



NATIVE AMERICAN
BUDGET & POLICY
INSTITUTE



Indian Child Welfare Act (ICWA)

Toolkit

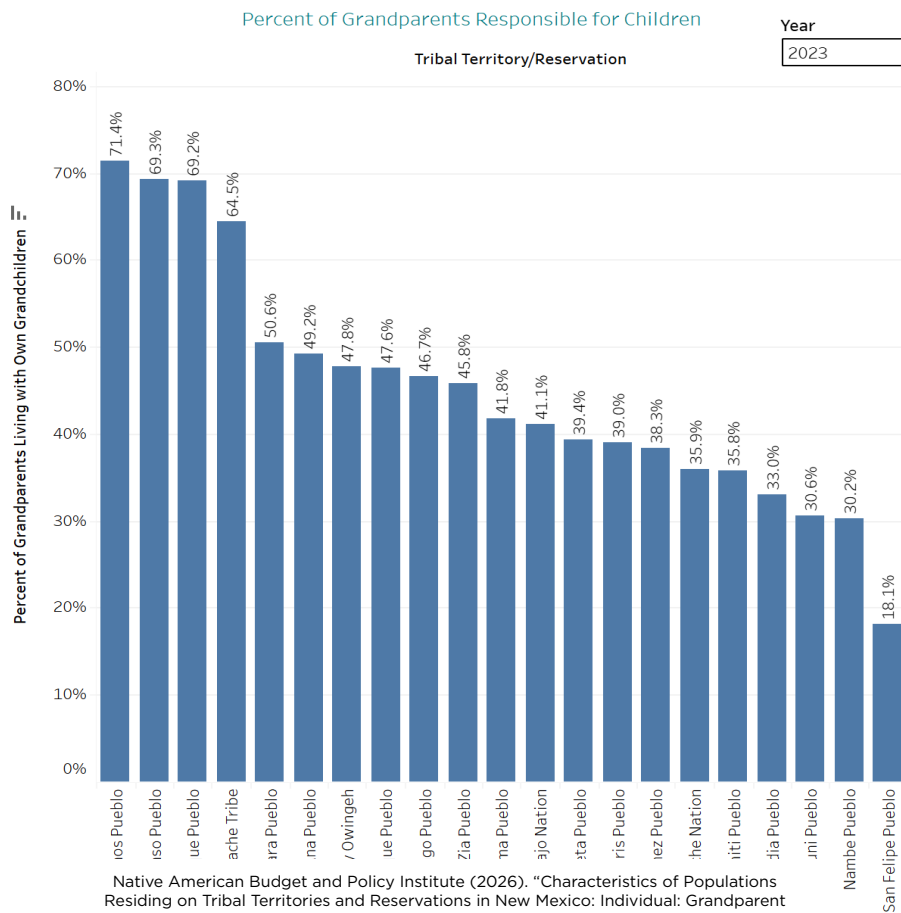
Indian Child Welfare Act (ICWA) Toolkit Introduction

Native families are the least likely to be offered family support interventions intended to keep children within the home, and Native children are the most likely to be removed from their homes as a first resort. Native children are 4x more likely to be removed from their home instead of receiving in-home family preservation services than non-Native children.

According to 2023 data, 42% of Native American households in New Mexico were composed of grandparents living with their grandchildren and legally responsible for care of their grandchildren. Native American grandparents responsible for caring for children range from 71.4% to 18.1% depending on the tribe (NABPI 2026). Almost 10% of Native American households had grandparents caring for their grandchildren but without legal responsibility to do so. These numbers do not reflect the number of households where relatives other than grandparents are caring for children. More than 260 Native American children are currently in foster care in New Mexico.

This toolkit is designed for Tribal leadership and department personnel support Native American children across New Mexico. It deepens readers' knowledge of the law and provides actionable recommendations for how to better protect and support Tribal families.

Note to user: legal terms (first mention) are **bolded in orange**. For full definitions, please see the glossary of terms provided at the end.



Indian Child Welfare Act Basics: What is it?

The Indian Child Welfare Act (ICWA) is a federal law developed to mitigate the massive removal of Native American children from their families that has occurred over the history of the United States. It sets *minimum* standards that *state* courts must follow before removing an “**Indian child**”¹ from their home.

ICWA directives are found in three places:

1. The statute (i.e., the law itself), codified in the United States Code (U.S.C.) at 25 U.S.C. §§ 1901-1963;
2. The regulations, which are legally-binding federal guidance on how to interpret the law, published at 81 FR 38864 (June 14, 2016) and codified at 25 C.F.R. part 23; and
3. The Bureau of Indian Affairs Guidelines, which are not legally-binding but reflect best practices and are meant to assist people in understanding and uniformly applying the law and regulations.

ICWA Basics: Why is it Needed?

ICWA was developed in 1978 as an explicit change in course for the federal government. Prior to its passage, U.S. policy had, for centuries, attempted forced assimilation of Native peoples and of the destruction of Native culture. At the time that ICWA was passed, more than 30% of Native American children were being removed from their homes, and three fourths of those children were placed with white families (<https://www.nicwa.org/what-is-icwa/>), meaning that these children not only were taken from their parents but also from their communities and their nations.

The overwhelming justification for removal was (and is) child neglect. Neglect was primarily alleged for two reasons: (1) non-Native social workers were coming into Native American homes and equating cultural otherness with child neglect; and (2) social workers were equating poverty with neglect. (<https://crownschool.uchicago.edu/student-life/advocates-forum/bolstering-indian-child-welfare-act>). The federal government cut off many reservation communities from resources and economic development but then blamed parents for the consequent housing conditions, the lack of clean water, and not having enough money to support their children.

Still, **Native families are the least likely to be offered family support interventions intended to keep children within the home, and Native children are the most likely to be removed from their homes as a first resort.** To be clear, these trends are not because Native homes are less stable or Native parents are less well-equipped than other families. The data show that among similarly situated parents, **Native children are 4x more likely to be removed from their home instead of receiving in-home family preservation services than non-Native children.** (<https://www.nicwa.org/wp-content/uploads/2025/02/Setting-the-Record-Straight-2018.pdf>). The differential treatment for *same* situation reveals that extensive bias continues to persist in the system.

¹ “Indian child” has a specific meaning as defined in the statute. That definition will be covered in “When Do ICWA and IFPA Apply” on page 3 of this toolkit.

ICWA Basics: ICWA's Policy Goals

ICWA's goals are to:

1. Protect the **best interests of Indian children**;
 2. Promote stability of Indian tribes and families;
 3. Prevent unwarranted removal of Indian children from their families; and
 4. In situations where the child has to be removed, ensure that the child is still connected to their culture and has support with their Native identity.
- 25 U.S.C. § 1902.

Robust implementation of ICWA achieves these goals through acknowledging Tribal sovereignty, providing heightened protections for families, and preserving family and Tribal connections.

Indian Family Protection Act (IFPA) Basics: What is it?

New Mexico also has its own ICWA statute: the Indian Family Protection Act (IFPA), codified in statute at section 32A-28-1, *et seq.* ICWA sets minimum standards for state courts to follow, and New Mexico created heightened requirements for certain types of cases through IFPA.

When Do ICWA and IFPA Apply?

ICWA applies when an “**Indian child**” is involved in a “**child custody proceeding**.”

“Indian Child”

ICWA:

An “Indian child” means any unmarried person younger than 18 and either:

1. A member* or citizen of an “Indian tribe”, or
2. Eligible* for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

25 U.S.C. § 1903(4).

IFPA:

An “Indian child” is a child who is:

1. A member* of an Indian Tribe, or
2. Eligible* for membership or citizenship in an Indian Tribe.

IFPA § 32A-1-4(N).

*The Tribe has the ultimate authority to decide who is and is not a member.² Judges, attorneys, and parties cannot infer whether the child is an Indian child, even based on knowledge of enrollment criteria.

“Member” ≠ Enrolled Member/Citizen

Tribes may define “member” for the purposes of ICWA however they want. Tribes can choose to determine that any child, even a child ineligible for enrollment, is a “member” sufficient for ICWA's and IFPA's application.

² Written determination or testimony from a Tribe that a child is a member or eligible for membership is conclusive evidence that the child is an Indian child. Written determination or testimony from a Tribe that the child is not a member or eligible for membership is conclusive evidence that the child is not a member or eligible for membership in that Tribe (child may still be vis-à-vis another Tribe). No response from a Tribe is *not* conclusive evidence that the child is not an Indian child, but the party asserting that ICWA applies has the burden to prove by a **preponderance of the evidence** that the child is an Indian child. See 25 C.F.R. § 23.108, BIA Guidelines B.1 & B.7.

The IFPA definition of “Indian child” better reflects the political status of being Indian and mitigates mistaken thinking about it as a biological or racial status. The definition also potentially applies more broadly than the ICWA definition, enabling more children to be considered “Indian children” for the purposes of IFPA.

The determination that a child is not an Indian child can be reconsidered during the pendency of an action on the motion of any party based on new evidence, redetermination by a Tribe, or by newly conferred federal recognition of a Tribe.

“**Indian tribe**” is also specifically defined by statute and largely equates to tribes that are federally recognized.

“Child Custody Proceeding”

ICWA (25 U.S.C. § 1903):

1. A “**foster care placement**,” meaning *any* action removing an Indian child where the parent or custodian cannot have the child returned upon demand (including guardianships);**
2. **Termination of parental rights**;
3. A pre-adoptive placement; or
4. An adoptive placement.

IFPA:

1. Permanent guardianship (IFPA § 32A-28-2);
2. Voluntary placement (IFPA § 32A-3A-8); or
3. Families in Need of Court Ordered Services (FINCOS) (IFPA § 32A-3B).

(All of these cases are brought by CYFD.)

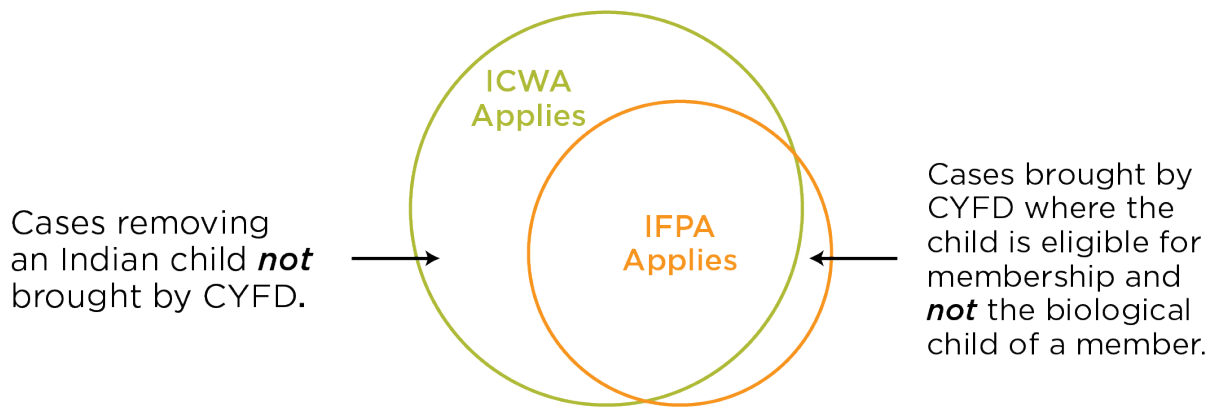
A “child custody proceeding” is *not*:

- Divorce or award of custody between biological or adoptive parents;
- Removal of a child associated with commission of a crime, i.e., placement in juvenile detention; or
- A proceeding in Tribal court.

**Given the statute’s definition of “foster care placement,” ICWA applies much more broadly than many litigants and judges think. Many equate foster care placement only to thinking of IFPA-type situations – cases where a child welfare agency is removing a child. That is *not* accurate. ICWA’s protections apply to any situation where a child is being removed and the parent/custodian cannot have the child returned upon demand, which includes kinship guardianships, some grandparent visitation cases, and others.

Another common misconception is thinking that ICWA does not apply to cases where a parent/custodian is voluntarily giving up custody, whether temporarily or permanently. This is also not true. ICWA still applies.³ Some of ICWA’s requirements, rather, do not apply to these cases.

³ 25 U.S.C. § 1913 outlines certain procedural requirements to ensure consent is truly voluntarily given. And, in the case of a foster care placement, consent is revocable at any time, at which point, the child must be returned immediately.



The Inquiry: an often-neglected requirement of ICWA

In any child custody proceeding, the court has a duty to inquire whether any participant knows or has **reason to know** that the child is an Indian child. If the court has “reason to know”⁴ that a child is an Indian child, it *must* treat the case as an ICWA case until the Tribe(s) determines that the child is not an Indian child.

- The court must ask each participant at the commencement of any emergency, voluntary, or involuntary proceeding.
- Responses must go on the record.
- The parties’ obligation to inform the court re: child’s Indian status is ongoing (i.e., the parties are not supposed to wait until asked by the judge if they find out some new information regarding the child’s Indian status).

25 C.F.R. § 23.107.

How ICWA/IFPA Cases Conclude

CYFD-initiated (aka, IFPA) cases typically conclude in one of the following ways:

- Wholesale **dismissal**;
- **Reunification**, which *should* always be the goal of the Court and the parties upon case opening;
- Dismissal with associated filing (by a private party) for kinship guardianship;
- Permanent **guardianship**, which often is sought when active efforts have been made but reunification is not able to be attained because the child needs permanency; or
- **Adoption**, which requires termination of parental rights and should be an option of last resort.

⁴ Any indication that the child, parent, or other family member has Tribal heritage or may be a citizen or member of a Tribe – even if the specific Tribe is unknown – constitutes a “reason to know” that the child is an Indian child.

Key Protections: How ICWA Achieves Its Purpose of Protecting the Best Interests of Indian Children, Their Families, and Their Tribes

ICWA's protections can broadly be organized into three overarching categories. The list below is not comprehensive but provides highlights.

1. Acknowledging Tribal Sovereignty

- a. Tribal court **jurisdiction**
- b. **Full faith and credit** to Tribal court orders
- c. **Tribal Notice**
- d. Right to **intervene**

2. Heightened protections for families

- a. Right to counsel
- b. **Active Efforts**
- c. **Qualified Expert Witness (QEW)**
- d. Attachment cannot be used as a reason to continue removal

3. Preserving Family and Tribal Connections - Placement Preferences

ICWA's Protections: Acknowledging Tribal Sovereignty

1. Originating Jurisdiction

- a. A Tribe and State have concurrent jurisdiction (meaning that the case can appropriately be brought in either court, i.e., either court can make decisions in the case) when the Indian child resides and is domiciled outside the boundaries of the Indian Tribe.
- b. The Tribe has exclusive jurisdiction (meaning that its court is the only that can appropriately hear a case) when the residence or domicile of the child is on a reservation where the Tribe exercises exclusive jurisdiction over child custody proceedings.

25 U.S.C. § 1911.

2. Case Transfer

- a. If a case where the tribe has exclusive jurisdiction was inappropriately brought in state court, the state court must expeditiously take steps to dismiss the state court case and ensure the tribal court has all of the case information. 25 C.F.R. § 23.110.
- b. The Tribe and parents/custodian have the right to petition for transfer to Tribal court in instances where the case may appropriately be heard in either state or Tribal court. 25 U.S.C. § 1911(b).
 - i. If the Tribe accepts the case, the state court *shall* transfer the case unless either parent objects or **good cause** exists to deny transfer.
 - ii. The burden is on the party opposing transfer to show, by **clear and convincing** evidence, that good cause exists not to transfer.⁵
 - iii. The court's basis to deny transfer must be stated orally on the record and in a written order.

Tip: Transfer can be held up because of lagging or ineffective communication between the two courts. This can be a good place for advocates to step in and facilitate communications, including just regularly checking in to make sure the administrative paperwork is moving forward.

3. Tribal Notice (25 U.S.C. §1912(a))

Notice is a critical part of respecting Tribal sovereignty. As sovereign nations, Tribes have a say over their citizens. Thus, the Tribe must be afforded the opportunity to assert its rights (to participate, intervene, seek transfer) under the Act irrespective of the position of the parents/custodian, child, or child welfare agency.

- a. If ICWA applies, Notice must be given to any and all Tribes with whom the child may be affiliated. 25 C.F.R. § 23.11. The statute requires certain information be included with the Notice and that the petitioner sends Notice by certified mail, return receipt requested, or registered mail with proof of delivery filed with the court.
- b. No foster care placement or termination of parental rights proceeding shall be held until at least ten (10) days after receipt of Notice by the parent/custodian and the Tribe (or the Secretary of the Department of the Interior). 25 U.S.C. § 1912(a).

Tip: Tribal Notice is a highly formulaic part of the statute. If your Tribe is not receiving Notice or adequate information about the details of cases involving your Tribe's children, challenging the proceedings from moving forward until Notice has been effected may be worth considering.

⁵ IFPA details factors that courts cannot consider for denying transfer (IFPA § 32A-28-7(G)): (1) the parent/custodian, guardian, or Tribe did not receive notice until late in the case; timing of the Tribe's intervention; prior proceeding for which transfer was not sought; predictions about whether transfer could result in a change of placement; the child's cultural connections (or lack thereof) with the Tribe; any perceived inadequacy of the Tribe's judicial system; perceived socio-economic conditions within the reservation; or delay in placing the child with extended family members. ICWA arguably would not allow consideration of these factors either.

- c. IFPA requires more vis-à-vis Tribal Notice than ICWA.⁶ CYFD must provide notice to the Tribe within 24 hours of initiating an investigation involving an Indian child. IFPA § 32A-28-12(A). If CYFD's investigation reveals that abuse or neglect is occurring and CYFD's provision of active efforts to prevent the break-up of the Indian family have proven unsuccessful, it must notify the Tribe of its intent to file a petition. IFPA § 32A-28-12(D). After filing the petition, once the Court has established the child is an Indian child or that it has reason to know the child is an Indian child, CYFD must provide the Tribal Notice otherwise described in ICWA. See IFPA §§ 32A-28-5(A), 32A-28-2(C). In situations where CYFD conducts an **emergency removal** of an Indian child who otherwise resides on a reservation but is temporarily located off reservation, CYFD must notify the Tribe within 24 hours of filing the petition for an emergency removal. IFPA § 32A-28-11.

Tip: Make sure the appropriate person is listed as your Tribe's **Designated Agent** in the federal register as this is the person to whom the law requires delivery of the Notice. 25 C.F.R. § 23.105.

4. Right to Intervene (25 U.S.C. § 1911)

In any state court ICWA proceeding, the Tribe has a right to intervene *at any point* in the proceeding. Intervention can even occur on appeal. The Tribe's right to intervene is not subject to or limited by a parent/custodian's objection.

If a Tribe has not received Notice timely, it can request up to twenty (20) additional days before a foster care placement or termination of parental rights proceeding to prepare for such proceeding. 25 U.S.C. § 1912(a).

After a Tribe intervenes, the intervenor becomes a party to the case and is entitled to notice and service of all motions and filings. Furthermore, an intervenor is also permitted to view and access the previous court records and filings. The intervenor then may request a transfer, monitor and participate in the proceedings, or withdraw from the case.

Tribal intervention is often the most effective way to ensure that the Tribe's rights are effected and its opinions considered in a case. That being said, a Tribe may want to be meticulous in considering whether to intervene and subject itself to state court rules and potential discovery requests.

⁶ An additional protection related to Notice: CYFD cannot proceed with a termination of parental rights unless the Tribe was provided with timely notice and opportunity to state whether it opposes termination of parent rights. IFPA § 32A-28-19.

Heightened Protections for Families

1. Right to Counsel

Indigent parents/custodians have the right to court-appointed counsel. 25 U.S.C. § 1911(b); IFPA § 32A-28-5. Few Indian parents are requesting and few judges are appointing counsel in non-IFPA cases. Encouraging indigent parents to assert and be persistent with this request can make a critical difference in support to the family in these cases. Providing legal counsel helps ensure that an Indian family is broken up only as a last resort option and not just as a result of a lack of proficiency in navigating the court system.

2. Active Efforts

Active Efforts is the key linchpin to ICWA.

“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.” 25 U.S.C. § 1912.

Stated another way, anyone attempting to remove an Indian child from their parents – whether CYFD or a grandmother, an uncle, or other private party petitioner – must show that they tried to support the family unit – through active efforts – but were ultimately unsuccessful in addressing the risk of harm that led to the court case. The law expects CYFD or private party **petitioners** to work collaboratively and constructively *with* parents *before* removal happens.

In this way, active efforts is the specific response to the biased instinct the data show exists of people to remove Indian children almost immediately, assuming their parents are problematically and irreparably deficient.

The term “active efforts” was created in contrast to “**reasonable efforts**,” which is a standard derived from 1980 legislation regarding child custody proceedings and is widely used in child welfare across the nation. Active efforts calls for *more* than reasonable efforts.

Distinction can be thought of as active versus passive, i.e., efforts to engage the family rather than simply offering referrals to the family and leaving it to them to seek out assistance. For example, taking a parent through the steps of a case plan rather than expecting the parent to do it on their own: making the calls to potential service providers for the parent, driving the parent to appointments, assisting the parent with a housing assistance applications, etc. And, active efforts requires using cultural resources where relevant.⁷

IFPA provides more clarity on what active efforts require within the statute itself than ICWA does.⁸ Private party petitioners should look to this list as a roadmap if they are unclear.

⁷ See 25 C.F.R. § 23.2 and the BIA Guidelines at E.3 for more examples.

⁸ Since IFPA applies to a state agency rather than to a private individual, there are also additional documentation and reporting responsibilities with reports due at each hearing. At the conclusion of every proceeding, IFPA requires the court to make a written determination as to whether the department has made active efforts to maintain or reunite the Indian child with the Indian child's family.

Note: The Adoption and Safe Families Act (ASFA) does *not* excuse CYFD or private party petitioners from providing active efforts. Even where ASFA may relieve CYFD from proving reasonable efforts, active efforts are still required.

3. Qualified Expert Witness (QEW)

No foster care placement or termination of parent rights may be ordered in a child custody proceeding in the absence of a determination, supported by evidence,* including testimony of a **qualified expert witness (QEW)**, 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; IFPA §32A-28-13(B) & §32A-28-19.

* The burden of proof is by clear and convincing evidence for a foster care placement and **beyond a reasonable doubt** for termination of parental rights. IFPA also requires beyond a reasonable doubt for a permanent guardianship. IFPA § 32A-28-19.

An essential purpose behind the qualified expert witness (QEW) requirement is that only someone with adequate familiarity of the prevailing cultural and social norms of the Indian child's Tribe should be able to accurately (i.e., unbiasedly) judge whether the child is facing threat of serious emotional or physical damage in the care of their parents.⁹ All too often, courts inappropriately qualify professionals who do not have familiarity with the specific Tribe in question to provide such testimony.

Under IFPA, the court may qualify a person to serve as a qualified expert witness if it finds that 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 to testify regarding whether a 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. Either a member of the child's Tribe or a person recommended by the Tribe. IFPA § 32A-28- 17.

If CYFD or the private party petitioner does not use an expert witness, the court does not have the authority to find that the statutory burden has been met to justify removal of the Indian child, and grounds for mandatory reversal of the placement exist.

Advocacy Opportunity:

Object to the court's qualification of a professional who does not have familiarity with your Tribe. Create a list of professionals with whom the Tribe is comfortable making judgments about the relative safety of children within their community members' homes to provide to CYFD and/or the court.

⁹ See BIA Guidelines at G.2 for more information.

4. Mitigating Unjustified Excuses to Continue Removal

Policymakers knew from research and testimony that bias against Native homes is rife in the child welfare field. They built numerous fail-safes into the law to protect against bias creeping back in and pushing these cases outside the hands of Tribes and these children outside of their homes and communities. See the impermissible reasons to deny transfer to tribal courts outlined above (also at IFPA § 32A-28-7(G)) and the impermissible reasons to depart from placement preferences outlined below (also at 25 C.F.R. § 23.132; IFPA § 32A-28-21(H)).

Preserving Family and Tribal Connections

The three primary ways in which ICWA preserves family and tribal connections are (1) including visitation as part of active efforts, (2) active efforts' requirement that services are culturally responsive, and (3) **placement preferences** when a child must be placed outside their home. This section focuses on those placement preferences.

ICWA's placement preferences, outlined in 25 U.S.C. section 1915, create a hierarchy so that placement with family, then with Tribe, then with other Native American families must be considered before placing a child in a non-relative, non-Native home.

In any foster/pre-adoptive placement, the placement preferences are:

1. Child's extended family member; then
2. Foster home specified by the child's Tribe; then
3. Indian foster home approved by a non-Indian licensing authority; then
4. Foster care agency approved by a Tribe or operated by an Indian organization; then
5. Non-Indian foster care agency approved by the child's Tribe; and only then
6. Non-Indian family committed to maintaining the child's connection to family, Tribe, and culture.

In any adoptive/**permanent placement**, the placement preferences are:

1. Child's extended family member; then
2. Indian family of same Tribe; then
3. Indian family of a similar culture; then
4. Another Indian family; and only then
5. Any other family that can provide a suitable home for an Indian child.

Tip: There are many pressures on CYFD and other state actors to act quickly rather than thoroughly when placing a child. Being prepared with the Tribe's preferred placements and/or access to family trees and contact information can make the difference between a child being placed in a preferred placement versus a non-preferred one.

Any party seeking departure from the placement preferences must prove good cause not to follow the placement preferences by clear and convincing evidence. 25 U.S.C. § 1915(a); IFPA § 32A-28-21. A placement may not depart from the preferences based on: (a) the socioeconomic status of the placement; (b) a home environmental that does not impact the safety or well-being of the child; (c) ordinary bonding or attachment that occurred from time spent in a nonpreferred placement made in violation of ICWA/IFPA;¹⁰ or (d) the extent of the participation of the parents or Indian child in tribal, cultural, social, religious, or political activities. 25 C.F.R. § 23.132; IFPA § 32A-28-21(H).

Tip: Tribes are able to establish a different order of placement preference by resolution. 25 U.S.C. § 1915(c). If your Tribe's children would be better protected by a different order of preference, this is a great place to exercise sovereignty and establish an alternative schema.

In CYFD cases, the court must hold **hearings** no less than every six months if the child is in a non-preferred placement. 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 comports with the preferences available and make active efforts to identify a more preferred placement. IFPA § 32A-28-21(C).

Advocacy Opportunity:

Placing children with family or in Native foster homes rather than defaulting to non-relative, non-Native homes is a place with room for significant improvement. If CYFD is routinely placing your Tribe's children in non-family, non-Native placements without duly considering preferred placements, Tribes have a right to request CYFD's data showing its work to comply with placement preferences. 25 U.S.C. § 1915(e). Such data may reveal actionable room for improvement.

Placement preferences apply in non-CYFD cases too, but few if any litigants or judicial officers are exploring placement options other than the private party petitioner in these cases, which contravenes ICWA.

¹⁰ Attachment to a foster family and/or hesitation to disrupt the stability of a placement have long and often been used as reasons to keep Indian children in non-family and non-Native placements. The data show that Native children are removed from their families and communities at higher rates than non-Native children in the same circumstances; i.e., bias causes removal to be used as a first- or almost first-resort option rather than as a last-resort option. It would compound the impact of that bias to then use the error of placing a child in an unlawful placement as a justification for continuing the unlawful placement.

Common Misconceptions

- In determining whether ICWA applies, the court cannot consider the parents' or child's participation in Tribal cultural, social, religious, or political activities; the relationship between either parent and the child, including whether the parent ever had custody of the child; or the Indian child's blood quantum. 25 U.S.C. § 1903; 25 C.F.R. § 23.103; BIA Guidelines B.2.
- ICWA will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.
- Father/mother is a non-Indian parent: ICWA protects the rights of Indian children, their Tribes, and their parents (i.e., ICWA's application is triggered by the *child's* Indian status, not one else's). Non-Indian parents are entitled to the same protections.

Recommendations for Better ICWA Implementation

- Do not assume that others understand ICWA's/IFPA's requirements better than you do. Do not trust the judge or the attorneys to ensure that ICWA's/IFPA's requirements are being met. New Mexico practitioners have significant room for growth in understanding the law, especially in its distinctions from other areas of child welfare and/or family law practice. Ask questions. Raise issues.
- Build and maintain strong channels of communication with CYFD's Office of the Tribal Liaison.
- Create **Memoranda of Understanding (MOUs)** with the state in order to streamline protections of your Tribe's children, communication when there are concerns, and/or cases regarding the removal of your Tribe's children from their homes.
- Have a list of trusted, culturally-responsive service providers that you can offer to petitioner as they effect active efforts.
- Create Memoranda of Understanding (MOUs) or other resource-sharing arrangements with other Tribes to pool resources for culturally-responsive social services, legal counsel in ICWA cases, QEWs, etc.

Additional Resources

- <https://www.narf.org/nill/documents/icwa/>
- https://childlaw.unm.edu/assets/docs/ifpa_icwa_bench_card_final_7-27-2023_.pdf
- <https://www.nicwa.org/>

About the Author

Cina Littlebird, J.D., M.A. Education, is a Tribal Policy Analyst for the University of New Mexico's Native American Budget and Policy Institute. She brings a decade of legal aid experience where she provides free legal services to low-income Native American families across Washington State and New Mexico. Cina has represented the tribe in Washington State ICWA cases and submitted *amicus curiae* briefing in two ICWA cases before the Washington Supreme Court.

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ICWA/IFPA Glossary

Active Efforts: Active efforts are explicitly distinct from – and more than – reasonable efforts (see definition of reasonable efforts below). The distinction can be thought of as active versus passive, e.g., driving a parent to their therapy appointments rather than just telling the parent that they need to obtain therapy. Active efforts mean affirmative, active, thorough, and timely efforts. IFPA § 32A-28-2(A). Active efforts also requires use of cultural resources where relevant.

Adoption: The creation of a parent-child relationship by judicial order between two parties who usually are unrelated. In state courts, adoption requires termination of the parental rights of the biological parents and erasure and replacement of the birth certificate.

Best Interests of the Indian Child: The best interests of the Indian child standard is intentionally distinct from the “best interests of the child” standard commonly used by courts, family law professionals, and child welfare agencies in determining custody, visitation, and guardianship. In developing ICWA, Congress was clear that it wanted to avoid the problems that arose out of subjective, western culture value judgments about what was “best” for Native American children. The best interests of the Indian child include protecting the child’s cultural identity, maintaining ties to the child’s Tribe, and preserving family connections are critical to the child’s well-being and overall long-term interests.

Beyond a Reasonable Doubt: This is the highest burden of proof in law, meaning it requires more certainty than any other burden of proof in law. The evidence must leave the juror/judge firmly convinced of the assertion being made.

Child Custody Proceeding: ICWA and IFPA each define “child custody proceeding” for the purposes of the respective Acts.

- ICWA definition (25 U.S.C. § 1903): A child custody proceeding is either a “foster care placement,” meaning any action removing an Indian child where the parent/custodian cannot have the child returned upon demand; termination of parental rights proceeding; pre-adoptive placement; or an adoptive placement.
- IFPA definition (§32A-28-2(C)): A child custody proceeding is an action for foster care placement, termination of parental rights, permanent guardianship, adoptive placement, or an action pursuant to Section 32A-3A-8 NMSA 1978 or the Family in Need of Court-Ordered Services Act (chapter 32A, Article 3B NMSA 1978). It includes investigations and other preliminary activities preceding the formal initiation of an action.

For the purposes of both Acts, a “child custody proceeding” does not include the award of custody between biological or adoptive parents, removal of a child associated with commission of a crime (e.g., placement in juvenile detention), or a proceeding in tribal court.

Clear and Convincing Evidence: This is a medium level burden of proof for certain judgments. It requires the party presenting evidence to prove that the contention is highly probably to be true. The standard is more rigorous to meet than a preponderance of the evidence standard but less rigorous to meet than providing evidence beyond a reasonable doubt.

Designated Agent: The ICWA Designated Agent is the person a Tribe designates to receive ICEA Notices other than the tribal governor/chairman/president. The Bureau of Indian Affairs (BIA) publishes the names and addresses of ICWA Designated Agents each year in the Federal Register. The BIA also publishes the list on its [website](#).

Dismissal: This term refers to a court's decision to terminate a court case without imposing liability on the person against whom the lawsuit was brought. The court may dismiss a case in response to the respondent's/defendant's motion to dismiss or on its own accord. The person or entity who brought the lawsuit may also voluntarily dismiss an action by choosing to drop the case or by reaching an out of court settlement.

Emergency Removal: This is a legal action that allows authorities to immediately, and *temporarily*, remove an individual, child, or student from a specific environment without prior court authorization. It should exclusively be used in crisis situations to prevent imminent danger, severe harm, or substantial disruption but is often used in non-imminent situations for removing Native American children.

Foster Care Placement: This is any action removing an Indian child from their parent/custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent/custodian cannot have the child returned upon demand, but where parental rights have not been terminated. 25 U.S.C. § 1903(1).

Full Faith and Credit: This is the requirement that state courts respect the laws and judgments of courts from other states or Tribes. It is derived from Article IV, Section I of the U.S. Constitution.

Good Cause: This is a legally sufficient reason for a ruling or other action by a judge. Good cause is often the burden placed on a litigant (i.e., one of the parties in a case) by the court to show why a request should be granted or an action excused.

Guardianship: The legal action by which someone is appointed guardian of another person. A guardian is the person lawfully invested with the power, and charged with the duty, of taking care of another person – in this case, an Indian child – and managing the property and rights of that other person.

Hearing: This refers to any formal proceeding before a court. The term usually refers to a brief court session that resolves a specific question rather than a full trial, but not always, as you will see below. In New Mexico child welfare proceedings, the following are different types of hearings that may come up:

- **Custody Hearing:** This is the first hearing in an abuse and neglect case. The primary purpose of the custody hearing is to determine if the child should remain in or be placed in CYFD's custody pending adjudication. IFPA § 32A-4-18(A). The court will provide the parents with their rights at this hearing and discuss visitation.
- **Adjudicatory Hearing:** This is also known as the trial or evidentiary hearing. The court will take testimony from the parties' witnesses at this hearing, and CYFD will have to prove through clear and convincing evidence that the children have been abused and/or neglected and that there is a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child. The QEW will also be required to testify at this hearing.

- **Dispositional Hearing:** At this hearing, the court will order CYFD to implement a case plan. The case plan should be narrowly tailored to remediate the particular risk factors that led to the removal of the child. The hearing will again address legal custody of the child and set visitation arrangements, if appropriate.
- **Judicial Review Hearings:** These hearings are to update the court on progress and the status of the child.
- **Permanency Hearing:** The general purpose of this hearing is to get the parties to move forward in finding a resolution for the case so that the child does not remain indefinitely “in the system.” At this hearing, the court determines what permanency plan is in the child’s best interests.
- **Permanency Review Hearing(s):** These hearings are to update the court on the progress of the permanency option that was decided at the permanency hearing. The permanency plan can also change during these hearings.

In-Home Family Preservation Services: Social services to promote safety, health, and well-being of the family together in the home. These are in contrast to services provided after removing a child from the home before the child is returned to the home.

Indian Child: Both ICWA and IFPA define this term. The definitions are largely overlapping but slightly distinct as further explained in the relevant section of the brief.

- **ICWA:** An “Indian child” means any unmarried person younger than 18 and either (a) a member/citizen of an Indian tribe, or (b) eligible for membership/citizenship in an Indian tribe and the biological child of a member/citizen of an Indian tribe. 25 U.S.C. § 1903(4).
- **IFPA:** An “Indian child” is a child who is either (a) a member of an Indian tribe, or (b) eligible for membership/citizenship in an Indian tribe. IFPA § 32A-1-4(N).

Indian Custodian: 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. 25 U.S.C. § 1903(5).

Indian tribe: Any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43. 25 U.S.C. § 1903(8). The definition essentially equates to any federally-recognized tribe.

Intervene/Intervention: Intervening or intervention is entry into a lawsuit by a third-party not already part of that existing case. The third-party is someone or an entity with a personal stake in the outcome of the case but who was not named as an original party in the case. The third-party who intervenes in a case is called an intervenor. In ICWA cases, the Indian child’s Tribe has intervention of right, meaning they have an unconditional right to enter the case based on statute. See 25 U.S.C. § 1911(a).

Joint Powers Agreement (JPA): A Joint Powers Agreement is a written contractual agreement entered into between two or more governmental agencies. These agreements can be created for any number of purposes. In the context of child welfare, JPAs are usually referring to agreements between Tribes and CYFD to establish protocols for cooperating on child welfare cases. Both ICWA and IFPA mention the coordination of states and Tribes via agreement: 25 U.S.C. § 1919(a), IFPA § 32A-28-8.

Jurisdiction: Jurisdiction refers to the authority a court has to listen to and decide a case. Two types of jurisdiction come up in ICWA and IFPA cases:

- **Concurrent Jurisdiction:** when a case can appropriately be brought in more than one court, i.e., either court can make decisions in the case.
- **Exclusive Jurisdiction:** when only one court has the authority to make decisions in a case.

Memorandum of Understanding (MOU): A memorandum of understanding is a written agreement between two or more parties defining the working relationship, expectations, and responsibilities between the parties. MOUs are not usually legally-binding in and of themselves; they are a useful first step before creating a formal agreement and/or binding contract between parties. In the child welfare context, MOUs are usually regarding agreements or understandings between Tribal and state agencies regarding child placement, services, and cases. Both ICWA and IFPA mention the coordination of states and Tribes via agreement: 25 U.S.C. § 1919(a), IFPA § 32A-28-8.

Petition/Petitioner: The petitioner is the party who starts a case, meaning the person or governmental entity that files the necessary paperwork with a court to begin a legal action in court. The petition is the name of the document that starts a case with the court.

- In cases brought by the state of New Mexico, CYFD is the Petitioner.
- A private party petitioner is the relative, friend, foster parent, or some other non-parent individual starting a case seeking custody of a child.

Placement Preferences: This is the term used to reflect the different tiers of priority of different categories of potential homes in which an Indian child can and should be placed. Under ICWA and IFPA, homes in priority tiers must be considered before an Indian child can be placed in a category of lesser priority.

Qualified Expert Witness (QEW):

- Under ICWA, petitioners must use testimony of a “qualified expert witness” in foster care placements and actions for termination of parent rights. The statute does not define this term, but the BIA Guidelines list three types of experts who would be qualified under ICWA: persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: (i) 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 or organization in childrearing practices. (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child’s Tribe. (iii) A professional having substantial education and experience in the area of their specialty. 44 Fed. Reg. 67,583, 67,593 (Nov. 26, 1979).
- Under IFPA, the court must hear testimony from a qualified expert witness in all adjudicatory hearings and all hearings to terminate parental rights. A person may be qualified to provide this testimony if 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 Indian child’s Tribe; (2) able to testify regarding whether the Indian child’s continued custody by the parent, guardian, or Indian custodian is likely to result in serious emotional or physical damage to the child; and (3) a member of the Indian child’s Tribe; or (4) a person recommended by the Indian child’s Tribe. IFPA § 32A-28-17(B).

Reason to Know: Any indication that the child, parent, or other family member has tribal heritage or may be a citizen or member of a tribe – even if the specific tribe is unknown – constitutes a “reason to know” that the child is an Indian child

Reasonable Efforts: This term refers to a standard of diligence requiring a party to take the actions a prudent, fair, and objective person would take under similar circumstances. It requires conscious, good-faith exertion but does not demand proactive or extraordinary measures.

Respondent: The respondent is the party against whom a case is started. In the case of child welfare proceedings, the Indian child’s parents, when living and maintaining custody rights of their child, are the respondents.

Reunification: The formal, court-supervised process of returning a child to the custody of their biological parents or legal guardians after a period of removal, foster care, or separation.

Statute: A formal written law enacted by a legislative body (such as the U.S. Congress or a state legislature). Statutes are also called acts.

Termination of Parental Rights: A legal action that permanently severs the biological or adoptive bond between a parent and a child. It completely ends a parent’s legal rights, duties, authority, and obligations regarding the child, which can include visitation, decision-making, and inheritance.

Tribal Notice: In general, “notice” informs a person of a proceeding in which their interests may be affected. It may also provide information about their rights in the proceeding. “Tribal Notice” in the context of ICWA and IFPA is a specific prescription as to when and how the Indian child’s Tribe(s) must be provided notice of the case.