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July 28, 2022

Mr. Steven Mullen, Information Collection Clearance Officer
Office of Regulatory Affairs and Collaborative Action
Indian Affairs, U.S. Department of the Interior
1001 Indian School Road, NW, Suite 229
Albuquerque, New Mexico 87104

Submitted via email: comments@bia.gov

Subject: Office of Management and Budget Control Number 1076–0111

Dear Mr. Mullen:

Enclosed please find comments approved for submission by the Judicial Council of California.

Should you have any questions or require additional information, please contact me at 916-323-3121.

Sincerely,

Cory T. Jasperson
Director, Governmental Affairs
Judicial Council of California

CTJ/AL/yc-s
Attachment
cc: Martin Hoshino, Administrative Director, Judicial Council of California
Ann Gilmour, Attorney, Center for Families, Children and the Courts, Judicial Council of California

Comments for OMB Control Number 1076-0111:

1. Payment for Appointed Counsel Should Include Appointed Counsel for Tribes.

When the Indian Child Welfare Act (ICWA) was enacted in 1978 it recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." (25 U.S.C. § 1901(3).)

ICWA provided tribes with most of the substantive rights of other parties to Indian child custody proceedings involving Indian children. However, the promise of ICWA to allow tribes to exercise their sovereignty and jurisdiction over child custody proceedings involving their children is undermined by the failure to provide appointed counsel for tribes, a resource that is provided to all other parties to a child custody proceeding.

As noted by the Bureau of Indian Affairs (Bureau) in its final rule on the ICWA regulations published in the Federal Register on June 14, 2016 (81 Fed.Reg. 38778–38875, hereafter "Final Rule"), since its passage in 1978, implementation and interpretation of the act across and even within states has been inconsistent, resulting in disparate application of the act. (Final Rule, at p. 38778.)

In fulfillment of the federal government's acknowledged trust responsibility to Indian tribes and people (25 U.S.C. § 1901(2)), the act creates minimum federal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms tribal interest in and jurisdiction over child custody proceedings involving Indian children. (25 U.S.C. § 1902; Final Rule, at p. 38779.) However, unlike other federal statutes setting standards for state courts to follow in child welfare cases, the act contains no enforcement mechanism and imposes no federal accountability on state courts or agencies. Attorneys for agencies, parents, and children are charged with advocating for their clients and may not advocate for proper application and enforcement of the provisions of the act.

This means that in practice, it falls to tribes to fight for the full, consistent, and robust application of the act, yet tribes are the only parties to the child custody proceeding who are not entitled to appointed counsel. This has placed a heavy and unfair burden on tribes throughout the country. Many tribes are small, with limited staff and budgets, yet they are expected to engage in child custody proceedings involving Indian children, many of whom are involved in child custody proceedings in states throughout the country. This severely restricts tribes' ability to fully participate in these cases. Many of the failures in ICWA implementation identified by the Bureau and discussed in the Final Rule are a direct result of this inability of tribes to fully participate to uphold ICWA requirements.

The provisions for payment of appointed counsel in ICWA cases should be expanded to include counsel for tribes that can demonstrate a financial need. If payment for appointed counsel is

expanded, the process for appointment of counsel for tribes should be consistent with tribal sovereignty and autonomy.

Alternatively, the federal government should consider allowing states to use funding provided under title IV-E of the Social Security Act to support providing appointed counsel to tribes to participate in cases governed by the Indian Child Welfare Act. The Children's Bureau Office of the Administration for Children and Families is responsible for interpreting and applying the provisions of title IV-E. In 2019, the Children's Bureau clarified its interpretation of various provisions of title IV-E to permit state agencies to use title IV-E funding to support a broader range of legal services for attorneys representing children and parents in child welfare proceedings.[1] However, the Children's Bureau stated that a state agency could only use title IV-E funding to support providing attorneys for a tribe if the agency had entered into an agreement with the tribe under section 472(a)(2(B)(ii) of the Act.[2] There are 574 federally recognized Indian Tribes in the United States.[3] It is not practical or possible for each state agency to enter into an agreement with every tribe in the nation, yet tribes can have cases involving their tribal children and families in any state. It is particularly challenging for tribes to fully participate in cases that are remote from their tribal community location. The result is that title IV-E dollars are not practically available to support payment for attorneys for tribes in cases in state courts. This results in harm to the Tribes most valuable asset, their children, and is not a system designed to support the intent of the Act. The Tribes need access to counsel to preserve the rights given to them by Congress.

2. Procedures for Claiming Payment for Appointed Counsel Should Be Simplified.

Since its enactment in 1978, the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) has provided that the federal government pay for appointed counsel for Indian parents involved in state court child custody proceedings governed by ICWA when relevant state laws do not provide for payment:

"In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees

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[1] See Child Welfare Policy Manual section 8.1B Title IV-E, Administrative Functions/Costs, Allowable Costs – Foster Care Maintenance Payments Program Question 30 available at https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36.
[2] Ibid. Question 31.
[3] See list of Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs published in the Federal Register on 01/28/2022: https://www.federalregister.gov/documents/2022/01/28/2022-01789/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of

and expenses out of funds which may be appropriated pursuant to [section 13 of this title].” (25. U.S.C. §1912(b))

Section 1912(b) is implemented in the Federal Regulations at 25 C.F.R. § 23.13. In the request for comment, it states that the Bureau receives two requests for payment from state courts per year under the section and estimates that the total annual time burden on state courts for these requests is six hours. Two applications for funding annually from throughout the country indicates that very little use is being made of the procedures set out in the regulations. Further, given the number of reported appeals from the Interior Board of Indian Appeals (IBIA) concerning denials of requests for funding under part 23.13, it appears that the current regulations are not achieving their purpose. The Bureau may wish to revise the regulations to clarify them and adopt forms to assist courts and attorneys.

Since 1982 there have been at least 18 reported IBIA appeals concerning denials of requests for certification or payment of attorney fees under part 23.13. Eight of these appeals originated in the Bureau’s Pacific Region. Most of the discussion in these appeals relates to confusion as to whether the appeal should be taken to the IBIA or to the Assistant Secretary. The regulations set out different procedures if the appeal is from denial of certification of eligibility for payment or a denial of a request for payment itself. This is confusing on its face as evidenced by the appeals.

Substantively, the overwhelming basis for denials (of either certification or payment) is lack of available funding. This was at least one of the underlying reasons for denial in six of the cases. In five of the reported cases the reason for denial was confusion over the procedural requirements of the regulations.

This background reflects a need to revise the procedures set out in 25 C.F.R. § 23.13 to clarify the requirements and create forms related to payment of appointed counsel in ICWA cases. It also reflects the need for congress to appropriate realistic funding. Unless these steps are taken, requests for reimbursement for the costs of appointed counsel will continue to be an exercise in frustration resulting in fruitless appeals that do nothing to meet the Bureau’s responsibility to Indian children.