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October 31, 2011

The Honorable Larry Echo Hawk
Assistant Secretary for Indian Affairs
Department of the Interior
MS-4141-MIB
1849 C Street, NW
Washington, D.C. 20240

Dear Assistant Secretary Echo Hawk:

We write to express our alarm and dismay in response to the recently reported investigation by NPR on the foster care system in the State of South Dakota, and to inform you that we will be requesting a formal Natural Resources Committee investigation into the matter.

The NPR investigation reports that Indian children are being removed from their families, and their cultures, in violation of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et seq.*, sometimes without cause, and in response to financial incentive.¹ As you know, the ICWA was passed in 1978 to combat precisely this problem – to reverse states’ practices of separating Indian children from their parents, families, and tribes through involuntary removal from Native American homes and involuntary termination of parental rights. H. Rept. No. 95-1386, at 8-11. The House Committee on Interior and Insular Affairs – the predecessor of the present-day House Committee on Natural Resources – termed the disparity between foster care placement rates for Indian and non-Indians “shocking.” *Id.* Notably, the Committee found that “[t]he decision to take Indian children from their natural home is, in most cases, carried out without due process of law” and that most cases did not go through adjudication because parents voluntarily waived their parental rights in the face of coercion from the state. *Id.* at 11.

¹ “Incentives and Cultural Bias Fuel Foster System,” *available at* <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>

Indeed, the ICWA is premised on the belief that “protection of the child’s relationship with the tribe is in the child’s best interest”² and identifies Indian children as a “resource” that is “vital to the continued existence and integrity of Indian tribes.”³ For foster care placement, the ICWA requires that state courts apply a specific standard in removing an Indian child from his or her home. 25 U.S.C. § 1912(e).⁴ The ICWA specifically mandates that foster care placement of Indian children be with a member of the child’s extended family; a foster home licensed, approved, or specified by the child’s tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or, an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child’s needs. *Id.* § 1915(b). These preferences make it likely that Indian children will not be removed from an Indian environment.

If the information in the NPR article is accurate, it would appear that the State of South Dakota has failed not only to abide by the mandates of federal law but has also failed its Indian children, their families and their tribes by violating the letter and the spirit of the ICWA.

The NPR investigation found that while Indian children make up 15 percent of the child population in South Dakota, over half of the children in foster care administered by the State are Indian. What is more, the State is removing 700 Indian children every year from their homes, sometimes under “questionable circumstances,” and failing to place these children with their relatives or tribes as required under the ICWA. That such removal may be unjustified is distressing, but it is simply outrageous that Indian children are being placed in non-Indian homes or group care at an alarming rate -- upwards of 90% end up in non-Indian care -- and that South Dakota is removing children at almost *three times* the rate of other states for what appears to be profit.⁵

² *Chester County Dep’t of Social Services v. Coleman*, 372 S.E.2d 912, 914 (S.C.Ct. App. 1988).

³ 25 U.S.C. § 1902.

⁴ Section 1912(e) provides that for involuntary proceedings, state courts must find, based on “clear and convincing evidence,” including the testimony of qualified expert witnesses, that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child” before placing the child in foster care. The “clear and convincing evidence” standard is higher than the “preponderance of the evidence” standard necessary for due process and employed by most states in foster care placement proceedings for non-Indian children.

⁵ The investigation reports that states have a financial incentive to place children in foster care, since states receive federal funding to address broken families. South Dakota, being a poor state, receives almost \$100 million a year from the federal government. The federal government provides a financial bonus for foster care of “special needs” children, entitling states to receive at least \$12,000 per child - \$6,000 more that it would have received per child without special needs. Since the state designated all *Indian* children to be “special needs,” over a period of ten years

The Honorable Larry Echo Hawk
Page 3
October 31, 2011

As trustee-delegate, you are charged with promoting the well being of American Indians and Alaska Natives, and the Department of the Interior's Bureau of Indian Affairs (BIA) has a particular interest in Indian children and their placement in the foster care system at the state level through implementation of the ICWA. We therefore request that you assist the Committee Democrats' oversight efforts by reporting on whether the abuses that the NPR report suggests that the State of South Dakota may have committed against Indian children have in fact occurred, if they represent a misapplication, or plain disregard, of the ICWA, and if so, what actions the BIA has taken (or intends to take) to rectify this situation and ensure it is not repeated.

Please respond in full by November 28, 2011. Should you have any questions, contact Jennifer Romero or Reece Rushing of the House Natural Resources Committee Democratic staff at 202-225-6065.

Sincerely yours,



Edward J. Markey
Ranking Member
Natural Resources Committee



Dan Boren
Ranking Member
Subcommittee on Indian and Alaska Native Affairs

this has added up to almost \$1 million in such bonuses from the federal government going directly to South Dakota coffers.