

Reviewing the Facts: An Assessment of the Accuracy of NPR's *Native Foster Care:* *Lost Children, Shattered Families*



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**A REPORT TO THE US CONGRESS
FROM THE COALITION OF SIOUX TRIBES
FOR CHILDREN AND FAMILIES**

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Reviewing the Facts:

An Assessment of the Accuracy of NPR's *Native Foster Care: Lost Children, Shattered Families*

I. Summary

Following NPR's 2011 report *Native Foster Care: Lost Children, Shattered Families*, which reported on the state of Native foster care in South Dakota and purported significant violations of the Indian Child Welfare Act (ICWA) by the state's Department of Social Services (DSS), six members of the United States House of Representatives asked then-Assistant Secretary for Indian Affairs Larry Echo Hawk to investigate the claims, report on their veracity, and outline what steps, if any, the Bureau of Indian Affairs (BIA) would take to rectify the situation.¹

To our knowledge, the BIA has not undertaken action to investigate and verify the NPR report's claims. Furthermore, the BIA's subsequent promise to sponsor a summit on Indian Child Welfare in South Dakota in early 2012 has not been fulfilled.² Therefore the members of the Coalition of Sioux Tribes for Children and Families—which is composed of the ICWA Directors of South Dakota's nine American Indian tribes—have taken it upon ourselves to respond to the Congressmen. In assessing the validity of NPR's claims, we have chosen to focus on those assertions made by NPR as they were re-articulated by Representatives Ed Markey and Dan Boren in their letter to the Department of the Interior. Following are those claims and our findings:

CLAIM #1: “While Indian children make up 15% of the child population in South Dakota, over one-half of the children in foster care administered by the state are Indian.”

FINDING: True. Native American children constitute approximately 13.5% of the child population of South Dakota,³ yet they make up on average 54% of youth who enter foster care in the state each year.⁴

CLAIM #2: “[South Dakota] is removing 700 Indian children every year from their homes...[which is] almost three times the rate of other states.”

¹ (1) Letter of 10/31/11 from Ed Markey and Dan Boren and (2) letter of 11/1/11 from Jim Moran, Dale Kildee, Tom Cole, and Mike Simpson to Department of the Interior. See footnote #13.

² Letter of 11/22/11 from Larry Echo Hawk. See footnote #14.

³ Children's Bureau, *Child Welfare Outcomes: Reports to Congress*. For underlying data and an explanation of methodology, see footnote #23.

⁴ *Ibid.* For underlying data and an explanation of methodology, see footnote #24.

FINDING: True. The number of Native American children entering South Dakota foster care every year is about 742.⁵ Even when controlling for the factor of poverty, South Dakota ranks *3rd in the nation* for the highest number of children taken into custody by the Department of Social Services.⁶

CLAIM #3: “[These removals are done] sometimes under questionable circumstances.”

FINDING: True. We believe that South Dakota’s DSS has created a conception of “neglect” that is severely biased against American Indian families, especially those residing on reservation. First, this conception inappropriately equates economic poverty with neglect. Second, it fails to understand the tribes’ kinship system of extended family care, a cultural tradition of the kind the ICWA was actually designed to protect. Under this bias, South Dakota’s rate of identifying “neglect” is 18% higher than the national average. In 2010, the national average of state discernment of neglect, as a percent of total maltreatment of foster children prior to their being taken into custody by the state, was 78.3%. In South Dakota the rate was 95.8%.⁷

CLAIM #4: “[South Dakota is] failing to place these children with their relatives or tribe – as is required under ICWA ... Indian children are being placed in non-Indian homes or group care [by the Department of Social Services] at an alarming rate – upwards of 90%” ...”

FINDING: True. As of July 2011, there were 440 American Indian children in family run foster homes in South Dakota. Of these, 381 (87%, or 9 out of 10) abided in non-Native family foster care.⁸ At the same time, there were 65 licensed Native American foster homes, and anywhere from 13–28 of these Indian foster homes sat empty.

⁵ Children’s Bureau, *Child Welfare Outcomes: Reports to Congress*. For underlying data and an explanation of methodology, see footnote #27.

⁶ National Coalition for Child Protection Reform, “2010 NCCPR Rate of Removal Index,” page 5

⁷ Children’s Bureau, “2010 Child Maltreatment Report,” pages 49-50

⁸ South Dakota DSS, Email to Lakota People’s Law Project, 2011. See footnote #35.

CLAIM #5: “South Dakota is removing children...for what appears to be profit.”

FINDING: True. Nearly \$100 million in federal funding is being sent to South Dakota to administer foster care each year. This includes \$55 million for Children’s Services,⁹ \$48 million to fund foster children's health care,¹⁰ and \$4 million for administration.¹¹ These federal monies constitute a significant portion of state expenditures, and, according to the healthcare consumer nonprofit organization Families USA, they have “a positive and measurable impact on state business activity, available jobs, and overall state income.”¹² All this demonstrates a strong financial incentive for state officials to take high numbers of Native American foster children into custody. Anecdotal evidence and testimony confirm that this incentive motivates the state’s actions.

In our view, the information provided in this report constitutes compelling evidence that South Dakota has knowingly and willfully violated ICWA since at least 2005 (see Section IV for an explanation of this date). Furthermore, federal monies create a strong incentive for South Dakota to seize large numbers of American Indian children. We believe it is likely that the state consciously treats Native American foster children as an attractor of federal money. To begin rectifying this situation, to ensure that the spirit and the letter of the Indian Child Welfare Act are adhered to, and to begin a process of reconciliation between Indian tribes and the State of South Dakota, we recommend that the BIA sponsor its promised summit post-haste and that concerned members of Congress, especially those who are members of the House Committee on Natural Resources, the House Subcommittee on Indian and Alaska Native Affairs, and the Senate Committee on Indian Affairs, attend this summit.

This document has been endorsed by the tribal councils from the Oglala, Cheyenne River, Standing Rock, Yankton, Sisseton-Wahpeton, and Flandreau Sioux tribes in South Dakota. Additionally, this report's demand for a BIA-sponsored summit on Lakota foster care has been endorsed by the Rosebud Sioux tribe. These seven tribal governments together represent 98% of enrolled members of the nine Sioux tribes from our state—and we are collecting tribal council endorsements of our findings from remaining tribes now. Endorsement letters are appended to the end of this booklet.

⁹ South Dakota 2012 Governor’s Budget, page 84. See footnote #42.

¹⁰ *Ibid.* Page 83. For underlying data and an explanation of methodology, see footnote #43.

¹¹ *Ibid.* Page 81. For underlying data and an explanation of methodology, see footnote #44.

¹² Families USA, “SCHIP Reauthorization: What’s at Stake for South Dakota?” 2007, page 4

II. Introduction

One afternoon in 2008, Janice Howe—a Dakota Indian from the Crow Creek tribe—waited at the bus stop for her grandchildren to come home from school. They never arrived.

That afternoon, a social worker had taken Janice's grandchildren. They were driven to a white foster facility hundreds of miles away. The reason stated in the case file: a “rumor” that Janice's daughter, Erin Yellow Robe, had been using drugs. She hadn't. To this day, Janice's daughter hasn't been charged or arrested for drugs—or *anything* else.

For the next year and a half, Janice fought to get her grandchildren back. She called the state's Director of Social Services. She wrote letters to the Governor. Finally, she convinced her tribe's Council to threaten the state with kidnapping. A few weeks later, her grandchildren were returned...on a “trial basis.”

In South Dakota, there are hundreds of grandmothers who share Janice's story. But they haven't all been so lucky.

On October 25-27, 2011, NPR broadcast a three-part investigative series by Laura Sullivan called *Native Foster Care: Lost Children, Shattered Families*. The piece won a Peabody Award for excellence, distinguished achievement, and meritorious public service. Ms. Sullivan's reporting highlighted Janice Howe's story and also went deeper, criticizing South Dakota's Department of Social Services (DSS) for violating the Indian Child Welfare Act (ICWA) and for doing so, in part, to bring federal money into the state.

In the wake of the NPR story, six members of the House of Representatives—four Democrats and two Republicans—wrote letters to the Assistant Secretary for Indian Affairs at the Department of the Interior.¹³ These congressmen were Ed Markey (D-MA), Dan Boren (D-OK), Jim Moran (D-VA), Mike Simpson (R-ID), Dale Kildee (D-MI), and Tom Cole (R-OK). The lawmakers demanded to know:

1. Was Ms. Sullivan's reporting accurate?
2. If so, was South Dakota engaged in a simple, innocent misreading of ICWA or in intentional disregard of the law?



"I feel like [my granddaughters] were traumatized so much...We have ceremonies at certain times a year. She's got to be getting ready to learn these things that she has to do in order to become a young lady. They took a year and a half away from us. How are we going to get that back?"

—Janice Howe,
Dakota Grandmother

¹³ (1) Letter of 10/31/11 from Ed Markey and Dan Boren to Larry Echo Hawk and (2) Letter of 11/1/11 from Jim Moran, Dale Kildee, Tom Cole, and Mike Simpson to Larry Echo Hawk, Ignacia Moreno, and George Sheldon. <http://lakotalaw.org/reports-to-congress>

3. If the system in South Dakota is broken, what does the Bureau of Indian Affairs (BIA) intend to do to undo the damage caused by the violations of ICWA and to make certain that they do not continue?

Assistant Secretary for Indian Affairs Larry Echo Hawk wrote back to the congressmen, pledging to sponsor a summit in early 2012 on Native foster care in South Dakota.¹⁴ The summit, Echo Hawk said, would bring together “all the stakeholders regarding this issue: the tribes, the South Dakota Department of Social Services, the South Dakota Office of Tribal Relations, and other tribal, state, and federal child advocacy groups.” The goals of the summit, according to the Department of the Interior, would be to:

1. Discuss ways to ensure compliance with ICWA;
2. Conduct a thorough review of South Dakota case law and statutes affecting ICWA;
3. Review the funding and oversight of tribal ICWA programs;
4. Review and update the 1979 BIA Child Custody Proceedings Guidelines in light of more recent case law development;
5. Work with tribes and congressional committees to analyze ways ICWA can be amended to better meet the needs of all children and tribes.

To date, this promised summit has not occurred. Furthermore, the House members’ request that the Department of the Interior confirm or refute the claims made by Ms. Sullivan’s report has not been honored.

In light of this failure by the BIA to respond in a timely manner to Congress, the members of the Coalition of Sioux Tribes for Children and Families—which is composed of the federally employed Indian Child Welfare Act directors from South Dakota’s nine reservations—have met to respond to this inquiry. We ICWA directors have prepared this report, *Reviewing the Facts: An Assessment of the Accuracy of NPR’s “Native Foster Care: Lost Children, Shattered Families”* to: (1) provide members of Congress an assessment of the NPR story’s primary claims; (2) present to Congress an assessment of whether ICWA violations—if they have occurred in South Dakota—were made intentionally or unintentionally (as requested by the congressmen of the BIA); and (3) propose a first step for moving forward, rectifying the situation, ensuring that the spirit and the letter of the Indian Child Welfare Act is adhered to, and beginning a process of reconciliation between Indian tribes and the state of South Dakota.

¹⁴ Letter dated 11/22/11 from Larry Echo Hawk to Jim Moran: <http://lakotalaw.org/wp-content/uploads/2012/07/Echo-Hawk-Response-to-Moran-Letter7-30-2012.pdf>

III. History of Sioux Indian Foster Care and the Indian Child Welfare Act (ICWA)

There is a long history of U.S. government agencies, both state and federal, taking Indian children from their homes. It began in the 1880s when the United States introduced mandatory education of Native American children in boarding schools both on and off reservations. For the Lakota, Nakota, and Dakota (Sioux) people of South Dakota, the absorption of children into state care began with the 1868 Treaty of Fort Laramie. Article VII stated that “In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted...and they, therefore, pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend.”¹⁵ Thousands of Native American children were sent to these Indian boarding schools, where mandatory English-only education programs and separation from their families ensured these children had few ties to their Native traditions.



“It enrages me. We’re very tight-knit families, and cousins are disappearing. Family members are disappearing...It’s kidnapping. That’s the way I see it.”

—Peter Lengeek,
Crow Creek Tribal Council Member

According to a study issued by the Brookings Institution at the request of the Department of the Interior in 1928, the boarding schools attended by Native American children were often staffed by teachers under-qualified and obsessed with writ memorization.¹⁶ Native American children who completed a boarding school education were often, on the one hand, ill-equipped to acquire meaningful employment within their tribal communities and, on the other hand, unable to claim employment within Anglo-American society.¹⁷ The Brookings Institution study therefore starkly criticized the boarding schools’ methods, staff, and general fitness as a continuing part of American life. This sounded the death knell for removal and assimilation of Native American children under the guise of betterment through education.

The relief granted in the wake of the reform stimulated by the Brookings Institution study, however, was not long lasting. After the boarding schools were closed, state governments continued to remove Native American children from their families and tribes, this time under the guise of child welfare. Thus, in his statement before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs in 1974,

¹⁵ Treaty of Fort Laramie, Article VII; page 3

¹⁶ The Brookings Institution, “The Problems of Indian Administration,” 2/21/28, pages 346-347

¹⁷ *Ibid.* Page 351

William Byler, the Executive Director of the Association on American Indian Affairs, noted that removal of Native American children had become a frightening epidemic: “[I]n South Dakota, 40 percent of all adoptions made by the State's department of public welfare since 1968 are of Indian children, yet Indian children make up only 7% of the total population. The number of South Dakota Indian children living in foster homes is per capita nearly 1,600 percent greater than the rate of non-Indians.”¹⁸ Byler hypothesized that the cause of such high removal rates was the use of culturally biased standards for what constitutes a fit home by the Department of Social Services.¹⁹ And Senator James Abourezk of South Dakota, who would later author the Indian Child Welfare Act in 1978, testified before the same subcommittee:

Few are knowledgeable about the difficulties American Indians face in a matter of vital concern to them; namely the welfare of their children and their families. It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials. Unwarranted removal of children from their homes is common in Indian communities... Whereas most non-Indian communities can expect to have children out of their natural homes in foster or adoptive homes at a rate of 1 per every 51 children, Indian communities know that their children will be removed at rates varying from 5 to 25 times higher than that.²⁰

Partly in response to these kinds of comments produced by the Senate Subcommittee on Indian Affairs (1974)—and also in response to the Indian Policy Review Commission (1977)²¹—Congress passed the Indian Child Welfare Act in 1978. This law outlaws the wholesale removal of Native American children from their homes and asserts that, should a child be removed, states must make “active efforts” to place the child within his/her own family, tribe, or a tribe of similar culture before placing the child into a white home.²²

Nevertheless, the situation we confront today is strikingly similar to that which prompted enactment of the ICWA. We believe that the culturally biased standards described by Byler persist. And the testimony provided by Senator Abourezk in 1974 could just as easily have been given today. Therefore we believe that the passage of the Indian Child Welfare Act has not ended the erosion of Native American families and culture through state policy. Unfortunately, South Dakota and others states violate ICWA constantly, as this report will help show.

¹⁸ Byler, William, Testimony for Hearings before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 4/8-9/74

¹⁹ *Ibid.*

²⁰ Abourezk, James, Testimony for Hearings before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 4/8-9/74

²¹ American Indian Policy Review Commission, “Final Report” as submitted to Congress, 5/17/77

²² Indian Child Welfare Act, §1915

IV. Evidence Relevant to Key NPR Assertions

“While Indian children make up 15% of the child population in South Dakota, over one-half of the children in foster care administered by the State are Indian.”

- From 1999-2009 Native American children made up approximately 13.5% of the child population of South Dakota²³ and constituted, on average, 54% of those children who entered foster care in the state.²⁴
- The most current data shows that the problem hasn't changed. As of June 30, 2012, 967 children were in paid alternative care in —which includes foster care, group care, and psychiatric care. Of those children, 570 were Native American, which is 58.9% of the total.²⁵
- In 2000 Native American children were in foster care at a rate of 4.7 times their representation in the state population. In 2010, this disproportionality had declined to 3.9 times.²⁶

“[South Dakota] is removing 700 Indian children every year from their homes... [which is] almost *three times* the rate of other states.”

- From 1999 to 2009, the average number of Native American children entering foster care in South Dakota each year was 742.²⁷

²³ Much of our data is drawn from *Child Welfare Outcomes*, a report prepared for Congress by the Children's Bureau of the U.S. Department of Health and Human Services' Administration for Children and Families. We have generally drawn our data from three of these reports, those issued in 2001, 2005, & 2009. For the 10-year period from 1999–2009, the median percentage of children under 18 years of age of American Indian heritage in South Dakota is 13.5% (14.4% in 1999, 13.3% in 2000, 13.5% in 2001, 14.0% in 2002, 14.3% in 2003, 14.6% in 2004, 14.9% in 2005, 13.3% in 2006, 13.2% in 2007, 13.1% in 2008, and 13.0% in 2009). Copies of the reports can be found on the Administration for Children and Families' website: www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/cwo

²⁴ *Ibid.* Percentage of children who enter foster care each fiscal year who are of American Indian heritage: 60.2% in FY99, 59.7% in FY00, 59.8% in FY01, 57.9% in FY 02, 54.0% in FY 03, 53.4% in FY04, 51.9% in FY05, 50.1% in FY06, 54.1% in FY07, 49.1% in FY08, and 48.5% in FY09.

²⁵ Letter from the South Dakota Department of Social Services; 7/26/12

²⁶ National Council of Juvenile and Family Court Judges (NCJFCJ); “Disproportionality Rates for Children of Color in Foster Care”; 5/2012; page 4

²⁷ Children's Bureau, *Child Welfare Outcomes: Reports to Congress*. The average of 742 was calculated first by multiplying the number of children who enter foster care each fiscal year by the percentage of those children who are of American Indian heritage. For example, in FY03 1,375 children entered the foster care system. 54.0% of those children were of American Indian heritage, thus approximately 743 Indian children entered foster care that fiscal year. We then averaged the resulting numbers for each year from 1999–2009, which were: 787 in FY99, 860 in FY00, 811 in FY01, 780 in FY 02, 743 in FY 03, 680 in FY04, 710 in FY05, 680 in FY06, 744 in FY07, 661 in FY08, and 700 in FY09.

- South Dakota removes 7.4 children per thousand, while the total state child population is 196,000. This ranks South Dakota 4th nationally for highest child rate-of-removal.²⁸
- The National Coalition for Child Protection Reform (NCCPR) calculates the rates-of-removal per thousand *impoverished* children for each state in the nation, thereby controlling for poverty when calculating foster child removal rates. The results show that South Dakota's DSS removes impoverished children at a rate of 47.6 per thousand, ranking even higher nationally, at 3rd, for removal of impoverished children. The national removal average is 23.3 impoverished children per thousand.²⁹

“[These removals are done] sometimes under questionable circumstances.”

- The Indian Child Welfare Act directors suspect that an inappropriate conception of "neglect" may be being used by DSS to seize high numbers of Native American children from their homes. South Dakota's definition of "abused or neglected" encompasses those "whose environment is injurious to the child's welfare."³⁰ This definition may be being interpreted by DSS in a way that blurs the line between neglect and impoverishment.

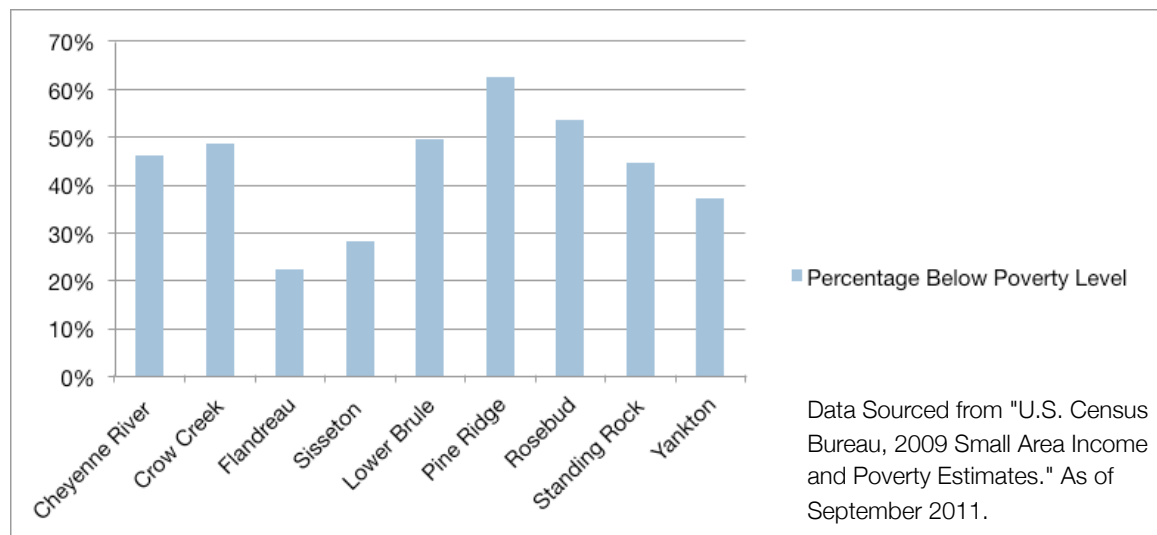


Figure 1: Percentage of Tribal Members Below the Poverty Line

²⁸ National Coalition for Child Protection Reform; “2010 NCCPR Rate of Removal Index”; page 7

²⁹ *Ibid.* Page 5

³⁰ South Dakota Neglect Citation: Ann. Laws § 26-8A-2: <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=26-8A-2>

- While neglect constitutes the largest share of state-recognized “maltreatment” of children in the U.S., South Dakota's rate of identifying neglect is even higher than the national average. In 2010 the national average, as a percentage of total maltreatment, was 78%; South Dakota's rate was 95.8%³¹. Notably, after 2005, neglect as a percentage of maltreatment in increased steadily (we ICWA directors are not aware of why this occurred but are very interested to know).

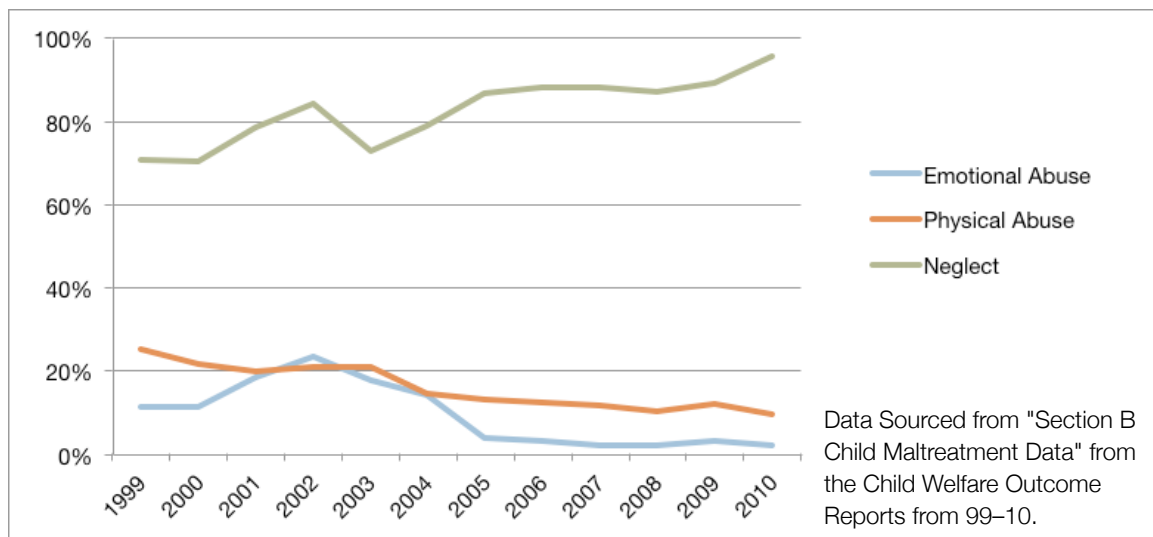


Figure 2: South Dakota Abuse Classification Statistics

Note: Aggregate percentages may exceed 100% because children may be classified in more than one category of maltreatment.

- Each tribe has the option to sign a contractual agreement with the South Dakota Department of Social Services to empower the state to administer foster care to the tribe's children.³² This optional contract is an expression of tribal sovereignty, in that it presents a choice to tribes to allow or deny DSS the right to take tribal children into custody. However, the DSS claims—falsely, in our view—the authority to remove tribal children *even when tribes*

³¹ Children's Bureau, Administration of Children and Families, Health & Human Services; "2010 Child Maltreatment Report," 2010; page 49-50 <http://www.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf>

³² Lawyers defending the State of South Dakota assert that a tribal court sanction of a particular *removal* of a Lakota foster child (these sanctions occur in about 50% of cases) provides cover for DSS to then *place* the child without consideration of ICWA's preferential placement mandates. We ICWA directors do not believe that the preferential placement requirements of ICWA are vitiated by a tribal court sanction of removals alone; we accept the legal interpretation of ICWA proffered by tribal court judge and professor of law B.J. Jones, who asserts: "Unless a Tribe has, by resolution or law, altered the foster care placement preferences requirement, DSS should be abiding by the foster care placement preferences of ICWA or seeking tribal court determinations of good cause to deviate from those placement preferences. This is not happening in the Tribal Courts (Rosebud, Cheyenne River, Crow Creek, and Yankton Sioux) where State DSS provides child protection services to on-reservation Native children."

choose not to sign a contract. There are two statutes, one state and one federal, that DSS has invoked to justify this:

1. South Dakota State Law CL 26-7A-12³³, which grants jurisdiction with respect to foster care to DSS throughout the state;
2. Federal Indian Law Title 25, Chapter 34: Indian Child Protection and Family Violence Prevention, 25 USC 3203(c)(2)(A).³⁴ This law states that “any local law enforcement agency or local child protective services agency that receives a report alleging abuse described in section 3202(3) of this title shall immediately initiate an investigation of such allegation and shall take immediate, appropriate steps to secure the safety and well-being of the child or children involved.” Although this law is clearly intended to protect the wellbeing of Indian children, South Dakota has leveraged it to sidestep the principle of tribal sovereignty and assign to DSS authority explicitly denied to it by ICWA.

“[South Dakota is] failing to place these children with their relatives or tribe, as is required under ICWA...Indian children are being placed in non-Indian homes or group care [by the Department of Social Services] at an alarming rate—upwards of 90%.”

Our research shows that not only are high numbers of Indian children being placed in non-Native foster care settings by South Dakota DSS, but also that culturally-biased state practices constrain the ability of American Indians to care for their relative children. Additionally, family reunifications are declining while at the same time juvenile detention and mental health incarceration of foster children are on the rise.

- As of July 2011, there were 440 Native American children in family run foster homes in South Dakota. At the same time there were 65 licensed Native American foster homes, with only 59 of the 440 children placed in 24 of these homes. 12 of the 64 Native foster homes had requested not to be considered for placement, and another 15 of the families were only willing to accept their relatives. This means that between 13 and 28 of these Indian foster homes sat empty, while 381 Native American children (87%, or 9 out of 10) abided in non-Native foster care.³⁵

³³ South Dakota Codified Law 26-7A-12: <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=26-7A-12>

³⁴ United States Code, Chapter 34; “Indian Child Protection and Family Violence Protection”: <http://uscode.house.gov/download/pls/25C34.txt>

³⁵ Email from South Dakota Department of Social Services, 2011. Note: it is impossible to tell how many of those families who were only willing to take in their relatives *actually took in* children. If all 15 of them did, this means that the number of unutilized foster homes was 28; if none of them did, it lowers the number of unutilized homes to 13.

- “Kinship care” is the process by which relatives care for foster children. It is a practice mandated as preferred by ICWA for Native American youth, and it is in our view both underutilized and underfunded by South Dakota. Kinship care happens in two ways, and each has its own type of funding; we will address the two methods separately. First, relatives can become licensed foster parents (ICWA requires that the state make active efforts to qualify relatives as foster parents) and thereby receive monies, both state and federal, allocated to support foster care services. There is a problem with this method: state standards in South Dakota for becoming a foster parent are too rigorous with respect to Native people—in fact, they are culturally biased—and they therefore exclude large numbers of safe relatives from foster parenting. For example, the Lakota have a practice of living two or more to a room—but DSS has a rule that each foster child must have his/her own room. According to a 2011 GAO study, other states across the union are taking active steps to make licensure *easier* for relatives—for example by waiving physical space requirements in the home and/or reducing the amount of required training hours.³⁶ Why is South Dakota refusing to enact these and similar measures? The second version of kinship care is that, when a relative is denied licensure to become a foster parent, he/she can still become a “nonparent caregiver” and thereby gain custody of his/her related minor. Nonparent caregivers receive federal support through the Temporary Assistance to Needy Families Program (TANF). However, there are problems with this method of kinship care as well. Too often Lakota candidates for this group are overlooked in favor of non-Native foster families. And, if a given relative caretaker is granted custody of a child without licensure, the TANF payments to assist that relative in child-caring are much smaller than those payments disbursed to foster parents. Nationwide average TANF payments were between 1/3-1/2 of what foster care payments were in 2011.³⁷ Meanwhile, some states are supplementing TANF payments to relative caregivers to make up for this disparity—but South Dakota is not among them.³⁸
- At the same time, between 1999 and 2009 South Dakota has drastically increased transfers of Lakota foster children from foster care to the Department of Corrections. During this period, exits from foster care in South Dakota grew with respect to the placement category titled “Other.” This “other” category is used by DSS to describe exits from care in some manner other than children being adopted out, reunited with their families, or aging out of the system. “Other” sub-categories include death, runaway, and transfer

³⁶ U.S. Governmental Accountability Office; “TANF and Child Welfare Programs”; 10/2011; page 21

³⁷ *Ibid.* Page 19

³⁸ *Ibid.* Page 21

to non-foster care institutions.³⁹ Specific death and runaway numbers are not given by South Dakota, but we assume that the vast majority of “other” exits have been transfers to “other institutions,” including the Department of Corrections and mental health facilities. “Other” exits grew for Native American children from 6.9% in 1999 to 32.8% in 2009,⁴⁰ a nearly five-fold increase.

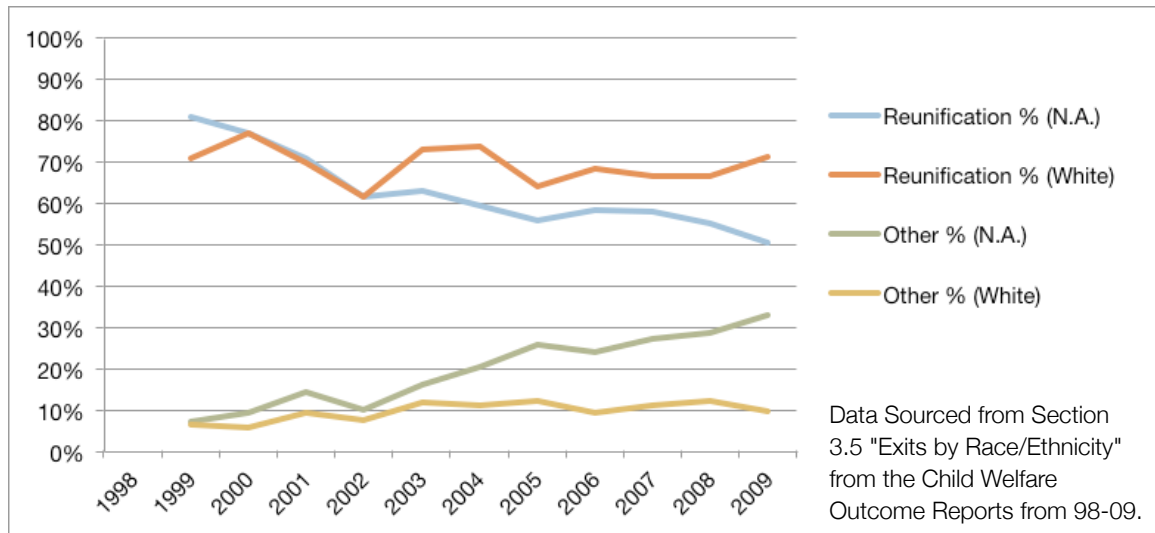


Figure 3: Rates of Exit Classifications for Native American (N.A.) and White Foster Children

“South Dakota is removing children...for what appears to be profit.”

The previously mentioned constraints on Indian families receiving foster-care licensure and the particulars of foster-care funding mean that more federal money flows into the state when an Indian child is placed in a licensed, non-Native setting as opposed to with a non-licensed family member. This creates a strong incentive for the state to place children in this manner; these federal monies are not only large in absolute terms, but they also constitute high percentages of the state’s total annual expenditures. This fact, as well as comments made by South Dakota state officials, demonstrate that this financial incentive is motivating DSS’s willful disregard for the ICWA.

- NPR’s claim concerning the profitability to South Dakota of taking Native foster children into custody is complex. NPR’s reporting asserts that 1) South Dakota attracts millions of federal dollars into its coffers each year by absorbing large numbers of Native foster children into its Department of Social Services, in violation of ICWA; 2) these federal dollars are spent by the

³⁹ Telephone Interview w/ South Dakota Department of Social Services, 08/2012

⁴⁰ Administration for Children and Families; Adoption and Foster Care Analysis and Reporting System (AFCAR); “Child Welfare Outcomes”; 1998-2001, 2002-2005, 2006-2009

state, largely to support white-run foster care, triggering successive rounds of spending and acting as a stimulus to South Dakota's struggling economy.

- The federal government sends \$100 million to South Dakota each year to fund foster care and related services, like adoption. This is consistent with the fact that the Tax Foundation ranks South Dakota 4th in the nation for general dependence on federal support.⁴¹ The three largest categories of 2012 federal foster care funding in South Dakota were Children's Services (\$55 million),⁴² foster children's health care (\$48 million),⁴³ and administrative funding (\$4 million).⁴⁴

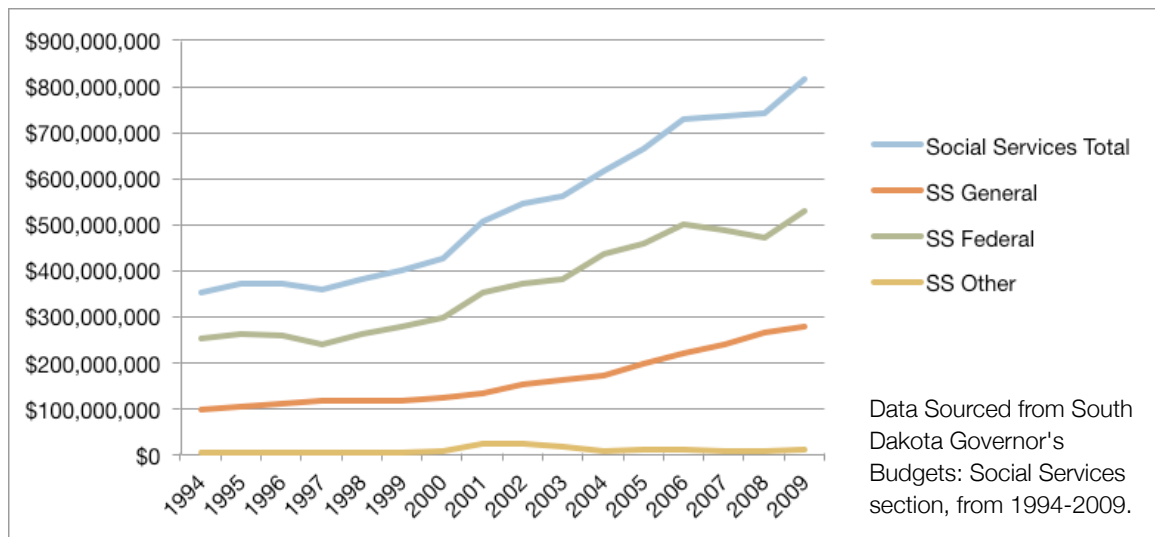


Figure 4: South Dakota Social Services Funding, 1994–2009

- Federal medical spending for foster children in South Dakota is processed through either the Medicaid program or South Dakota's State Child Health Insurance Plan (SCHIP). The average federal share of South Dakota's Medicaid expenditures from the years 1997–2009 was 69.4%, meaning that

⁴¹ The Tax Foundation; "Federal Aid to State Budgets," 12/10/2012. <http://taxfoundation.org/blog/monday-map-federal-aid-state-budgets>

⁴² South Dakota 2012 Governor's Budget; page 84. Children's Services is the agency within the South Dakota Department of Social Services that manages child support enforcement, child protection services, and child care services, i.e. foster care and adoption. <http://www.state.sd.us/bfm/budget/rec12/>

⁴³ South Dakota 2012 Governor's Budget; page 83. Our figure of \$48 million was derived by calculating the percentage of total persons served by DSS that are foster children (10%) and then multiplying that by the total amount of federal money spent on medical care by DSS (\$479 million). <http://www.state.sd.us/bfm/budget/rec12/>

⁴⁴ South Dakota 2012 Governor's Budget; page 81. Our figure of \$4 million was derived by calculating the percentage of total DSS staff that is part of Children's Services (22%) and then multiplying that by the total amount of federal money spent on administration (\$18 million). <http://www.state.sd.us/bfm/budget/rec12/>

every dollar spent by the state on Medicaid brought in \$2.27 in federal funding.⁴⁵ The average federal share of South Dakota's SCHIP expenditures from the years 1999–2012 was 75.1%, meaning that every dollar spent by the state on SCHIP resulted in \$3.01 of federal funding.⁴⁶

- According to the healthcare consumer nonprofit organization Families USA, “State funds that are spent on Medicaid and SCHIP are matched by the federal government at a rate that varies by state ... Because SCHIP is a block grant, each state receives a certain amount of federal funding to pay for the program each year, but it is up to the state to spend the money to draw down those federal dollars.”⁴⁷ According to Families USA, “Because of their financing structures, SCHIP and Medicaid introduce new money into [South Dakota’s] economy, which has a positive and measurable impact on state business activity, available jobs, and overall state income. SCHIP and Medicaid payments to hospitals and other health-related businesses have a direct impact on the state's economy. These dollars trigger successive rounds of earnings and purchases as they continue to circulate through the state's economy...This ripple effect of spending is called the 'economic multiplier effect.' This is why South Dakota will reap so many economic benefits from additional SCHIP and Medicaid spending, above and beyond expanded coverage for children. If SCHIP is reauthorized [in 2007] with the full \$50 billion in additional five-year funding promised in the budget resolution, the \$129.6 million in additional federal dollars injected in South Dakota's economy will generate \$48.7 million in new business activity (output of goods and services), \$18.6 million in new wages, and 667 new jobs.”⁴⁸
- As of January 2010, the average monthly maintenance payment given by South Dakota to (predominantly white) foster families to offset expenses for foster children with basic needs, aged 0 – 12, was \$527.12; for children aged 13-18 the state paid families \$652.31 per month. For the same year, the average monthly state expenditure per foster child by South Dakota for group and residential facilities was \$3,319.24; for psychiatric treatment facilities it was \$6,330.68.⁴⁹
- Statistics are not readily available concerning state expenditures on special needs foster children. However, there is an abundance of information

⁴⁵ Health & Human Services Dept.; “Federal Percentages and Federal Medical Assistance Percentages, FY 1961- FY 2011.” <http://aspe.hhs.gov/health/fmapearly.htm>

⁴⁶ *Ibid.*

⁴⁷ Families USA; “SCHIP Reauthorization: What’s at Stake for South Dakota?”; 5/2007; page 6

⁴⁸ *Ibid.*

⁴⁹ South Dakota Governor’s Budgets, Fiscal Years 1994-2009; Child Protection Services section

available about the financial implications of the adoption of special needs children in South Dakota. First, the definition of a special needs adoptive child is unusually broad in South Dakota. According to the South Dakota Indian Child Welfare Act Commission of 2004, "Special needs children are 1.) abused and neglected children that might be more difficult to place in a permanent home due to the child being physically, behaviorally or emotionally disabled, 2.) a member of a sibling group, 3.) a particular age or race, or 3.) any combination of these factors."⁵⁰ In keeping with this broad definition, between the years 1996-2003 the percent of foster children with no reported special needs adopted out in South Dakota was *zero*; South Dakota was one of very few states in the union that treated *all* adopted children as special needs.⁵¹ This policy continued in fiscal years 2009 and 2010, when 100% of adopted children qualified as special needs.⁵² (Statistics are not available for the period 2004-2008.) Meanwhile, South Dakota receives an award from the federal government of \$2,000—over and above the baseline bonus amount of \$4000—for every special needs child adopted out.⁵³ South Dakota has received \$820,800 from the federal government between 1998-2009 from this adoption incentive bonus program alone.⁵⁴ Also, adoptive parents of special needs children automatically qualify for the full Federal Adoption Tax Credit, unless the parents' annual income exceeds particular limits. The 2009 Federal Adoption Tax Credit was \$12,150 per child.⁵⁵

- As previously stated, large numbers of Native American children exit foster care by being transferred to other state-run institutions. These institutions are another attractor of federal dollars to South Dakota. For example, the total budget for juvenile corrections in South Dakota increased by 213% over the period 1999 to 2009—and a significant percentage of this spending was paid for by the federal government (see graph below). Spending increased even

⁵⁰ South Dakota Office of the Governor; "Indian Child Welfare Act Commission Report; 12/30/04; page 91; <http://www.sdtribalrelations.com/icwa/icwa04report.pdf>

⁵¹ North American Council on Adoptable Children; "AFCARS Adoption Data Research Brief # 4, Special Needs and Disabilities"; page 19; <http://www.nacac.org/adoptionssubsidy/AFCARSSpecialneeds.pdf>

⁵² Administration for Children and Families; Children's Bureau; "Child is Identified as Special Needs Adoption"; 2009 & 2010: http://www.acf.hhs.gov/sites/default/files/cb/special_needs_2009.pdf; <http://www.acf.hhs.gov/programs/cb/resource/special-needs-2010>

⁵³ Cornerstone Consulting Group, Inc.; "A Carrot Among the Sticks," 2001; page 1. http://familyrights.us/bin/white_papers-articles/carrot_among_sticks.pdf

⁵⁴ Administration for Children and Families; "Adoption Incentive Earning History"; 2010: <http://www.acf.hhs.gov/programs/cb/resource/adoption-awards>

⁵⁵ North American Council on Adoptable Children; "Adoption Tax Credit for Adoptions before 2010"; page 1; <http://www.nacac.org/taxcredit/taxcreditbefore2010.html>

though enrollment in the juvenile corrections system decreased by one half during the same period.⁵⁶ Consequently, it appears that Native American foster children are becoming an increasingly important attractor of federal corrections dollars to South Dakota.

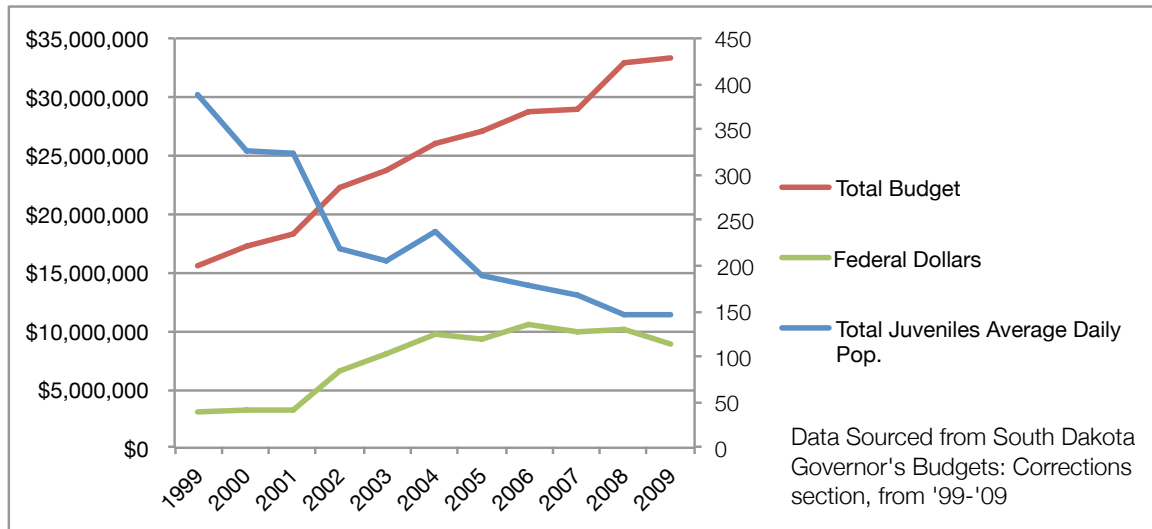


Figure 5: South Dakota Juvenile Corrections Funding as compared to Juvenile Corrections Facilities Average Daily Population, 1999–2009

- When asked by NPR journalist Laura Sullivan how important the federal money is for the state's DSS, former South Dakota Governor William Janklow's response was telling:

“It's incredibly important. I mean look, we're a poor state... We're like North Dakota without oil. We're like Nebraska without Omaha and Lincoln. We don't have resources... We don't have high income jobs. We don't have factories opening here hiring people in high wage jobs.”⁵⁷
- Additional comments were made by former state Attorney General Larry Long and former State Representative Ted Klaudt, who at the time chaired the Government Operations and Audit Committee. On January 5, 2005 three South Dakota child-family activists—Marian White Mouse (a Lakota grandmother), Naomi Johnson (a grandmother of Lakota children), and Gwen Caldwell (President of the Voice of Women)—accompanied the Chief Counsel for the Lakota People's Law Project to the state house. There they confronted

⁵⁶ South Dakota Governor's Budgets, Fiscal Years 1994-2009

⁵⁷ Sullivan, Laura & National Public Radio; “Native Foster Care: Lost Children, Lost Families”; 10/25-27/11; section "Federal Financial Incentives For Removing Children"; <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families>

Mr. Long and Mr. Klaudt about the epidemic of Native children being taken from their families and demanded that the state appoint an ombudsman to investigate the problem. Representative Klaudt replied to them by saying: "That's an awful lot of money coming into this state every year. That would have legal implications." Attorney General Long added: "You would have to sue us before we would do anything like that."⁵⁸

⁵⁸ Interview w/ Daniel Sheehan, Chief Counsel for the Lakota People's Law Project; 1/5/2005

V. South Dakota's Intentions: Has ICWA been violated accidentally or wilfully?

According to a South Dakota State Supreme Court ruling in January of 2005, South Dakota's Department of Social Services was engaged in an unlawful policy of seizing Lakota children without "actively" trying to return those children to their families.⁵⁹ The opinion was delivered by Justice Konenkamp in *In re. J.S.B., JR.* on January 5, 2005, and it stated: "Under the Adoption and Safe Families Act (ASFA), enacted in 1997, 'reasonable efforts' to reunify a family are not required before termination of parental rights when a parent has a pattern of abusive or neglectful behavior constituting an aggravated circumstance. On the other hand, the Indian Child Welfare Act (ICWA), enacted in 1978, provides special rules for the needs of Indian children and families. ICWA requires 'active efforts' to reunite families before a parent's rights may be terminated [no matter whether there are aggravated circumstances] ... During the proceedings [of *In re. J.S.B., JR.*], the [lower] court ruled that ASFA 'preempts' the requirements of ICWA, such that 'active efforts' were not required in the circumstances. We [as the higher court] conclude that ASFA does not override the requirements of ICWA."

Immediately following this South Dakota State Supreme Court ruling, no steps were taken by DSS officials to revise the well-over 2,500 recommendations that those officials had made to the state courts in previous years concerning the placement of Lakota children. Instead, South Dakota's state legislature, between February 8th and March 4th of 2005, enacted legislation which moved *against the grain* of the supreme court decision: South Dakota Senate Bill No. 55⁶⁰ and House Bill No.1226.⁶¹ These laws, in combination, effectuated the following changes in South Dakota state law:

1. Senate Bill No. 55 restricted the Indian persons who possess the authority to appeal a recommendation made to a state court by DSS regarding removal and placement of Lakota foster children *to* relatives of the child in question who have already been denied adoptive placement. Under the new law, to appeal a foster care placement recommendation, relatives have to a) have already sought adoptive custody of the foster child and been denied; b) have been sent a notification by the DSS by regular mail which alerts the relatives of their kin's placement by the DSS with a person other than a relative of the child; c)

⁵⁹ *The People of the State of South Dakota in the Interest of J.S.B., JR., Minor Child and Concerning J.S.B., Sr. and O.L.J., Respondents*; first paragraph of case brief: <http://www.narf.org/icwa/state/southdakota/case/jsb.html>

⁶⁰ South Dakota Senate Bill 55

⁶¹ South Dakota House Bill 1226

have received that letter at their last known address; d) and have responded to DSS demanding an appeal within 30 days of DSS' having sent the letter (see Senate Bill No. 55, Eightieth Session of the Legislative Assembly, 2005, amending Chapter 26-7A-19 page 2 line 18 to page 3 line 1).

2. Senate Bill No. 55 granted for the first time discretion to the Department of Social Services to refuse to place a Native American foster child with a relative because the DSS believes that it is not in the best interest of the child (see Senate Bill No. 55, line 14.).
3. House Bill 1226 established the rules of parental notification of proceedings on South Dakota's terms, as opposed to ICWA's. It amended §26-7A-15, stating: 1) The department shall make "reasonable efforts" to inform the Indian custodian and the Indian child's tribe of court proceedings related to the removal and placement of a child; 2) Failure to notify the child's parents, guardian, custodian, or the child's tribe of the temporary custody hearing is *not* grounds for delay of the hearing if the child is represented by an attorney at the hearing; 3) The temporary custody hearing will be held within 48 hours if it concerns any "apparent abused or neglected child, or if it concerns any apparent delinquent child," or within 24 hours if "it concerns any apparent child in need of supervision pursuant to §26-8B-3" (see House Bill 1226, Eightieth Session of the Legislative Assembly, 2005, lines 11, 19-20). (The standard "reasonable efforts" here contradicts the more specific definition of "active efforts" required under ICWA.⁶² Also, the fact that failure by the state to notify a child's relatives of a hearing is made to not constitute grounds for delaying the hearing expressly contradicts ICWA. Finally, the construction "a child in need of supervision," defined under §26-8B-3, is vague, allowing for inappropriate expedition of the custody hearing process.)

⁶² The Indian Child Welfare Act, 1978, Section 1912 (D)

VI. Conclusion

We, the members of the Coalition for Sioux Tribes and Families, find that the dominant claims made in NPR's report "Native Foster Care: Lost Children, Shattered Families" are accurate. South Dakota, for well over a decade, has systematically violated the spirit and the letter of the Indian Child Welfare Act. The state appears to have done this willfully, and a flawed system of constraints on Native-families and perverse financial incentives has likely led the state to do so in order to bring federal tax dollars into South Dakota.

Members of the House of Representatives were right to request action by the Department of the Interior to both investigate and remedy the situation. Although the Bureau of Indian Affairs—an agency of the Department of the Interior—took initial steps to honor this request by promising to sponsor a summit in early 2012, the BIA has not followed through on this pledge.

The Salt Lake Tribune

"Another troubling sign: American Indian youths have a suicide rate that is 1.5 to three times higher than that for children from other ethnic groups in the U.S. When considering just American Indian youths, the rate is six times higher for those living in non-Indian homes, according to one report."

"American Indian Children Too Often in Foster Care,"
by Brooke Adams, 3/24/12

We are encouraged that steps have recently been taken to reinitiate dialogue around holding a summit, but we also desire more than just encouraging signs. We cannot allow things to continue. Enough is enough. It is time for real solutions with real accountability.

Therefore, we call on the BIA to follow through on its commitment to sponsor a summit on Native foster care in South Dakota at the earliest possible date. We also call on all concerned members of Congress, especially those who are members of the House Committee on Natural Resources, the House Subcommittee on Indian and Alaska Native Affairs, and the Senate Committee on Indian Affairs, to come to our state to attend this summit, to witness first hand what is happening here, and to work with us on finding real, lasting solutions.

VII. References and Resources

The Lakota People's Law Project, which researched and prepared this report, has been partnering with tribes and leaders in South Dakota since 2005. The project combines public interest law, research, education, and organizing in a unique model for advocacy and social reform.

The Lakota People's Law Project is sponsored by the 501(c)(3) non-profit Romero Institute based in Santa Cruz, California. The Institute is named after slain human rights advocate Archbishop Óscar Romero of El Salvador. The Romero Institute seeks to identify and dismantle structural sources of injustice and threats to the survival of our human family.

When and where possible we have attempted to provide clear descriptions of the source materials used as well as thorough descriptions of methodologies employed. We have also made every effort to facilitate access to source materials by providing the URLs of documents and data that are available online. However, we understand that these documents will not always be available.

Electronic copies of all the materials referenced in this report, as well as electronic copies of the report itself, can be downloaded on the Lakota People's Law Project website at:

<http://www.lakotalaw.org/reports-to-congress>

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