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**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Mark Reynolds

**No. A-1-CA-39480**

**STATE OF NEW MEXICO ex rel.  
CHILDREN, YOUTH & FAMILIES  
DEPARTMENT,**

Petitioner-Appellee,

v.

**JAMES M.,**

Respondent-Appellant,

**and**

**FARRAH S.,**

Respondent,

**IN THE MATTER OF JOVAN M.,  
JAMIA M., and JARROM M.,**

Children.

**APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY**

**Flora Gallegos, District Judge**

1 Children, Youth & Families Department  
2 Mary McQueeney, Chief Children's Court Attorney  
3 Santa Fe, NM  
4 Kelly P. O'Neill, Assistant Children's Court Attorney  
5 Albuquerque, NM

6 for Appellee

7 Susan C. Baker  
8 El Prado, NM

9 for Appellant

10 Victoria W. Doom  
11 Las Vegas, NM

12 Guardian Ad Litem

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} The Appellee’s motion for rehearing was granted. The opinion filed in this  
4 case on September 26, 2022 is hereby withdrawn, and this opinion is substituted in  
5 its place.<sup>1</sup>

6 {2} James M. (Father) appeals the district court’s order terminating his parental  
7 rights to his three children (Children).<sup>2</sup> This case is subject to the Indian Child  
8 Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963. ICWA sets “minimum  
9 Federal standards” for the removal of an Indian child from their family, for continued  
10 state custody of an Indian child, and, most relevant here, for the termination of  
11 parental rights to an Indian child. 25 U.S.C. § 1902.

12 {3} Father raises two issues on appeal, which he contends require reversal of the  
13 district court’s judgment terminating his parental rights. First, Father contends that  
14 ICWA and New Mexico state law require the district court at the adjudicatory  
15 hearing to find that Father abused or neglected Children by evidence beyond a  
16 reasonable doubt, rather than by clear and convincing evidence. We conclude that  
17 ICWA and New Mexico law together require that a district court’s findings of abuse

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<sup>1</sup>For the guidance of the reader, we note that only the order on remand has been modified.

<sup>2</sup>The parental rights of Farrah S. (Mother) were terminated in the same proceeding. Mother has not appealed.

1 and neglect at an adjudication involving an Indian child be supported by clear and  
2 convincing evidence, not evidence beyond a reasonable doubt. We, therefore, find  
3 no error in the district court’s findings at adjudication.<sup>3</sup>

4 {4} Father next contends that the district court’s finding pursuant to ICWA, 25  
5 U.S.C. § 1912(d), that the Children, Youth & Families Department (CYFD) made  
6 “active efforts” to reunite Father and Children and prevent the breakup of the Indian  
7 family was not supported by sufficient evidence at the termination of parental rights  
8 (TPR) hearing. We agree with Father that CYFD failed to present evidence sufficient  
9 to support the district court’s finding beyond a reasonable doubt that the efforts  
10 CYFD made to assist Father complied with the “active efforts” requirement of  
11 ICWA. We reverse and remand on this basis for proceedings consistent with this  
12 opinion.

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<sup>3</sup>We note that the New Mexico Legislature adopted a new statute governing abuse and neglect and custody proceedings concerning Indian children in 2022: the Indian Child Protection Act (ICPA), NMSA 1978, §§ 32A-28-1 to -42 (2022). This case was filed in 2018; therefore, we rely on the provisions of the New Mexico Abuse and Neglect Act (ANA), NMSA 1978, §§ 32A-4-1 to -35 (1993, as amended through 2022), as well as ICWA, which were in place before the adoption of ICPA. We note that there is no significant difference relevant to the issues discussed in this opinion between the federal and state law applied in this opinion and ICPA.

1 **BACKGROUND**

2 {5} We briefly review the circumstances leading to Children being taken into  
3 custody by CYFD, the facts supporting the adjudication of neglect by Father, and  
4 Father’s treatment plan.

5 {6} Children were in the care of Mother when the abuse and neglect petition was  
6 filed on February 14, 2019. Father was living in Louisiana and working as a long-  
7 haul truck driver. Mother had previously been involved with Zuni Pueblo’s social  
8 services agency due to substance abuse resulting in neglect of Children. She did not  
9 successfully work her treatment plan.

10 {7} The two older Children had lived with Father from March 2018 until he  
11 returned them to Mother eight months later in November 2018. Father testified at  
12 the TPR hearing that he returned them, in part, because he believed Mother had  
13 stopped using drugs and was doing better. Father knew that a tribal judge had  
14 returned Mother’s other two children to her in June or July 2018, supporting his  
15 belief that Mother was doing better. He hoped at that time to have an ongoing  
16 relationship with her.

17 {8} Father testified at the TPR hearing that when he visited in November, he had  
18 some concerns but did not see obvious signs that Mother was using drugs. Later,  
19 when he called Mother, she started hanging up on him and sounded strange. Father  
20 called the police to ask them to do a welfare check on Children. When he did not

1 hear anything about the welfare check, Father made a trip to New Mexico to check  
2 on Children. Finding that Mother was drinking, he called CYFD. Although he  
3 believed Mother's behavior put Children at risk, he left Children with her and  
4 returned to his home and job in Louisiana.

5 {9} In mid-February 2019 Father learned from Mother that Children had been  
6 taken into state custody. Father contacted CYFD the next day. At the adjudicatory  
7 hearing, Father testified that he did not have the ability to care for Children  
8 immediately. He said he was looking for a new job that would allow him to work  
9 locally so he could be home with Children. A CYFD investigator testified at the  
10 adjudicatory hearing that Father had been able to obtain low-cost housing when  
11 Children were living with him, but no longer qualified when he was living on his  
12 own. The investigator reported that Father did not have appropriate housing to take  
13 care of Children at the time of the adjudication. The district court found, by clear  
14 and convincing evidence, that Father had neglected Children, pursuant to Section  
15 32A-4-2(G)(2) (defining a "neglected child" to mean a parent's inability to provide  
16 adequate care because of the parent's faults or habits), and found as well, also by  
17 clear and convincing evidence, that continued custody of Children by Father was  
18 "likely to result in serious emotional or physical damage" to Children, a finding  
19 required by ICWA, 25 U.S.C. § 1912(e), because he had placed Children at risk by  
20 leaving them with Mother, knowing Mother was drinking and using drugs.

1 {10} The district court’s findings state that the court was not persuaded that  
2 Father’s calls to police and CYFD were adequate to protect Children. Father was  
3 ordered to work a treatment plan that required him to obtain safe and stable housing,  
4 participate in the Circle of Security parenting classes (a parenting program offered  
5 by CYFD), participate in a psychological evaluation and follow the psychologist’s  
6 recommendations, and participate in a domestic violence assessment and follow the  
7 recommendations.

8 {11} We discuss additional evidence later, as necessary to our decision.

## 9 **DISCUSSION**

### 10 **I. Proof of Neglect or Abuse at an Adjudicatory Hearing in an ICWA Case** 11 **in New Mexico Is by Clear and Convincing Evidence**

12 {12} Father first alleges on appeal that the district court erred in its adjudicatory  
13 judgment in failing to apply a beyond a reasonable doubt standard of proof to its  
14 finding that Children were neglected by Father. The district court, in its adjudicatory  
15 judgment, found by clear and convincing evidence that Father had neglected  
16 Children, pursuant to Section 32A-4-2(G)(2) (defining a “neglected child” to mean  
17 a parent’s inability to provide adequate care because of the parent’s faults or habits).  
18 Father alleges that the district court applied the wrong standard of proof.

19 {13} Father’s argument conflicts with our precedent applying the clear and  
20 convincing evidence standard of proof to all required findings at an adjudicatory  
21 hearing involving an Indian child. In our decision in *State ex rel. Children, Youth &*

1 *Families Department v. Maisie Y.*, 2021-NMCA-023, 489 P.3d 964, we held that the  
2 state law requirement that the district court find abuse or neglect “on the basis of  
3 clear and convincing evidence,” § 32A-4-20(H), applies to adjudicatory proceedings  
4 concerning an Indian child. *Maisie Y.*, 2021-NMCA-023, ¶ 21. We see no reason to  
5 reconsider this precedent, and Father offers none.

6 {14} We note that the ICWA requirement for an additional finding that the return  
7 to the parent’s custody and care is “likely to result in serious emotional or physical  
8 damage to the child” must be proved at the adjudicatory hearing “by clear and  
9 convincing evidence,” not by evidence beyond a reasonable doubt. 25 U.S.C.  
10 § 1912(e). It is only at the TPR hearing that ICWA requires proof beyond a  
11 reasonable doubt of the likelihood of serious emotional or physical damage to the  
12 child if returned to the parent’s care. *See* 25 U.S.C. § 1912(f) (providing that the  
13 standard of proof at termination of parental rights is beyond a reasonable doubt); *cf.*  
14 25 U.S.C. § 1912(e) (providing that standard of proof at adjudication must be  
15 supported by clear and convincing evidence).

16 {15} New Mexico law adopts these same standards of proof, allowing proof by  
17 clear and convincing evidence at an adjudication involving an Indian child, and  
18 requiring that ICWA requirements and state law requirements alike be proved by  
19 evidence beyond a reasonable doubt at a hearing to terminate parental rights to an  
20 Indian child. *See Maisie Y.*, 2021-NMCA-023, ¶ 19 (“[W]e hold that Section 32A-



1 4-29(I) dictates the grounds supporting termination of parental rights in ICWA cases,  
2 including the determination that a child has been abused or neglected under Section  
3 32A-4-28(B)(2), must be proved beyond a reasonable doubt.”).

4 {16} In this case, the district court properly found neglect by Father under Section  
5 32A-4-2(G)(2) at the adjudicatory hearing, applying the clear and convincing  
6 evidence standard of proof, and in contrast, made its finding of neglect at the TPR  
7 hearing by evidence beyond a reasonable doubt.<sup>4</sup> We do not see any error in these  
8 findings or in the standard of proof applied by the district court at either the  
9 adjudicatory hearing or the TPR hearing.

10 **II. The District Court’s Finding That CYFD Made “Active Efforts” to Assist**  
11 **Father Toward the Goal of Reunification Is Not Supported by**  
12 **Substantial Evidence in the Record**

13 {17} To terminate parental rights in proceedings brought under the ANA when  
14 those proceeding are not subject to ICWA, the district court is generally required to  
15 find that CYFD made “reasonable efforts” to “assist the parent in adjusting the  
16 conditions that render the parent unable to properly care for the child.” Section 32A-  
17 4-28(B)(2). In a termination of parental rights proceeding subject to ICWA,

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<sup>4</sup>We note that in addition to finding neglect or abuse beyond a reasonable doubt under our state law, termination of parental rights under ICWA also requires a finding beyond a reasonable doubt “that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child,” as required by 25 U.S.C. § 1912(f) of ICWA. Father’s argument on appeal challenged only the district court’s finding of neglect under state law.

1 however, this standard is heightened: CYFD must prove that “active efforts have  
2 been made to provide remedial services and rehabilitative programs designed to  
3 prevent the breakup of the Indian family and that these efforts have proved  
4 unsuccessful.” 25 U.S.C. § 1912(d).<sup>5</sup>

5 {18} We begin our discussion of the sufficiency of the evidence to establish that  
6 CYFD made “active efforts” to provide Father with remedial services and  
7 rehabilitative programs designed to prevent the breakup of Children’s family with a  
8 review of the law defining “active efforts.” We then turn to the record to determine  
9 whether the evidence is sufficient to support the district court’s finding that the  
10 degree of certainty required by the beyond a reasonable doubt standard, CYFD made  
11 “active efforts” toward the goal of reuniting Father and Children. Concluding that  
12 the evidence is insufficient to support the court’s finding that “active efforts” were  
13 made, we reverse.

14 **A. ICWA’s “Active Efforts” Requirement**

15 {19} This Court has held that the “active efforts” standard imposed by ICWA is a  
16 “more involved and less passive standard than that of reasonable efforts.” *State ex.*  
17 *rel. Child., Youth & Fams. Dep’t v. Yodell B.*, 2016-NMCA-029, ¶ 20, 367 P.3d 881,

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<sup>5</sup>Section 1912(d) of ICWA reads as follows: “Any party seeking to effect a . . . termination of parental rights to, an Indian child under [s]tate 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.” *Id.*

1 *overruled on other grounds, Maisie Y.*, 2021-NMCA-023. *Yodell B.* describes the  
2 distinction as follows:

3       Passive efforts are where a plan is drawn up and the client must develop  
4 his or her own resources towards bringing it to fruition. Active  
5 efforts . . . is where the state [permanency worker] takes the client  
6 through the steps of the plan rather than requiring that the plan be  
7 performed on its own.

8 2016-NMCA-029, ¶ 17 (internal quotation marks and citation omitted). “The term  
9 active efforts, by definition, implies heightened responsibility compared to passive  
10 efforts. Giving the parent a treatment plan and waiting for the parent to complete it  
11 would constitute passive efforts. Active efforts require more than pointing the parent  
12 in the right direction, it requires ‘leading the horse to water.’” *State ex rel. Child.,*  
13 *Youth & Fams. Dep’t v. Keon H.*, 2018-NMSC-033, ¶ 42, 421 P.3d 814 (alterations,  
14 internal quotation marks, and citations omitted).

15 {20} When construing ICWA, we accord substantial weight to the federal ICWA  
16 regulations and interpretive guidelines published by the Bureau of Indian Affairs.  
17 *See State ex rel. Child., Youth & Fams. Dep’t v. Marlene C.*, 2011-NMSC-005, ¶ 18,  
18 149 N.M. 315, 248 P.3d 863; *State ex rel. Child., Youth & Fams. Dep’t v. Douglas*  
19 *B.*, 2022-NMCA-028, ¶ 16, 511 P.3d 357, *cert. granted* (S-1-SC-39139, Apr. 19,  
20 2022). We therefore turn to the definition of “active efforts” found in the federal  
21 ICWA regulations, 25 C.F.R. § 23.2 (2018). That regulation gives eleven

1 nonexclusive examples of ways in which a state agency can meet the “active efforts”  
2 requirement. The regulation reads, in relevant part, as follows:

3 Active efforts means affirmative, active, thorough, and timely efforts  
4 intended primarily to maintain or reunite an Indian child with his or her  
5 family. Where an agency is involved in the child-custody proceeding,  
6 active efforts must involve assisting the parent . . . through the steps of  
7 a case plan and with accessing or developing the resources necessary to  
8 satisfy the case plan. To the maximum extent possible, active efforts  
9 should be provided in a manner consistent with the prevailing social  
10 and cultural conditions and way of life of the Indian child’s Tribe and  
11 should be conducted in partnership with the Indian child and the Indian  
12 child’s parents, extended family members, Indian custodians, and  
13 Tribe. Active efforts are to be tailored to the facts and circumstances of  
14 the case and may include, for example:

- 15 (1) Conducting a comprehensive assessment of the circumstances of  
16 the Indian child’s family, with a focus on safe reunification as  
17 the most desirable goal;
- 18 (2) Identifying appropriate services and helping the parents to  
19 overcome barriers, including actively assisting the parents in  
20 obtaining such services;
- 21 . . . .
- 22 (7) Supporting regular visits with parents or Indian custodians in the  
23 most natural setting possible as well as trial home visits of the  
24 Indian child during any period of removal, consistent with the  
25 need to ensure the health, safety, and welfare of the child;
- 26 (8) Identifying community resources including housing, financial,  
27 transportation, mental health, substance abuse, and peer support  
28 services and actively assisting the Indian child’s parents or, when  
29 appropriate, the child’s family, in utilizing and accessing those  
30 resources;
- 31 (9) Monitoring progress and participation in services;

1 (10) Considering alternative ways to address the needs of the Indian  
2 child's parents and, where appropriate, the family, if the  
3 optimum services do not exist or are not available.

4 {21} We next apply the standard set out in federal law and regulation to the  
5 evidence concerning CYFD's efforts to assist Father and reunite Children's family.

6 **B. The Undisputed Evidence Was Insufficient to Support the District**  
7 **Court's Finding That CYFD Made "Active Efforts"**

8 {22} In reviewing the sufficiency of the evidence of CYFD's efforts, we bear in  
9 mind that CYFD was required to prove that it made "active efforts" by evidence  
10 beyond a reasonable doubt: "[T]he evidence and inferences drawn from that  
11 evidence must be sufficiently compelling so that a hypothetical reasonable  
12 fact[-]finder could have reached a subjective state of near certitude" about its  
13 conclusion. *State v. Maes*, 2007-NMCA-089, ¶ 12, 142 N.M. 276, 164 P.3d 975  
14 (internal quotation marks and citation omitted). Our standard of review, therefore, is  
15 whether, "viewing the evidence in the light most favorable to [CYFD], the fact[-]  
16 ]finder could properly determine that the [beyond a reasonable doubt] standard was  
17 met." *In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 3, 120  
18 N.M. 463, 902 P.2d 1066. "We review [the district] court's application of the law to  
19 the facts de novo." *State ex rel. Child., Youth & Fams. Dep't v. Lisa A.*, 2008-  
20 NMCA-087, ¶ 6, 144 N.M. 324, 187 P.3d 189.

21 {23} CYFD called only two witnesses to testify about the efforts made to assist  
22 Father. Amber Gurule, Father's CYFD permanency planning worker and Rebecca

1 Mathews-Geng, a New Mexico counseling provider who attempted to provide  
2 Father an online parenting class. It was undisputed that Father lived outside New  
3 Mexico both before and after Children were taken into CYFD custody. Ms. Gurule  
4 testified that for the first six months following his adjudication of neglect on April  
5 15, 2019, until September or October 2019, Father was difficult to pin down, and  
6 CYFD spent time tracking him through Louisiana, Texas, Illinois, and North Dakota.  
7 Father was a long-haul truck driver during this period with no permanent residence.  
8 Ms. Gurule testified that she contacted the child protective agencies in several  
9 different states to obtain referral lists for Father based on Father's representation that  
10 he was living in or planning to move to these states. Drawing all inferences in favor  
11 of the district court's finding of fact, it was reasonable based on this testimony for  
12 the district court to conclude that CYFD did what it could to assist Father, and that  
13 the failure to do more was excused by Father's itinerant life and the inference that  
14 Father did not stay in one place long enough for CYFD to offer him more substantial  
15 assistance.

16 {24} In September or October 2019, however, nine months before his parental  
17 rights were terminated, Father moved to North Dakota. He informed CYFD that he  
18 had obtained a job in the local oil fields and would be living in Bismarck, North  
19 Dakota. Despite this change in Father's circumstances, Ms. Gurule did not describe  
20 any greater effort to seek help for Father in obtaining services in North Dakota. She

1 reported calling the child protective services agency in North Dakota to obtain a  
2 referral list for Father. She referred Father for a psychological evaluation in North  
3 Dakota, which Father successfully completed in January 2020. The evaluation's only  
4 recommendation was parenting classes, something already part of Father's treatment  
5 plan. No local class was available, so CYFD offered Father an online parenting class  
6 with a New Mexico provider. Father struggled with the computer technology to  
7 access that class via an online platform called telehealth and was able to complete  
8 only one of twelve sessions. The provider testified, and Father agreed, that he had  
9 more difficulty than usual with the access instructions. CYFD tried to help with  
10 computer access, but Father continued to struggle and was not able to complete the  
11 class. CYFD sent Father the workbooks on anger management, domestic violence,  
12 and parenting, usually used when parents are incarcerated, which Father completed.  
13 CYFD, however, plainly did not believe that the workbooks were sufficient to satisfy  
14 the requirement of Father's treatment plan that he obtain training in those areas.  
15 CYFD made no effort either to evaluate Father's parenting skills after he completed  
16 the workbooks or to find a local consultant in North Dakota who could work with  
17 Father in person if he had not made sufficient progress through the workbooks.

18 {25} The only other effort CYFD described was arranging two video visits with  
19 Children twice a week on Wednesdays and Thursdays. Father visited with Children  
20 remotely about twice a week between twenty minutes and one hour. CYFD admitted

1 that Father was faithful in initiating calls to CYFD on visiting days and remaining  
2 in contact with CYFD throughout the case.

3 {26} CYFD contends on appeal that the efforts described were the “affirmative,  
4 active, thorough, and timely efforts” required to constitute “active efforts” under  
5 ICWA to reunite Father and Children. We do not agree. The federal ICWA  
6 regulations specify that “[a]ctive efforts are to be tailored to the facts and  
7 circumstances of the case.” 25 C.F.R. § 23.2. “Active efforts” include a  
8 “comprehensive assessment” of Father’s circumstances and needs, 25 C.F.R.  
9 § 23.2(1), and active assistance in identifying community resources and overcoming  
10 barriers to services, given the parent’s circumstances, 25 C.F.R. § 23.2(2), (8). If the  
11 parent confronts barriers to services, CYFD is expected to offer alternative ways to  
12 meet a parent’s needs, 25 C.F.R. § 23.2(10). CYFD must also monitor and report to  
13 the court on a parent’s progress, 25 C.F.R. § 23.2(9).

14 {27} The undisputed evidence showed that CYFD (1) had not provided active  
15 assistance in obtaining services for Father, (2) had not developed or proposed  
16 alternative ways of meeting Father’s need for parenting classes in light of his  
17 difficulty with computer technology, (3) had not facilitated in-person visits with  
18 Children, (4) had not monitored Father’s progress, (5) provided no assistance to  
19 Father in obtaining appropriate housing for him and Children, and (6) did not assess  
20 either the home Father ultimately found without CYFD assistance prior to the



1 termination of his parental rights, or Father’s ability to care for Children in his North  
2 Dakota home without creating a likelihood of serious emotional or physical damage  
3 to Children. CYFD’s efforts to assist Father in North Dakota, where he lived for  
4 eight months before the TPR hearing, were limited to calling that state’s child  
5 protective agency to obtain referral lists to give to Father. Merely providing a referral  
6 list and instructing the parent to contact the providers and arrange services and  
7 provide their own progress reports—the primary effort CYFD made in this case—  
8 have been held by both our Supreme Court and this Court to be insufficient to satisfy  
9 the “active efforts” requirement of ICWA. *See Keon H.*, 2018-NMSC-033, ¶ 42  
10 (“Active efforts require more than pointing the parent in the right direction, it  
11 requires ‘leading the horse to water.’” (alteration, internal quotation marks, and  
12 citation omitted)); *see also Yodell B.*, 2016-NMCA-029, ¶ 26 (holding that CYFD  
13 pointing the parent in the direction of service providers is not sufficient under  
14 ICWA).

15 {28} CYFD never made any effort to assess Father’s progress, something which is  
16 clearly required by the ICWA regulations defining active efforts. CYFD never  
17 requested that a home study be performed by the child protective services agency in  
18 North Dakota.<sup>6</sup> When Father reported to the district court at a permanency hearing

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<sup>6</sup>Our Legislature has facilitated interstate cooperation in assessing both the adequacy of housing and the ability to parent when placement of children out of state is contemplated by adopting the Interstate Compact on the Placement of Children,

1 in December 2019, six months before the TPR hearing, that Father had found a social  
2 services worker in North Dakota who had agreed to assist him and asked how he  
3 should proceed, the court directed him to connect this person to Ms. Gurule, rather  
4 than directing CYFD to make contact through North Dakota’s child protection  
5 agency. Once again, Father was left to develop his own resources. This Court has  
6 held that when “the client must develop his or her own resources” to bring a case  
7 plan to fruition, the agency has not made active efforts. *Yodell B.*, 2016-NMCA-029,  
8 ¶ 17 (quoting *A.A. v. State, Dep’t of Fam. & Youth Servs.*, 982 P.2d 256, 261 (Alaska  
9 1999)). By CYFD’s own admission, that is what was expected of Father.

10 {29} To the extent counsel for CYFD suggests that it is excused from making active  
11 efforts to assist Father because he was not living in New Mexico, it misapprehends  
12 the law. Living in another state does not excuse CYFD’s failure to follow both  
13 federal and New Mexico law in a termination of parental rights proceeding any more  
14 than it excuses CYFD from assisting a parent who is living in another country. *See*  
15 *State ex rel. Child., Youth & Fams. Dep’t v. Alfonso M.-E.*, 2016-NMCA-021, ¶ 64,  
16 366 P.3d 282 (holding that “New Mexico law does not relieve CYFD of its statutory  
17 mandate to make reasonable efforts to assist the parent in adjusting the causes and  
18 conditions of neglect simply because the parent has been deported to another

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NMSA 1978, §§ 32A-11-1 to -7 (1977, as amended through 1993). CYFD never sought the assistance of Louisiana or North Dakota in assessing Father’s home, his needs, or his progress.

1 country”). Where the parent remains in contact with CYFD, participates in their  
2 treatment plan, and indicates a desire to reunite with their children, as Father did in  
3 this case, the burden remains on CYFD to meet statutory requirements.<sup>7</sup> *See id.*

4 {30} We conclude that the undisputed evidence presented by CYFD of the efforts  
5 made to reunite Father and Children is not sufficient to reasonably support the  
6 district court’s finding that CYFD made the “active efforts” to provide Father with  
7 remedial services and rehabilitative programs designed to prevent the breakup of the  
8 family, as required by 25 U.S.C. § 1912(d).

## 9 **CONCLUSION**

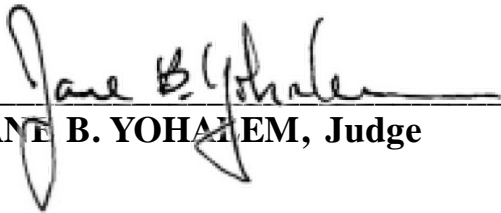
10 {31} For the stated reasons, we reverse the termination of Father’s parental rights.  
11 We remand to the district court with direction to require CYFD to promptly assess  
12 both Father’s home and his ability to care for Children without a likelihood of serious  
13 emotional or physical damage to Children and to initiate active efforts to transition  
14 Children to Father’s care. If after good faith, active efforts are made to transition  
15 Children to Father’s custody, it becomes apparent that return to Father’s custody  
16 would likely result in serious emotional or physical damage to Children, CYFD is

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<sup>7</sup>We notice a significant difference between the active efforts made with Children’s mother, who is a tribal member, and with Father, who is not. CYFD is required by ICWA to make “active efforts” to reunite an Indian child with that child’s family. The “active efforts” requirement is not limited to the Indian parent. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2 (“Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.”).

1 not foreclosed from pursuing a second motion to terminate parental rights. *See State*  
2 *ex rel. Child. Youth & Fams. Dep't v. William C.*, 2017-NMCA-058, ¶ 25, 400 P.3d  
3 266 (following reversal of an order terminating parental rights, CYFD is permitted  
4 to file a second motion relying on the existing adjudication of neglect or abuse, as  
5 well as on new evidence).

6 {32} **IT IS SO ORDERED.**

7  
8   
**JANE B. YOHALEM, Judge**

9 **WE CONCUR:**

10   
11 **KRISTINA BOGARDUS, Judge**

12   
13 **GERALD E. BACA, Judge**