4; Ch. Ct. Rule 10-318. A placement may not depart from the preferences based on: 1) the socioeconomic status of the placement; 2) a home environment that does not impact the safety or well-being of the child; 3) ordinary bonding or attachment that occurred from time spent in a non-preferred placement made in violation of IFPA; or 4) the extent of the participation of the parents or Indian child in tribal, cultural, social, religious or political activities. IFPA § 32A-28-21(H); see also, Final Rule § 23.132; Guidelines H.5; Ch. Ct. Rule 10-318.</p>

	Different order of placement preferences	If the child’s tribe has established a different order of preference by any means, the preferences shall apply. When appropriate, the preference of the child or parent may be considered. IFPA § 32A-28-21(A), (G), & (I) . See also, ICWA § 1915(c) ; Final Rule §§ 23.130 & 23.131 ; Guidelines H.1 & H.2
	Active efforts required	At the inception of the case and periodically through the pendency of the case, CYFD must make active efforts to identify a placement that aligns with the placement preferences. Active efforts, at a minimum must include: 1) contacting the tribe, 2) conducting a relative search, 3) interviewing relatives throughout the case, 4) making ongoing active efforts to search for and identify child’s relatives throughout the case, 5) providing drive with all information regarding family members, 6) offering relatives an expedited foster care license, assisting relatives with practical supports through licensing process and actively supporting relatives in overcoming barriers, 7) conducting timely home studies when identifying a placement that aligns with preferences, 8) providing continued contact, including visitation, and (9) providing access to culturally appropriate interventions. IFPA § 32A-28-21(C) ; see also, Guidelines H.3
Foster Care Placement/ Adjudication IFPA § 32A-28-13 IFPA § 32A-28-a 17 ICWA § 1912(d)-(e) ; Final Rule § 23.121 ; Guidelines G.1. ; Ch. C. § 32A-4-20 ; Marlene C., 2011-NMSC-005 ; Yodell B., 2016-NMCA-029	Burden of Proof, Active Efforts & QEW Requirement	The court must find, by clear and convincing evidence, that active efforts were made to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family and such efforts proved unsuccessful, including testimony of one or more qualified expert witnesses that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child. IFPA §32A-28-13(B) ; see also, ICWA § 1912(d)-(e) ; Ch. C. § 32A-4-20 ; CYFD v. Marlene C., 2011-NMSC-005, ¶ 36 (the adjudicatory hearing is the hearing when a “foster care placement” occurs); CYFD v. Yodell B., 2016-NMCA-029, (filed Dec. 21, 2015) . The court must receive the testimony from one or more qualified expert witnesses even if the parties have stipulated to a finding of abuse or neglect. IFPA § 2A-28-17(A) . A finding of futility or aggravated circumstances cannot be pled by CYFD or found by the court. IFPA § 32A-28-13(A) Evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody by the parent, guardian or custodian is likely to result in serious emotional or physical damage to child. Without this causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, the custodian’s age, crowded/inadequate housing, substance abuse, or non-conforming social behavior shall not by itself continue clear and convincing evidence that continued custody is likely to result in serious emotion or physical damage to the child. 32A-28-13 ; see also, Final Rule § 23.121 ; Guidelines G.1.
	Notice	See Notice of the Proceeding, above.
	Timing of Hearing	Because “foster care placement” occurs at the adjudication in New Mexico, the adjudication may not be held for at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or BIA. If requested by the parent, guardian, Indian custodian or tribe, the Court shall grant an additional 20 days to prepare for the proceeding. IFPA § 32A-28-13 ; see also, ICWA §1912(a) ; CYFD v. Marlene C., 2011-NMSC-005, ¶ 36 .

<p>Active Efforts</p> <p>ICWA § 1912(d); Marlene C., 2011-NMSC-005; Yodell B., 2016-NMCA-029</p>	<p>Requirement, Burden of Proof, Timing</p>	<p>Active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family are required in every IFPA case. IFPA § 32A-28-13(A) (the court shall not make findings of futility or aggravated circumstances in child custody proceeding [involving an Indian child]); Active efforts must be proved by clear and convincing evidence in adjudications and beyond a reasonable doubt at termination of parental rights hearings. State ex rel CYFD v. Maisie Y., 2021-NMCA-023 ¶ 23 overruling CYFD v. Yodell B., 2016-NMCA-029, (filed Dec. 21, 2015); CYFD v. Marlene C., 2011-NMSC-005, ¶ 36.</p> <p>ASFA does not alter ICWA’s active efforts requirement: even where ASFA may relieve the State from proving reasonable efforts, active efforts are required.</p>
	<p>Meaning</p>	<p>“Active efforts means affirmative, active, thorough, and timely and that represent a higher standard of conduct than reasonable efforts.” § 32A-28-2(A); see also, Final Rule § 23.2. Active efforts apply to voluntary and involuntary proceedings and must be tailored to the facts and circumstances of the case. Active efforts must assist the parent or Indian custodian through the steps of a case plan and with accessing or developing the resources need to satisfy the plan; Yodell B., ¶¶ 26, 29 (active efforts are more involved and less passive than reasonable efforts; reversing TPR because CYFD “took a passive role by shouldering Father with the burden of not only independently locating and obtaining services, but also ensuring that service providers were communicating with the Department about his progress.”). CYFD provides active efforts in a manner consistent with prevailing social and cultural standards and way of life of tribe and cooperates with the child, parents, extended family members, Indian custodian and tribe in providing efforts. § 32A-28-4; see also, Final Rule § 23.2; Guidelines E.3. For examples of active efforts, see IFPA § 32A-28-4(C). See also Guidelines E.3 & E.4.</p> <p>In State ex rel. CYFD v. Casey J., 2015-NMCA-088, ¶ 14, the NM Court of Appeals found that active efforts were not required to find a placement in accordance with the placement preferences, but IFPA does require active efforts to meet the placement preferences.</p>
<p>Term. of Parental Rights, Permanent Guardianship</p> <p>IFPA § 32A-28-19 ICWA § 1912(d)-(f)</p>	<p>Burden of proof for TPR – beyond a reasonable doubt.</p>	<p>In any proceeding involving IFPA, the grounds for termination of parental rights or permanent guardianship shall be proved beyond a reasonable doubt. The burden of proof at TPR for active efforts is also beyond a reasonable doubt. In addition to finding the grounds for termination, the court must find by evidence beyond a reasonable doubt that active efforts were made to provide remedial and rehabilitative services designed to prevent breakup of Indian family and that such efforts proved unsuccessful, including testimony of a qualified expert witness that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child. The court must consider whether an alternative to TPR, including permanent guardianship, would best support child. Court cannot order TPR unless the tribe was provided with timely notice and opportunity to state whether it opposes TPR; and, if the tribe proposes an alternative permanency plan, CYFD can show good cause supported by clear and convincing evidence why that alternate permanency plan should not be ordered. IFPA § 32A-28-19; see also, ICWA § 1912(d)-(f).</p>
<p>Qualified Expert Witness (QEW) (cont. pg. 9)</p>		<p>The court may qualify a person to serve as a qualified expert witness if the court finds that the person is: 1) knowledgeable about the prevailing social and cultural standards of the tribe and is familiar with the family and child-rearing practices of the tribe; 2) able</p>

<p>Qualified Expert Witness (QEW) (cont. from pg. 8)</p> <p>ICWA § 1912(e)-(f); Final Rule § 23.122; Guidelines G.2</p>	<p>to testify regarding whether child’s continued custody by parent, guardian or Indian custodian is likely to result in serious emotional or physical damage to the child; and 3) is either a member of the child’s tribe or a person recommended by the tribe. IFPA § 32A-28-17; see also, ICWA § 1912; Guidelines G.2. When CYFD notifies tribe of pendency of investigation, it must request the tribe designate a QEW to testify in any child custody or termination proceedings that result from the investigation and collaborate with the tribe to identify a person to serve as a qualified expert witness. IFPA § 32A-28-17; see also, ICWA § 1912(e)-(f); Final Rule § 23.122; Guidelines G.2. If, after filing the petition, CYFD has not identified a QEW, in considering a motion for continuance, the court must consider whether it is in the child’s best interest to remain in CYFD’s custody for additional time. IFPA §32A-28-17. No CYFD employee can serve as a QEW. IFPA § 32A-28-17; see also, Final Rule § 23.122; Guidelines G.2.</p>
<p>Parental consent in vol. placement or termination</p> <p>ICWA § 1913(c); Final Rule § 23.125</p>	<p>Prior to accepting a child for voluntary placement, CYFD must make active efforts to provide or arrange for affordable services and that would alleviate the conditions leading to the placement request. IFPA §§ 32A-28-4(D) & 32A-28-2-18. A voluntary placement agreement involving an Indian child must be executed in writing and recorded before the court. The court must make specified certifications, including that there is no pending child abuse and neglect investigation involving the child and that the parent or guardian is voluntarily entering into the placement without any threat of removal of the child by CYFD. The parent or guardian may withdraw consent to the voluntary placement at any time and, upon receipt of a request to withdraw, CYFD must return the child to the child’s parent or guardian. CYFD has 48 hours after withdrawal of consent to allow for transition arrangements to be made for the child’s return. IFPA § 32A-28-18.</p> <p>See also ICWA § 1913(c); Final Rule § 23.125 (in voluntary proceedings for termination of parental rights to or adoptive placement of and 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).</p>
<p>Other State Court Proceedings (cont. pg. 10)</p>	<p>ICWA does not have provisions relating to State court proceedings such as judicial reviews and permanency hearings, but IFPA added requirements for these hearings as well as for CYFD’s required reports for the hearings. The provisions are in addition to the requirements for the hearings set forth in the Abuse and Neglect Act, § 32A-4-1, et seq.</p> <p>At disposition, the court must include findings of: 1) placement preferences incorporated into case plan or good cause for noncompliance clearly stated and supported by clear and convincing evidence; 2) case plan provides for maintenance of cultural ties; 3) how child’s cultural needs are considered and how, when reasonable, access to cultural practices and traditional treatment provided; and, whether tribe was included in developing case plan and provided copy of plan before presentation to court. IFPA § 32A-28-28(A) (see also § 32A-28-26 regarding what needs to be in predispositional report).</p> <p>At initial judicial review, and at periodic judicial reviews, CYFD must demonstrate that it made active efforts to implement the case plan and the court must determine the extent to which the case plan was implemented and make appropriate supplemental orders. The court also looks at whether the placement preferences were followed and, if not, whether good cause for noncompliance is clearly stated. IFPA § 32A-28-29.</p>

<p>Other State Court Proceedings (cont. from pg. 9)</p>	<p>At permanency hearings, CYFD must submit progress reports documenting: 1) tribe invited to pre-permanency meeting and included in any attempt to settle issues attendant to permanency hearing and had opportunity to participate in developing case plan; 2) active efforts to prevent breakup of family or reunify family; 3) placement preferences were followed, or good cause as to why they weren't followed is clearly stated and supported by convincing evidence; 4) active efforts to implement cultural maintenance plan in conjunction with tribe and family; 5) inclusion of tribe in CYFD's active efforts and documentation of tribe's input; and, 6) all requirements of IFPA followed. IFPA § 32A-28-27</p>
<p>Transition Services & Discharge Hearing</p>	<p>Transition services provided by CYFD: 1) Prior to child reaching 17, CYFD must meet with the youth, tribe, child's attorney and others of youth's choosing, including biological family members, to develop transition plan IFPA § 32A-28-24(A); 2) CYFD must assist the youth in identifying and planning to meet youth's needs after 18, including maintenance of culture, housing, education, employment or income health and mental health, local opportunities for mentors and continuing support services IFPA § 32A-41-24(A); and, CYFD must include the tribe in developing the transition plan and provide a copy of plan to the tribe prior to presentation to court. IFPA § 32A-28-23(B).</p> <p>Discharge hearing: At last review or permanency hearing prior to 18th birthday, the court must determine whether documentation of the youth's tribal membership and any information regarding tribal affiliation is provided to the child. If the court determines that CYFD has not made active efforts to meet all requirements of § 32A-4-25.3 and § 32A-28-25(A) and that termination of jurisdiction would be harmful to the youth, the court can continue to exercise jurisdiction (see also § 32A-28-28(C) –for one year and the young adult must consent)</p>
<p>Invalidation of proceedings</p> <p>IFPA § 32A-28-20 ICWA § 1914; Final Rule § 23.137; Guidelines K.3</p>	<p>Any Indian child, any parent, guardian or Indian custodian from whose custody the child was removed, or the Indian child's tribe may petition any court to invalidate the child custody proceeding upon a showing that the action violated any provision of Section 4 (active efforts required), Section 5 (notice to tribe), Section 7 (jurisdiction, transfer), Section 9 (full faith and credit), Section 12 (investigations), Section 13 (notice, standards of evidence, documentation of applicability, compliance), Section 14 (intervention), Section 16 (record of tribe, tribe's right to participate, Section 17 (QEW), Section 18 (VPA), Section 19 (TPR), Section 21 (placement preferences), Section 28 (dispositional judgments), Section 34 (adjudication, disposition, decree of adoption, invalidation), or Section 35 (return of custody). IFPA § 32A-28-20; see also, ICWA § 1914 (a court of competent jurisdiction may be a different court than the court where the original proceedings occurred); Final Rule § 23.137; Guidelines K.3.</p>
<p>Return of custody after TPR or relinquishment</p> <p>ICWA § 1916</p>	<p>When a child has been adopted and the relationship between the parent and the child has been severed for any reason, a biological parent, guardian or prior Indian custodian may petition for return of custody. There is a presumption that the child will be returned unless it is not in the best interest of the child. IFPA § 32A-28-35; see also, ICWA § 1916.</p>
<p>Improper removal</p> <p>ICWA § 192; Final Rule § 23.1140</p>	<p>If any party asserts or the court has reason to believe that an Indian child has been improperly removed from a parent or Indian custodian or improperly retained in custody, the court must expeditiously determine whether the removal or retention was improper, and if so, the court must immediately return the child to parent or Indian custodian unless return would subject child to substantial and immediate danger or threat of immediate danger. ICWA § 1920; Final Rule § 23.114.</p>

Tribal-State Agreements

IFPA § 32A-28-8
ICWA § 1919(a);
Guidelines A.2

CYFD must make good faith efforts to enter tribal-state agreements for coordination of care and custody of Indian children with each tribe in New Mexico. CYFD may enter agreements with tribes outside of New Mexico if children residing in New Mexico are members or eligible for membership of that tribe. [IFPA § 32A-28-8](#); [see also, ICWA § 1919\(a\)](#); [Guidelines A.2](#).

