

# ICWA Compliance Summary and Review of Existing Literature

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## Introduction

The purpose of this summary review is to describe what research and tools exist and what gaps or barriers exist in the research in regards to compliance with the Indian Child Welfare Act (ICWA). A scan of existing literature was conducted, and findings were compiled into two categories: (a) systematic reviews of existing studies on ICWA compliance and (b) checklists, methods, and frameworks for measuring ICWA compliance.

## Summary of Systematic Reviews of Existing Studies on ICWA Compliance

*A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act*

Casey Family Programs (Williams et al., 2015) produced this brief in collaboration with the Center for Regional Tribal Child Welfare Studies, University of Minnesota, Duluth; National Council of Juvenile and Family Court Judges; and the Minneapolis American Indian Center to explore state compliance with ICWA, barriers to compliance, measuring compliance, as well as make recommendations to support best practices for ICWA compliance and measurement in 2015. The brief is framed with the history of abusive Indian child welfare practices and information on the Indian Child Welfare Act.

The brief acknowledges that there is limited research available on ICWA compliance and without federal oversight, state agencies and courts must interpret ICWA provisions and definitions themselves (Williams, et al. 2015). The brief indicates that there is a varying degree of compliance with ICWA by different states. The majority of studies cited in this brief were all conducted in a single state with a relatively small number of cases. One Government Accountability Office report (national data) was also analyzed for this brief.

The brief cites several barriers to compliance with ICWA including lack of federal oversight of ICWA, lack of knowledge about ICWA requirements,

challenges in identifying children who may be eligible for ICWA protections, and lack of education and training for social workers, attorneys, and judges.

The brief discusses how the measurement of compliance with ICWA is driven by the intended purpose of the research question. Whether a compliance study is aimed at gathering information on strengths and weaknesses in implementing the law, monitoring progress toward implementation, or documenting an intervention designed to improve compliance the tools and methodologies used will differ. Current approaches to measurement of ICWA compliance use court focused methods such as observation and judicial case review. Surveys and structured interviews were also used to gather information on perceptions of ICWA compliance.

The studies cited looked at several areas of compliance including, identification of American Indian/Alaska Native (AI/AN) children, active efforts, qualified expert witnesses (QEW), and placement preferences. There were three recommendations that this brief made to support improved monitoring of ICWA compliance. They are below:

1. Allocate funds and resources for effective child welfare services to support active efforts and placement preferences.
2. Develop training mechanisms and opportunities to include initial and continuing education for Child Protective Services (CPS) and judicial staff and incorporate ICWA history, importance, and compliance measurement into existing training programs.
3. Develop a standardized national compliance measure for certain provisions of ICWA and differentiate standards that can be measured across sites from jurisdiction-specific measurements. (Williams et al., p.13)

The brief concludes that compliance data are necessary to ensure fulfillment of ICWA requirements and sanctions and to investigate whether or not ICWA desired outcomes are being achieved.

**Table 1: Current Compliance Findings**

Area of Compliance	Study Findings*
Identifying American Indian children	<ul style="list-style-type: none"> <li>• One study by the Government Accountability Office in 2003 found that only five states could identify ICWA-eligible children in their State Automated Child Welfare Information System.<sup>34</sup></li> <li>• In one study that reviewed case records, 15% of the records found no documentation regarding how the court or child protection agency determined the child was American Indian.<sup>35</sup></li> </ul>
Active efforts	<ul style="list-style-type: none"> <li>• Two studies found a large majority of ICWA cases included judicial assessment that active efforts were taken to prevent child removal or termination of parental rights in ICWA cases.<sup>36,37</sup></li> <li>• One study found case record documentation of active efforts undertaken, in addition to the judicial assessment, in 66% of cases examined.<sup>38</sup></li> <li>• One study using case record review methods found that cases documenting active efforts on the record varied by type of hearing, from 21% for disposition hearings to 67% for pretrial or adjudication hearings.<sup>39</sup></li> <li>• One observational study found verbal findings of active efforts were more likely to occur at adjudication review and permanency hearings but were highly unlikely at the initial hearing.<sup>40</sup></li> </ul>
Qualified expert witnesses (QEW)	<ul style="list-style-type: none"> <li>• One study of judicial case records found that a qualified expert witness was used in 71% of cases involving foster care placement.<sup>41</sup></li> <li>• One observational study found that testimony from qualified expert witnesses was present in 38% of adjudication hearings but in none of the three other types of hearings sampled.<sup>42</sup></li> </ul>
Placement preferences	<ul style="list-style-type: none"> <li>• One study found that 83% of out-of-home placements of the American Indian children in the study followed ICWA placement guidelines.<sup>43</sup></li> <li>• A forthcoming brief documents the placement patterns of American Indian children in a nationally representative sample; this study finds that Indian children are more likely than children of other races to receive services at home 18 months after an investigation.<sup>44</sup></li> </ul>

\*Note: Unless otherwise mentioned, study findings are from a single state or jurisdiction, and are not representative of ICWA compliance nationally or in other jurisdictions.

Note: Adopted from Williams et al., 2015, p. 9

**Table 2: Current Approaches to Measurement of ICWA Compliance<sup>45</sup>**

	Method	Tools	Strengths	Weaknesses
Court-focused methods	Observation (in-person or via audio or video recording)	Structured forms with checklists and limited text fields, e.g. QUICWA Performance Checklist	<ul style="list-style-type: none"> <li>• Specific information: information easily obtained by a trained observer</li> <li>• Data collection: tools focus on consistency of data collection and reliability of results; both quantitative and qualitative data may be collected</li> <li>• Research presence: the process of being observed can result in behavior changes</li> <li>• Utility: sample compliance within a case or follow a case over time</li> </ul>	<ul style="list-style-type: none"> <li>• Variance: consistency and depth of information varies by jurisdiction and court</li> <li>• Observer training: technical language of cases and speed and complexity of court proceedings can impede observation and require extensive training</li> <li>• Missing data: nonverbal cues or silent presence of key players may be missed</li> <li>• Resource intensive: training and observation can be expensive and time consuming</li> <li>• Complex tools: complexity of observation forms may interfere with observer accuracy</li> </ul>
Court-focused methods (cont.)	Judicial case record review	Structured case record review form	<ul style="list-style-type: none"> <li>• Amount of data: large amounts of court physical and digital data are available, providing a cumulative snapshot of key indicators of ICWA compliance at any selected time</li> <li>• Relative objectivity: impartial coders</li> <li>• Clarity: easy to follow variance in compliance rates over time</li> <li>• Pacing: data may be collected at a coder's own pace</li> <li>• Depth: judicial case records may present more detail (e.g., on active efforts) than court proceedings</li> </ul>	<ul style="list-style-type: none"> <li>• Courtroom behaviors: case review does not allow researcher to see what is happening in the courtroom (extent of tribal presence or involvement may not be included)</li> <li>• Variance: consistency and depth of information varies by jurisdiction, court and clerk</li> <li>• Missing information: court transcripts are typically not included</li> <li>• Multiple sources: information moves through multiple filters, including child welfare staff, judges, court clerks, etc.; knowledge of local jurisdictional practice is essential to the design of research questions and case record review forms</li> </ul>
Perception-based methods	Focus groups  Structured interviews  Surveys	Paper or web surveys  Structured interview guides	<ul style="list-style-type: none"> <li>• Ease of data collection: surveys allow researchers to collect large amounts of data relatively easily and inexpensively</li> <li>• Qualitative data: provides additional context and information, including perceptions of multiple stakeholders, practitioners and constituents</li> </ul>	<ul style="list-style-type: none"> <li>• Subjective data: participants may experience response bias or express only "socially desirable" opinion</li> <li>• Representation: smaller samples from some qualitative data collection efforts may not be fully representative of all stakeholders and participants</li> </ul>

Note: Adopted from Williams et al., pp. 10–11



## Implementation and Effectiveness of the Indian Child Welfare Act: A Systematic Review

Francis et al. (2023) conducted a systematic review of studies with the purpose of determining the extent to which ICWA has been effective (i.e., led to beneficial outcomes), if effectiveness has increased or decreased over time, to what extent the provisions of ICWA have been implemented as intended, and what factors aid or hinder implementation. Court challenges of ICWA bring up questions about whether it is being implemented as intended, its effectiveness, and future needs in terms of policy revisions and system changes. They collected 408 studies ranging from the 1970s-2010 and using a priori inclusion criteria (already defined parameters for studies to help avoid selection bias), ultimately including 16 studies for this review. Three research questions were asked: (a) what is the effectiveness of ICWA regarding the foster care placement and permanency outcomes for AI/AN children and families, (b) in what ways has ICWA been implemented, and (c) what factors serve as barriers to or facilitators of the implementation of ICWA? Studies on the effectiveness of ICWA were mixed, although many positive results

***“Studies on the implementation of ICWA found limited capacity for many ICWA programs in the areas of improvements from cultural training, underfunding for many programs, lack of tracking systems, use of qualified experts, communication with Tribes, and identification practices for American Indian children.”***

were found. Studies on the implementation of ICWA found limited capacity for many ICWA programs in the areas of improvements from cultural training, underfunding for many programs, lack of tracking systems, use of qualified experts, communication with Tribes, and identification practices for American Indian children. Studies on barriers to ICWA included cultural differences between Tribes and the child welfare system, lack of units to respond to Indian child welfare, and a lack of AI/AN foster homes and Tribal resources to respond to notice. This review also includes implications for practice, policy, and future research.

Seven studies examined the effectiveness of ICWA with some positive outcomes and some mixed results. A large longitudinal study of AI/AN children in California found that AI/AN children who stayed in their own Tribal community had fewer placements, despite being in foster care longer and that most lived with relatives (Quash-Mah et al., 2010). A large cross-sectional study in California found that rates of kinship care adoption were higher for AI/AN children than for non-AI/AN children, but on average AI/AN children spent longer times in care (Barth et al., 2002). A qualitative study in Maine looked at the Wakanaki Tribe's involvement and cooperation with child welfare workers and found that the Tribal child welfare staff felt a strong commitment to feeling like a family with the children and families they worked with. The study also found that staffs' perception was that interactions were being guided by rules and standards from the child welfare staff and that the impact of removing a child from their community was not fully understood by child welfare workers (Bjorum, 2004).

A cross-sectional study conducted in one southwestern state found that 83% of children were placed using ICWA guidelines, including 55% of those children placed with extended family, 33% placed in Tribally approved homes, and 13% placed in AI/AN licensed foster homes (Limb et al., 2004). It also showed that all court cases examined showed that active efforts were used to prevent the break-up of the family.

Another large longitudinal study conducted between 1975–1986 across 19 states showed that the average state adoption rate for AI/AN children decreased by 93% and that average foster care placement rate of AI/AN children decreased by 31% (MacEachron et al., 1996). ICWA was signed into law on November 8, 1978. Other studies looked at reunification and Tribal involvement with one study finding that 55% of ICWA-eligible children received reunification services versus 33% of non-ICWA AI/AN children (Waddell, 2002). It also found that no ICWA-eligible children received family maintenance services to prevent the need for out-of-home placement compared to 66% of non-ICWA eligible children (Waddell, 2002).

Ten studies examined the implementation of ICWA (Brown, 2020; Bjorum, 2014; Groves, 1981; Lawrence et al., 2012; Leake et al., 2012; Limb & Brown, 2008; Limb et al., 2004; Moore, 2020; Waddell, 2002; Wares et al., 1994) with several looking at human resources available focusing on administrators. Wares et al., surveyed Tribal administrators who handled child welfare cases for Tribes and found that administrators made between \$15,000–\$25,000 annually and that two-thirds of administrators had been in their position for over two years. Eighty-two percent of administrators were AI/AN (1994). This study also found that Tribal ICWA programs were typically small with 30% being managed by just one person and 35% having two to five staff.

Later studies looked at other characteristics of administrators such as knowledge and beliefs. Limb and Brown (2008) looked at administrators' involvement in the implementation of ICWA and found that nine out of 10 administrators reported reviewing ICWA guidelines and six out of 10 reported providing ICWA-informed feedback to their state's plan for implementing ICWA.

Other studies highlighted that knowledge barriers among child welfare workers presented challenges to implementation of ICWA. Leake et al. (2012) surveyed Tribal and community members around child welfare needs in a national cross-sectional study and found responses emphasized the need to expand their child welfare program, including their tracking system, citing underfunding as a key issue affecting the tracking system, child welfare staff, and Tribal resources. Respondents did not believe child welfare workers understood ICWA or how to implement it. A cross-sectional study in one southwestern state found that there was a high level of state and Tribal cooperation but child welfare workers reported limited knowledge of ICWA or how to implement it (Limb et al., 2004). This study also found that QEWs were used in 71% of ICWA child welfare court cases to determine where a child should be placed and that child welfare workers considered culture and resources in 84% of cases.

Several studies looked at the implementation of ICWA near the beginning of child welfare involvement when a child is removed from

the home. A longitudinal study over 40 years looked at how a child's race is determined and identified three key factors: evidentiary standards (i.e., rules to guide actions), record keeping (i.e., maintenance of official records), and incentive structures (i.e., what influences caseworkers' determination of race) (Brown, 2020). This finding shows that the determination of a child's race differs based on the institution or worker, which has implications for a child's eligibility for ICWA protections. Another cross-sectional study (Waddell, 2002) looked at social workers professional experience and found 57% of workers with seven months to five years of experience asked families about their culture, and 44% of social workers who reported they did not ask families about culture had less than 12 months of experience. The study also found that two-thirds of workers discussed the child's needs with their Tribal community. A cross-sectional study in two states found that 81% of public child welfare agencies informally encouraged compliance with ICWA and were in the process of developing formal policies and procedures (Groves, 1981).

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Six studies explored barriers and facilitators relating to implementing ICWA. Three of those studies examined national data and three explored state-specific data (Groves 1981; Hand, 2006; Limb & Brown, 2008; Reza, 1989; Waddell, 2002; Wares et al., 1994). A national cross-sectional study reviewed 44 state child welfare service plans and interviewed administrators at the Administration for Children and Families (ACF) and found that 100% of states agreed to use their plans to outline their state's plan to foster ICWA compliance (Limb and Brown, 2008). Another national cross-sectional study found that 19% of state child welfare administrators reported not receiving any formal ICWA training with most reporting learning on the job (Wares et al.,

1994). Administrators did report opportunities to attend national trainings on ICWA.

Intercultural issues were studied as a barrier to ICWA implementation in another study finding that child welfare practice over-relied on removing children from their home and that there was little initiative by states to blend the two cultures (Hand, 2006). Recognizing the importance of extended family, commitment to the well-being of the child and the resilience, and continuity of the Ojibwe culture were key cultural issues found to need improvement.

A California-based cross-sectional study showed that state workers' level of experience had an effect on their willingness or ability to comply with ICWA protocols (Waddell, 2002). Findings showed workers with less experience discussed culture less with children in care and consulted with Tribes less. It did show that 88% of state child welfare administrators consulted with an ICWA social worker.

A California and Washington-based cross-sectional study found that agencies had interest to follow ICWA guidelines but had limited capacity to actually do so (Groves, 1981). Another California-based cross-sectional study found several barriers to implementation of ICWA including lack of trained social workers with ICWA knowledge and understanding of culture, lack of early identification of AI/AN identity, and lack of AI/AN foster homes and Tribal resources to respond to ICWA notices (Reza, 1989).

This systematic review by Francis et al. (2023) discussed effectiveness of ICWA with four main outcomes including foster care placement, reunification, kinship care, and adoption. There were mixed findings regarding ICWA's effectiveness in terms of foster care placement. Studies indicate positive findings when ICWA is implemented with greater involvement from Tribes and positive outcomes for AI/AN children in foster care with the exception of being placed in non-AI/AN placements. One study conducted in a southwestern state found that over 80% of AI/AN children were in placements that met ICWA guidelines (Limb, et al., 2004). One of the studies from California found almost half of AI/AN children were being placed in non-AI/AN foster homes (Reza, 1989). Another

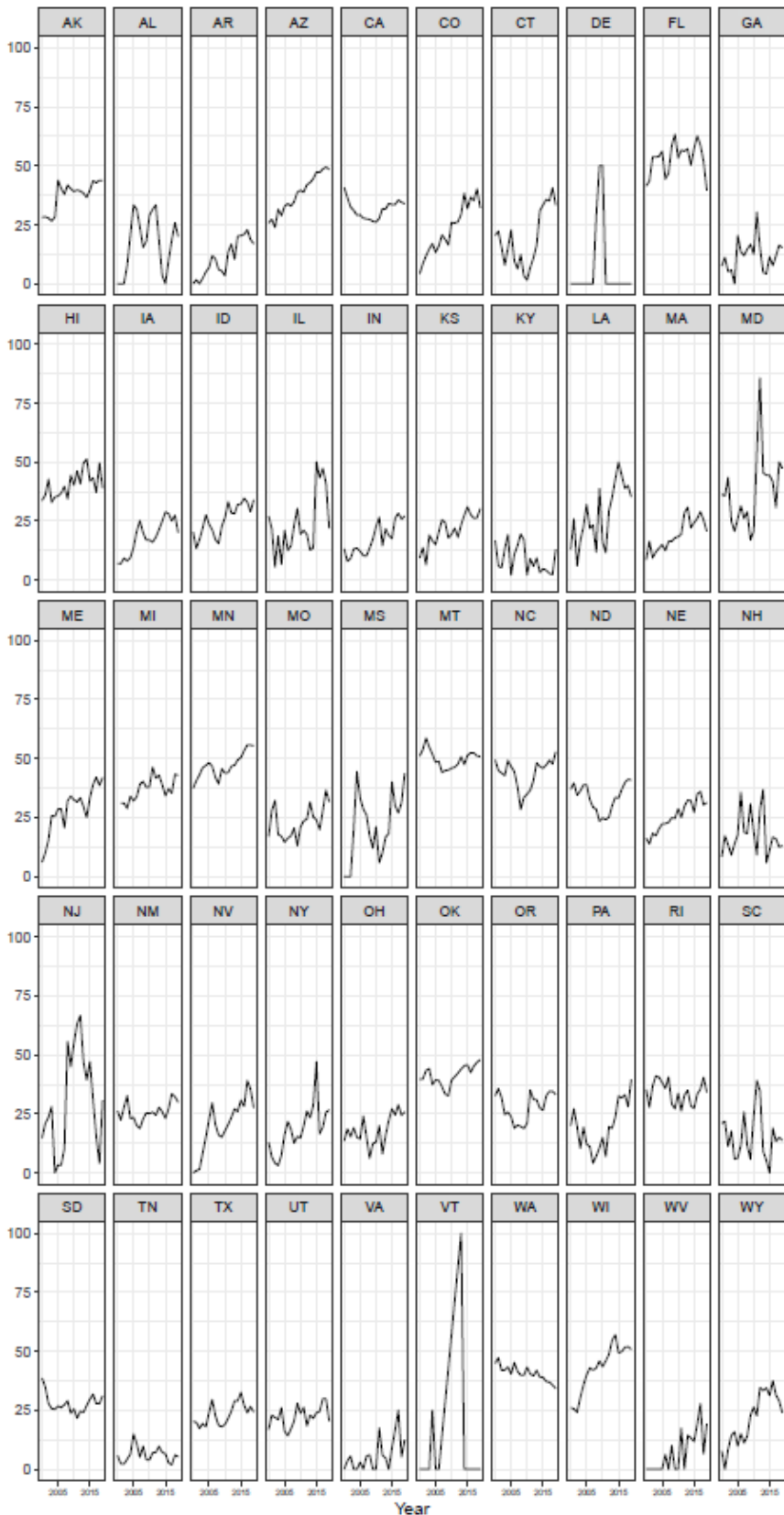
California-based study found over three-quarters were placed with AI/AN foster parents of a different Tribe indicating that over time they have more compliance with ICWA but lack placements that are of the same Tribe as the child (Waddell, 2002).

There were positive outcomes regarding reunification with one study in California found over half of AI/AN children had been reunified after four years (Barth et al., 2002), another California study found one-quarter were reunified within 12 months (Reza, 1989), and a third study from California found over half of families received reunification services (Waddell, 2002). These findings suggest that it takes time to be reunified with services and it also emphasized the limited number of families receiving reunification services. For specific sample sizes and details of these individual studies, see Francis et al. (2023), Table 1.

There were mixed findings regarding implementation of ICWA's priority on kinship care. Overall, findings show positive steps in achieving the ICWA goal of placement with extended family. However, one rigorous national study found that AI/AN children were less likely than their non-AI/AN counterparts to be placed in kinship care and more likely to be placed in group homes (Carter, 2009). Another study in California found that AI/AN children remained in non-kinship placements longer than their White and Hispanic counterparts (Barth et al., 2002). Still, a small study in Butte County, California, found that 74% of children were placed with Tribal relatives with the remaining children placed in non-AI/AN homes (Waddell, 2002). Another small study examined case records for 49 children and found over half of children were placed with relatives, one-third placed with homes approved by their Tribe, and about 13% were placed in AI/AN foster homes (Limb et al., 2004).

Mixed results were also seen for adoption. One study found that AI/AN children spent longer times in foster care and were less likely to be adopted within four years but were more likely to be adopted by kinship caregivers (Barth et al., 2002). The Barth et al. (2002) study also found that over half of AI/AN children were adopted by at least one AI/AN parent. Another study found adoption rates declining at a

Table 2: Percent of AI/AN identified children in ICWA preferred placements



Note: Original data not previously published.

significant rate since 1975 (MacEachron et al., 1996). Francis et al. (2023) note that these studies are dated, and gaps in research fail to recognize corruption that may exist beyond the state level to the international level for adoption of AI/AN children, e.g., pressures and restrictions regarding international adoption making adoptive AI/AN children more lucrative for non-AI/AN adoptive parents (Cross, 2014).

Francis et al. (2023) conclude that collectively, the literature shows that ICWA can lead to positive outcomes for children, though ICWA may not have been applied nationwide with high fidelity. Improvement is needed for placement and permanency outcomes and cultural competency. Francis et al. (2023) finally conclude that recent studies that have research rigor and can be more generalizable need to be conducted. Longitudinal studies using national data should be conducted to better understand the effectiveness of ICWA on foster care and adoption outcomes for AI/AN children in care as well as to examine the implementation of ICWA over time. Studies with rigorous designs (e.g., pretest/posttest designs, interrupted time series designs, and instrumental variable designs) allow for comparison of outcomes for AI/AN children before and after the 1978 implementation of ICWA. Rigorous sampling (e.g., probability sampling) is also recommended to help obtain more generalizable samples. Rigorous studies should be conducted using current data and multiple participants in the child welfare system (e.g., youth with lived experience, case workers, foster parents) to look at the impact of ICWA in order to triangulate findings and inform ICWA policies. Also, future studies should include Tribal staff and liaisons to help inform ICWA policies. It may also be helpful for studies to identify Tribes participating in the studies to help recognize and understand cultural differences among Tribes.



## Proxy Data for ICWA Compliance

As evident in the literature summary above, studies on ICWA compliance are limited and many are with older data. ICWA compliance is challenging to measure directly, particularly with national data sets. These data sets include state data for children under state jurisdiction but not Tribal data. In addition, national data sets record what type of placements children have, not whether states considered ICWA placement preferences or whether states made active efforts in those cases. Proxy data can be gleaned on ICWA compliance from the rate of ICWA-preferred placements in state data.

Below, using data from the 2010–2019 Adoption and Foster Care Analysis and Reporting System (AFCARS) foster care files, we examine the placement setting for children identified as AI/AN (alone or in combination with any other racial or ethnic identity). The data analysis was newly generated for the present report with the assistance of Dr. Frank Edwards. We count a child as being in an ICWA-preferred placement setting if the child was in a kin or relative foster home or if the child was in a non-relative foster placement where any of the caregivers identify as AI/AN. Note that this analysis is an imperfect measure of compliance with ICWA placement preferences. AFCARS did not contain measures for ICWA eligibility or Tribal affiliation and instead relied on self-identification by race during this reporting period.

On average, in 2019, for states with at least 100 AI/AN children in foster care, 35% of AI/AN-identified children were in ICWA-preferred placements. In general, these rates have been increasing over time (29% in ICWA-preferred placements in the same set of states in 2010). We identify only four states where the majority of AI/AN-identified children were in ICWA-preferred placements in 2019: Minnesota (55%), North Carolina (53%), Montana (51%), and Wisconsin (51%). In all other states with at least 100 AI/AN children in foster care, fewer than half of AI/AN-identified children were in ICWA-preferred placements in 2019.



## Summary of Checklists, Methods, and Frameworks for Measuring ICWA Compliance

As noted above, national data sets are indirect proxy measures of ICWA compliance and do not include Tribal child welfare system data—only state child welfare agency data. Direct measures of ICWA compliance are conducted by examining individual court cases or administrative child welfare data for individual cases, which can only be done at the local level. For example, a recent study by Summers (2023) examined ICWA implementation in five state court sites, including 151 ICWA cases. These cases were reviewed for active efforts, Tribal presence at hearings, use of QEW testimony, notice of court proceedings, and confirmation of ICWA status. Results were mixed and showed that specific ICWA implementation measures and aggregate measures were not related to outcomes. However, more timely permanency was associated with the early involvement of Tribes in cases such as having the Tribe present at the first hearing (Summers, 2023). Given the dearth of similar studies that directly measure ICWA implementation or compliance, in the section below, we identify methods for measuring ICWA compliance to inform the design of future local studies.

### Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit

The National Council of Juvenile and Family Court Judges created a toolkit to be used as a starting point to think about how to measure ICWA performance, and it is not meant to be an exhaustive resource list. The toolkit discusses the strengths and weaknesses of different data collection methods, things to consider in selecting the right approach, and how data can be used (Summers and Woods, 2014).

Four methods of data collection are discussed in this toolkit, including case file review, court observations, surveys, and focus groups. Strengths of using case file review are that large amounts of data are available, much of the data is objective, and case review can provide a lot of quantitative data with qualitative data that gives context to the numbers. However, behavior in court is not recorded, and it requires a lot of time by experienced coders, so the



process is resource-intensive.

Court observation can allow the coder to understand courtroom behaviors while collecting both quantitative and qualitative data. Still, the time commitment to this is extensive, the ability to code can be difficult in a fast-paced court setting, and it can be more subjective than case file review.

Surveys can offer an easy way to collect qualitative data with a low time commitment; however, results can be subjective as they are perceptions being reported, and there can be response bias, meaning that participants may answer in a way that is more positive than realistic.

The strengths of using focus groups are that they offer depth of discussion, participant interaction, and qualitative data. There are similar weaknesses to this method as surveys such as subjectivity in data and response bias. Participants may or may not respond differently because they are being watched. A focus group must also have a trained moderator who will be able to manage the participants and know when to ask follow-up questions.

The toolkit points to many things to consider when choosing the right approach. The use of multiple methods may provide a richer and more comprehensive understanding of the research questions asked. Identifying those research questions first is critical, and the type of data will depend on what you are looking for. Once the type of data and available resources are identified, a sample size can be determined—qualitative data will need a smaller sample size. In contrast, quantitative will need a representative size, at least 10% of the study population. Impacts on participants must also be considered, such as confidentiality, especially in focus groups, and stress that may be caused when collecting sensitive information. It may be useful, although not required, for data collectors to be familiar with case process and ICWA. Training on whatever tool being utilized is very important—coders should practice using the tool before data collection begins. Inter-rater reliability is also important to see consistency and if there are disagreements between what people are seeing.

The toolkit also discusses how the data can be used. Questions to ask include who is the audience of the data, why is it important, and what did this data show or answer? One way to show the data is by descriptives such as mean or median. In addition to how the data will be reported is what data will be reported, such as data related to the research questions and information that provides an overview of the sample.

The toolkit used two de-identified site examples looking at ICWA compliance in two jurisdictions. One site used a court observation tool, and another site used a case file review. The court observation tool was tested using a site that had a moderate population of AI/AN families. Coders were identified and trained on the tool. Due to limited resources, the data collected represented a convenience sample of only one jurisdiction. Coders collected data on 90 ICWA case hearings. Data was limited to only one hearing across the life of a case and data is limited to what was directly observable in court, meaning that findings from past hearings may not be available and information that may be written on the record but not made verbally were not recorded.

For the case file review site example, researchers were contracted by the site to do a statewide assessment of practice. A sample of recently closed ICWA cases from each jurisdiction was reviewed in one location. The site asked many questions, some with findings and some that they were not able to answer. Case file review provided information over the life of the case providing an accurate representation of some of the questions; however, some questions were not able to be answered due to information that was not clear in documentation. For instance, caregivers' names were included in the files but it was difficult to determine if placement preferences were considered in some cases.

## **Operationalizing ICWA Compliance to Improve AI/AN American Child and Family Outcome**

This methodological report was conducted in collaboration by a midwestern university and the local Court Improvement Program (CIP).

A request for proposals for a five-year court-record review was issued by the state supreme court as a need was identified for an ICWA compliance study. All state court records, of one midwestern state with a larger-than-average AI/AN population, in which ICWA may have applied were reviewed. Court records from 2009-2012 and 2016 were reviewed and an ICWA compliance checklist was created (Sage and Barkdull, 2022).

The checklist was developed so that it could measure both quantitative and qualitative data. After a review of existing peer-reviewed and grey literature, which included a search for publications about ICWA compliance and a scan for ICWA compliance checklists or manuals, a draft list of ICWA compliance variables was developed. The ICWA subcommittee of the CIP committee reviewed and revised the draft list and measurements that were meaningful to varied stakeholders were chosen. Before finalizing the checklist, the following questions were asked about each variable: (a) is the operationalization explicit in the law, (b) given the data available in court records, is it possible to know whether the case was compliant with ICWA related to the operationalized variable, and (c) does this inform what we know about the standard and spirit of the ICWA law?

The study considered whether the “spirit” of ICWA was met alongside the technical compliance to the law; for example, it considered whether an effort was made to involve the Tribe and their priorities in case planning. They acknowledge that they were unable to manage the research study entirely within the spirit of ICWA, which would require participation of Tribal communities in the research and dissemination process. A limitation to the accuracy of the data was that only flagged ICWA cases were evaluated, which likely means there was an undercount of cases where ICWA was not properly assessed. A major challenge was that documenting compliance was difficult when there wasn’t supporting evidence recorded. For example, court records documented that “all parties were noticed” or found that “active efforts were met” without evidence that showed these efforts.

This report discussed some of the lessons learned. The authors argue that the measurement of ICWA needs to not only examine whether ICWA placement preferences are being followed specifically but also evaluate if the broader intent of the law is being implemented. An assessment that is based on the operationalization of the letter of the law may overestimate the level to which the purpose of the law is addressed. Still, courts could adopt the definitions posed in this report as a way to adopt standardized definitions of compliance. Another lesson learned was that the irregularity of how different jurisdictions report data related to ICWA variables means that researchers need to be skilled in understanding the structure and language of court records. If regularity is expected, researchers may underestimate the time it takes to evaluate a single record for compliance. Measurement of compliance itself is an intervention as it raises attention to practice and policy during an audit. This report used historical data, so it was impossible to see whether the research discussions impacted compliance measures. Organizational silos were also found to be a barrier. This is a court-funded audit and therefore they were not interested in child welfare agency procedures. However, it’s clear that ICWA compliance relies on both child welfare agencies and court activities.



***“The authors argue that the measurement of ICWA needs to not only examine whether ICWA placement preferences are being followed specifically but also evaluate if the broader intent of the law is being implemented.”***

Table 3 Compliance Checklist

ICWA standard	Operational definition (Compliance met if the following existed in court records)
Identification and jurisdiction	Record notes that ICWA applies or ICWA may apply. If ICWA is not mentioned in the case record but was found to apply in previous cases, the record is noted as non-compliant.
Right to intervene	Record notes that the Tribe was properly noticed and requested the intervener's status and whether the court granted it.
Emergency removal	Record notes that the reason for removal was substantiated related to imminent harm and subsequent/continued placement was necessary and whether children were returned home as soon as imminent harm was absent. Narrative notes that the child would be at imminent risk of emotional or physical abuse if left in the parents' custody.
Notice to parents and Tribe	Record notes that "all parties were noticed" and/or names specific parties noticed and that the correct parties were noticed according to court documentation. If parents cannot be found, the record notes that their rights were previously terminated, they are deceased; or if copies of notice receipts are scanned in file.
Right to counsel	Record notes that parties are noticed of their right to counsel and their response and whether counsel was present.
Placement preference	Record notes that the child was placed following placement preference, record documented relative/kin search, and placement consideration, or record noted good cause not to follow placement preference at each hearing or placement change. If not in a preferred placement, narrative notes that ongoing work toward preferred placement.
Culturally relevant services	Record specifically mentions the phrase "culturally relevant services" or identifies specific services considered culturally informed, such as a Tribal parenting program or the use of an Indigenous therapist or contact with the Tribe to identify culturally relevant services.
Active efforts	Record specifically finds that active efforts were made. In cases where some evidence of active efforts is apparent, but there are only findings of reasonable efforts, the case is not counted as compliant. Examples of active efforts include transporting the parent to meetings, providing pre-placement services to keep children in the home, and providing homemaking services to keep the children home or to return the children home as soon as possible.
Qualified expert witness	Record indicates testimony by a Qualified Expert Witness is documented in minutes related to a placement hearing and (if applicable) in termination of parental rights hearing.

Note: Adopted from Sage and Barkdull, P.15



## What is Measured is What is Done: Methods to Measure Compliance with the Indian Child Welfare Act

This article discusses the compliance and measurement of ICWA. It outlines the provisions of ICWA that are measurable at a local or national level as well as past attempts at measurements. Familiarity with the law is necessary for enforcement and proper implementation, and enforcement also requires monitoring and measuring of compliance. However, there is neither a funding mechanism to ensure ICWA compliance nor assigned federal oversight responsibility for it. The article discusses several studies that examine the provisions of ICWA compliance, including the definition of children subject to ICWA, active efforts, QEW, and placement types and preferences. Barriers to compliance are discussed as well as strengths and weaknesses of methods to measure compliance with ICWA (Williams et al., 2016).

One study in Arizona stated that 94% of 48 records reviewed provided active efforts to provide services to prevent the breakup of family (Limb et al., 2004). However, cross-state variation is seen in meeting active efforts. The article suggests that this may be due to differences in the operational definitions used by researchers or differences in the interpretation of the meaning of active efforts. For example, Minnesota defines active efforts and provides examples, whereas, in Oklahoma, active efforts are determined on a case-by-case basis.

A study in Arizona showed that 71% of 49 case records used QEW testimony involving foster care placement (Limb et al., 2004). In 19 cases involving termination of parental rights, 89% included testimony from one or more QEWs supporting a finding that continued custody with the Indian parent or guardian would result in serious harm to the child (Bellonger & Rubio, 2004). Another study in South Dakota found that across cases reviewed, professional persons were used as QEWs almost twice as often as lay experts with social and cultural knowledge of the child's Tribe (Bellonger & Rubio, 2004). This study indicates the critical role of QEWs in

ICWA court cases and the importance of cultural experts also serving as QEWs.

Research on placement types and preferences was reviewed, and an Arizona study of child protection case records reported 48 of 49 case records reviewed involved children who had been placed in foster or pre-adoptive homes. Of the 48 cases, 83% had been placed in homes that were within ICWA preferences (Limb et al., 2004).

Several barriers were discussed in this article, including lack of federal oversight, interpreting active efforts, and different state variations in interpreting and applying ICWA. After a 1994 study by the Office of Inspector General (OIG) "to identify opportunities for the Administration for Children and Families to strengthen the provision of child welfare services and protections to American Indian and Alaska Native children (Department of Health and Human Services, Office of the Inspector General, 1994)," the Administration for Children and Families and the Bureau of Indian Affairs (BIA) were encouraged to work together with "Tribal and state representatives to ensure that federal requirements provide adequate protections for Native American children in either state or Tribal custody." However, both ACF and BIA disclaimed authority to provide ICWA compliance oversight. At present, there is no formal mechanism that addresses ICWA compliance.

The OIG report also recommended that ACF improve its technical assistance around ICWA for state child welfare agencies and state courts to improve understanding of the law. This lack of federal oversight leaves states to interpret the provisions of ICWA on their own. Some groups have attempted to create tools to fill this gap. The National Council of Juvenile and Family Court Judges created a judicial checklist and the Mississippi Administrative Office of Courts Court Improvement Program developed a training video. Thirty-three states have also incorporated all or parts of ICWA into their state codes, some states including additional requirements as well. The most frequent variation is what is required to meet the active efforts provision.

Active efforts vary across states. In Minnesota, the Tribal-state agreement defines active efforts. It gives examples for social workers, such as

requesting Tribal-designated representatives and providing concrete services and access to Tribal services to families. In Oklahoma, courts determine active efforts on a case-by-case basis. California and Maryland equate “active efforts” with the “reasonable efforts” definition included in the Adoption and Safe Families Act. Local interpretation of ICWA is a barrier to broadly applicable definitions and measurements of compliance.

The article discusses methods for measurement of compliance and considerations to take. The aspect of measuring compliance will drive the method used. Understanding barriers to compliance or how compliance could be improved might take a qualitative approach, while understanding the extent to which ICWA compliance is being achieved might take a quantitative approach that looks at the frequency of ICWA-defined steps or outcomes in specific cases. When examining ICWA compliance, this article points to mixed methods, which are the most comprehensive and informative.

Observational methods require a trained monitor—familiar with family courts, ICWA, and child welfare agency practice—to fill out a structured checklist with limited text fields. This can be difficult as often court cases may be quick and require the monitor to be looking down at their tool almost the entire time with the possibility that they will miss important non-verbal cues. Key actors may change their behavior due to the awareness that a monitor is present. The Quality Uniform ICWA Collection performance checklist (QUICWA) is one tool that can be used as an in-person observation tool. Inter-rater reliability is also important to understand the quality of the tool and how monitors code the event. Inter-rater reliability analysis was used with the QUICWA tool and found high agreement for some aspects and low agreement for others. For example, 93% agreement was seen for whether the judge made “a finding orally on the record that ICWA” does or does not apply. However, items measuring whether there was QEW testimony supporting out-of-home placement and orders for permanency had agreement levels less than 60%. Monitoring

efforts also must consider whether there is active versus passive data gathering. With active data gathering, a monitor will actively seek out information, while passive data gathering uses “present” or “not present” questions.

The fluidity of ICWA is also a barrier to measuring ICWA compliance. Cases not originally marked as ICWA could become ICWA cases as new information is found. It is also true that a case could be flagged as ICWA but then the child has a Tribal membership decision come back as ineligible, and ICWA would no longer be applied. The two examples are of cases that have different levels of compliance over the life of the cases.

The strengths and weaknesses of judicial case record reviews were also discussed in this article. A strength that the article identified was that in the area of active efforts, data gathered from case review records that follow a single case for the duration of the case may be more reliable because the findings must be on the record. A weakness identified was that case files are often filed by the caregiver name without information about relationship, Tribal affiliation, etc. These items can be found in child welfare records but child welfare record review is very labor intensive. Observational and case record methods are both great choices for addressing how often certain elements of compliance take place and could be used to address questions of why compliance or noncompliance is happening. Because application of ICWA may vary by jurisdiction training and instruments for observation and case record review may not be able to be used across jurisdictions making it difficult to compare cross site.

Surveys and focus groups are another data gathering method that is relatively inexpensive, and the questions may be general enough to use across jurisdictions. It can be useful to complement more objective data. Open-ended questions may reveal questions that allow researchers to find out what they do not know.

This article identified several recommendations around resources, training, standardized data and documentation requirements, and enforcement. Child welfare funding is not appropriated relative to the disproportionate

representation of AI/AN children in care or at risk of going into care. Increasing cultural competence of workers and collaboration between state and Tribal child welfare agencies may boost effectiveness and help meet ICWA requirements with little additional funding. To address the lack of evidence of ICWA compliance the importance of training is emphasized. Existing training mechanisms can be leveraged to improve cultural relevance and understanding of ICWA. It could be a way to integrate ICWA into general child welfare practice rather than its own category. Measurement tools are needed to measure progress, and having a standardized way to measure compliance across jurisdictions nationally while still having ways to meet specific jurisdiction needs would be a significant development. This article also recommended that ACF, BIA, or both be designated the responsibility of oversight agency.

## Conclusion

ICWA systemic compliance studies can directly measure adherence to the law in state or local jurisdictions. In Williams et al. (2015), the study looked at state compliance with ICWA requirements. They recognized the limited research on ICWA compliance and varying degrees of ICWA compliance by states. Several barriers to better oversight were also identified, including lack of federal oversight, challenges in identifying AI/AN children, and lack of education and training for child welfare professionals.

In Francis et al., the authors looked at prior studies from the 1970s to 2010 to determine the extent to which ICWA has been effective (i.e., led to beneficial outcomes), if effectiveness has increased or decreased over time, to what extent the provisions of ICWA have been implemented as intended, and what factors aid or hinder implementation. The studies identified the limited capacity of ICWA programs and barriers to implementing the law across all examined studies. The studies were varied in terms of their specific ICWA focus and methodology. The study authors concluded the results from the studies they reviewed were mixed in terms of ICWA's effectiveness, but many positive outcomes were noted.

As noted in the studies above, studies on ICWA compliance are limited, and many are with older data. Proxy data in national databases offers indirect, approximated measures of using ICWA placement preferences. Using AFCARS data from 2010-2019, Dr. Frank Edwards, working with NICWA staff, developed a measure of the number of Native children in ICWA placement preference homes. The data is limited to measures used in AFCARS to identify Native children and does not include measures that determine if a Native child is ICWA eligible or the Tribal affiliation of the child in care. Direct methods for assessing ICWA compliance at a local level can include checklists and other methods and frameworks that are conducted by examining individual court cases or administrative child welfare data for individual cases. Summers examined ICWA implementation in five states and found mixed results. Still, more timely permanency was associated with the early involvement of Tribes in cases such as having the Tribe present at the first hearing. In Summers and Wood, the National Council of Juvenile and Family Court Judges created a toolkit to be used as a starting point to think about how to measure ICWA performance. The toolkit discusses the strengths and weaknesses of different data collection methods, things to consider in selecting the right approach, and how data can be used. Sage and Barkdull examined state court records of one midwestern state with a larger-than-average AI/AN population, in which ICWA may have applied. Court records from 2009-2012 and 2016 were reviewed, and an ICWA compliance checklist was created. The authors identify several lessons learned in creating and implementing an ICWA compliance study in a state court setting. In Williams et al. (2016), the authors examine provisions of ICWA that are measurable at a local or national level as well as past attempts at measurements. The authors identify several recommendations regarding resources, training, standardized data and documentation requirements, and enforcement of ICWA.

Future directions for ICWA compliance studies might include expanded local studies directly examining ICWA compliance and considering the potential risks and benefits of expanded regional or national data collection of Tribal



child welfare system data for expanded information on ICWA compliance. Partnership with Tribal nations and a community-based participatory research methodology would be critical for such future work. NICWA notes that federal oversight gaps regarding ICWA compliance must be addressed to provide a reliable framework and support for regular collection and review of ICWA compliance by state agencies and courts.

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### About the National Indian Child Welfare Association

The National Indian Child Welfare Association (NICWA) protects the safety, health, and cultural identity of Native children and families today and for future generations. NICWA strengthens Tribal capacity to prevent child abuse and neglect, advances policies that uphold Tribal sovereignty, and promotes Native-led, culturally grounded approaches to child welfare.

Through advocacy, coalition-building, workforce training, and technical assistance to improve service systems, NICWA works at the Tribal, local, state, and national levels to ensure that Native children can thrive within their families and communities.

Learn more at [www.nicwa.org](http://www.nicwa.org).