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June 25, 2021

Via Email and First Class Mail
Bryan Newland
Acting Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, N.W.
MS-4660-MIB
Washington, D.C. 20240

Re: Petition of the Southern Sierra Miwuk Nation for Federal Acknowledgment

Dear Acting Assistant Secretary Newland:

On behalf of our client, the Tribal Council of the Southern Sierra Miwuk Nation (SSMN or "Tribe"), we are responding to the May 11, 2011, letter from Lee Fleming, Director of the Office of Federal Acknowledgment (OFA), advising the SSMN that you had granted their request for an extension of the public comment period on the Proposed Finding issued in this matter by your predecessor. In his letter, Director Fleming also denied the Tribe's renewed request that the proposed finding issued on the SSMN petition for acknowledgement ("Proposed Finding") on November 16, 2018, be withdrawn, stating that "the AS-IA is not considering any alternatives to the established regulatory process . . ," and further stating that "[d]uring this additional 180-day extension, OFA will complete its response to SSM's outstanding FOIA request." On behalf of the SSMN, we request that you reconsider denial of their request that the Department withdraw the Proposed Finding and that you direct the OFA to respond to their FOIA request within 30 days.

The SSMN has been in the federal acknowledgment process since 1982, almost four decades. During that period, it has had numerous conference calls and technical assistance consultations and meetings with OFA, and its petition was under Active Consideration prior to issuance of the Proposed Finding for approximately eight (8) years, from 2010 until issuance of the Proposed Finding on November 16, 2018, far exceeding the length of time specified in the federal regulations.[1] In light of this

[1] The 1994 regulations provide at 25 CFR § 83.10(h): "Within one year after notifying the petitioner that active consideration of the documented petition has begun, the Assistant Secretary shall publish proposed findings in the FEDERAL REGISTER. The Assistant Secretary has the discretion to extend that period up to an additional 180 days." Active Consideration of the SSMN was commenced on November 1, 2010, and a 180-day extension of the date for issuance of the Proposed Finding was granted on November 2, 2011. Following this, the OFA/AS-IA granted themselves seventeen (17) unilateral extensions of time and six (6) suspensions of the period of Active Consideration, totaling a period of slightly more than eight (8) years until the Proposed Finding was issued on November 16, 2018.

extraordinary delay, the SSMN expected to receive a comprehensive Proposed Finding addressing each of the seven (7) federal acknowledgment criteria in accordance with the federal regulations. Instead, the former Assistant Secretary-Indian Affairs (AS-IA) issued an unprecedented Proposed Finding that addressed only one element of one criterion (Community, §83.7(b)) and contradicted statements made by the OFA both prior to and after issuance of the Proposed Finding regarding the issue of unambiguous previous federal acknowledgment (UPFA).[2] As detailed below, the Proposed Finding and the OFA's review process fail to comply with the federal acknowledgment regulations under which the OFA reviewed the SSMN petition (25 U.S.C. Part 83, as published in 1994). Specifically, the Proposed Finding fails to address all seven mandatory acknowledgement criteria in accordance with § 83.10(e)(2); the OFA has failed to provide the full complement of the documents relied on by OFA/AS-IA in preparing and issuing the Proposed Finding and the documents in response to the SSMN's Freedom of Information Act (FOIA) request submitted on May 7, 2019; and the Proposed Finding fails to comply with the required analysis of unambiguous previous federal acknowledgement (UPFA) set forth in §83.8. We address these matters separately below.

1. The Proposed Finding fails to comply with 25 C.F.R. § 83.10(e)(2)

Section 83.10(e)(2), provides:

> If the review [technical review] cannot clearly demonstrate that the group does not meet one or more of the mandatory criteria in paragraph (e), (f) or (g) of § 83.7, a full evaluation of the documented petition under all seven of the mandatory criteria shall be undertaken during active consideration of the documented petition pursuant to paragraph (g) of this section. (Emphasis added.)

The technical review of the SSMN petition did not clearly demonstrate that the SSMN "does not meet one or more of the mandatory criteria in paragraph (e), (f) or (g) of §83.7." Therefore, the SSMN was entitled to a full evaluation and decision in the Proposed Finding under all seven mandatory criteria. Instead, the Tribe received a severely truncated partial finding under the community criterion, §83.7(b), which is an unjustified and unprecedented deviation from the federal regulations.

Although the AS-IA adopted a guidance document on federal acknowledgment procedures in May 2008 that authorizes issuance of a finding based on a single criterion of the seven mandatory criteria, the circumstances under which such a finding can be issued are strictly circumscribed, with such a finding being "most appropriate when the

[2] Two former OFA staff who were part of the OFA peer review process for the SSMN petition submitted public comments on the Proposed Finding, expressing incredulity that what they understood was a consensus within OFA on issuance of a positive finding on all mandatory criteria was issued as a negative finding on a single element of one criterion (i.e. the "at present" element of the community criterion, 25 CFR § 83.7(b)) in violation of the regulations. *See* letters of Drs. Aldo Salerno, December 4, 2018, and Mark Nicholas, April 4, 2019 **(Enclosures 1 and 2)**.

deficiency becomes apparent during the initial stages of active consideration." *See* Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures, FR 73-30146 (May 23, 2008) ("Guidance"). The Guidance specifically provides:

> This process should be used to increase the speed of the decision-making process and better utilize the time and expertise of OFA professional staff. Thus, this process is most appropriate when the deficiency becomes apparent during the initial stages of active consideration.

It cannot be reasonably argued that issuance of a proposed finding based on one element of part of one of seven mandatory criteria, after almost eight years of active consideration, was either "used to increase the speed of the decision-making process and better utilize the time and expertise of OFA professional staff" or issued "during the initial stages of active consideration." The undersigned counsel for the SSMN emphatically made this point at the On the Record meeting ("OTR Meeting") in Washington, D.C., on April 24, 2019. (*See* Transcript of OTR Meeting, at page 59, lines 19-22, and page 60, lines 1-19; **Enclosure 3.**)

This protracted and piecemeal approach to the SSMN petition is unsupported by the acknowledgment regulations. Contrary to the Guidance, this approach unduly lengthens the petition review process at great expense to the petitioner and reflects the OFA's own inability to complete its review in an efficient and timely manner. Moreover, the question whether issuance of a single criterion proposed finding denying acknowledgment can be reconciled with the intent and purposes of the federal acknowledgment regulations, including those of "timeliness" and "efficiency", has never been subjected to the public notice and comment provisions of the Administrative Procedures Act and, for that reason, the Guidance should be strictly construed. Here, the AS-IA relied on the Guidance document (*see* Proposed Finding at page 2) to support not a single criterion proposed finding under §83.7(b), but rather a truncated partial version of that criterion addressing only the SSMN community during the "at present" period, rather than the complete historical period. This deviates, without explanation or justification, from the Department's prior precedent in the Tolowa Nation Proposed Finding (*see* discussion, *infra*, at Section 4).[3]

The significant time and evidentiary burden placed on the SSMN by the unprecedented partial finding under § 83.7(b) is further illustrated by the statement made by one of the OFA staff, Dr. Frances Flavin, in his PowerPoint presentation during the OTR Meeting in Washington: "***If*** you [SSMN] can fix your insufficiencies with criterion (b) at present, which you would have to do regardless of how you proceed, then you will receive an ***Amended Proposed Finding*** on all seven criteria, with another comment and response period, before receiving a Final Determination." (Final slide of Dr. Francis Flavin's April 24, 2019, PowerPoint presentation.) This statement puts the

[3] It is noteworthy that the AS-IA issued the Tolowa Proposed Finding on November 18, 2010, slightly more than one year after commencing Active Consideration on August 3, 2009. By comparison, it took the AS-IA almost 8 years to issue the SSMN Proposed Finding, and even then the finding was incomplete and addressed only the "at present" period of the community criterion, § 83.7(b), in violation of the federal regulations and the 2008 Guidance.

SSMN in a seemingly endless cycle of submitting additional documentation and responses to the OFA while the OFA withholds or fails to provide the documents it relied on in issuing the unauthorized and unprecedented Proposed Finding (*see* discussion below at Section 3).

2. OFA has failed to comply with 25 C.F.R. § 83.10(j)(1) and FOIA

Section 83.10(j)(1) provides, in relevant part: "The Assistant Secretary shall make available to the petitioner in a timely fashion any records used for the proposed finding not already held by the petitioner, to the extent allowable by Federal law." The SSMN has been attempting since May 2019 to obtain, through the Freedom of Information Act (FOIA), the information and documents on which your predecessor AS-IA relied in issuing the Proposed Finding. These are documents the OFA should have made available to the SSMN pursuant to § 83.10(j)(1), without requiring the SSMN to submit a FOIA request. The various representations made by OFA about providing a response to the SSMN's FOIA request, including the statement in its most recent May 11, 2021, extension letter that it "will complete its response to SSM's outstanding FOIA request," without providing a date certain, have been meaningless. To put it bluntly, this situation is irreconcilable with the Department's obligations under FOIA and constitutes a clear violation of the letter and intent of the federal acknowledgment regulations. The SSMN's FOIA request of May 7, 2019, seeking these documents remains outstanding after more than two years.[4]

3. The Proposed Finding fails to provide the analysis of unambiguous previous federal acknowledgement (UPFA) as required in 25 C.F.R. §83.8

The requirements for the determination of a previous Federal acknowledgment are set forth in 25 C.F.R. § 83.8(b):

> A determination of the adequacy of the evidence of previous Federal action acknowledging tribal status shall be made during the technical assistance review of the documented petition conducted pursuant to § 83.10(b). If a petition is awaiting active consideration at the time of adoption of these regulations, this review will be conducted while the petition is under active consideration unless the petitioner requests in writing that this review be made in advance.

The SSMN petition was not formally under "active consideration" until November 2010 so it was "awaiting active consideration" at the time of adoption of the 1994 regulations. Therefore, the OFA was required to conduct the UPFA review during the period of active consideration, which commenced in November 2010. As discussed

[4] At the OTR Meeting in Washington, the OFA did provide some of the documents it reviewed, but these documents are only a partial list of what the OFA reviewed and do not include any analysis by OFA of their relevance and significance to the Proposed Finding or individual acknowledgment criteria.

below, the OFA's review of the SSMN petition under UPFA was incomplete and inconsistent with its statements in the Proposed Finding and during the OTR Meeting.

During active consideration of the SSMN petition, the OFA sent a letter to the SSMN on September 23, 2016 (**Enclosure 4**), in which it appears to make a specific finding of UPFA under 25 CFR § 83.8 by identifying the historical Southern Sierra Miwuk tribal entities which signed treaties with the United States and from which the SSMN are descended. The OFA affirmatively states in the letter that it "considered 1857 as the last date of unambiguous Federal acknowledgment."[5]

The September 23, 2016 letter was followed by a teleconference conducted on October 19, 2016, between the OFA Director and staff and SSMN representatives and the undersigned attorney. In a November 8, 2016 letter (**Enclosure 5**), the OFA recapped the teleconference of October 19, 2016, and provided the Tribe with an extensive list of the kinds of "community and political evidence that could be applied to the period of 'at present' (1990-2011) for criteria 83.7(b) and 83.7(c)." Once again the OFA focused on the period "at present." In response, over the next three months the SSMN compiled and scanned hundreds of documents in 39 file batches, each containing multiple documents and photographs illustrating a broad range of governance and community activities. The SSMN submitted these by letter and certification dated January 18, 2017 (**Enclosure 6**). The Tribe never received <u>any</u> response to this submission from OFA until the Proposed Finding was issued on November 16, 2018.

Notwithstanding the 2016 finding of UPFA and the Tribe's submission of evidence to meet the modified evidentiary burden of §§ 83.8(d)(2) and (d)(3), the Proposed Finding, without providing any explanation or justification, retreats from the 2016 UPFA finding in stating: "If the petitioner decides to request unambiguous previous recognition because of this treaty evidence, they should submit evidence that sets forth their claim." (Proposed Finding at page 11.) (As if there had been no previous finding, discussion or submission of evidence of UPFA!) In addition, Dr. Flavin stated in his presentation at the OTR Meeting in Washington that ". . . if you look at the way the proposed finding is written, we are not making any decisions on whether or not you're eligible under 83.8." (Transcript of OTR Meeting, at page 63, lines 18-20.) It is therefore clear that, after decades

[5] Although in that letter the OFA referred to "technical problems" regarding evidence under §§ 83.7(b) and (c), OFA stated that those problems were limited to the "at present" period (defined by OFA as 1990 to the present) only. Thus the letter found that there was previous unambiguous federal acknowledgment as of the treaties with the last date of 1857. The finding of UPFA is confirmed by OFA's focus in the letter on only the period "at present" under the modified evidentiary burden of §§ 83.8(d)(2) and (d)(3). OFA identified no problems related to the period from historical times through the present, further indicating that OFA found sufficient evidence to satisfy: (i) the requirement under 83.7(b) that the SSMN comprised a distinct community and has existed as a community from historical times until the present period, and (ii) the requirement under 83.7(c) that the SSMN has maintained political influence or authority over its members as an autonomous entity from historical times until the above referenced present period.

of technical review and eight years of active consideration of the SSMN petition, the AS-IA issued a Proposed Finding that fails to make "any decisions" regarding UPFA in contradiction of the requirements set forth in 25 C.F.R. § 83.8(b). Moreover the Proposed Finding contradicts the OFA's position in September 2016 and the time period used in the OFA's September 23, 2016, letter for evaluating the SSMN community "at present" pursuant to §83.7(b).[6] It concludes with an unprecedented partial finding under a single element of one mandatory criterion, determining that the SSMN does not exist as a distinct Indian community "at present" (1982-2011) without addressing any of the other mandatory acknowledgment criteria.

4. The AS-IA's issuance of a negative Proposed Finding that the SSMN does not constitute a distinct Indian community "at present" violates the 2008 Guidance regarding issuance of a negative proposed finding based on a single mandatory criterion.

In the above-quoted statement from page 11 of the Proposed Finding regarding UPFA, the AS-IA essentially disavowed any finding of UPFA, and OFA staff reiterated this position in characterizing the Proposed Finding at the OTR Meeting as "not making any decisions on whether or not [the SSMN is] eligible under 83.8 [UPFA]." In the absence of a finding of UPFA in the Proposed Finding, the AS-IA was required, in issuing a negative finding based on the single community criterion of § 83.7(b), to evaluate the entire historical period, as was done in the Tolowa Nation proposed finding.[7] Instead of doing so, the AS-IA issued the SSMN Proposed Finding under § 83.7(b) for only "the present period" without addressing the historical period, in clear violation of the regulations, the 2008 Guidance, and the Tolowa Nation precedent. Dr. Aldo Salerno, a former OFA historian who is familiar with the SSMN petition and participated in the OFA's peer review of the SSMN petition, submitted public comments in which he criticized the Assistant Secretary's above-quoted statement in the Proposed Finding as "not only disingenuous and misleading but [also] a violation of the spirit and letter of the regulations." Dr. Salerno continued, stating the reasons for his scathing criticism:

> The OFA analyzed dozens of documents on previous recognition while the SSM was on active consideration and reached firm conclusions, covering several pages of text, regarding the issue. Those documents

[6] In its September 23, 2016, letter to the SSMN, OFA used the period from "1990 to present" as the operative period; however, the Proposed Finding uses the period from 1982 to 2011.

[7] *See In Re Federal Acknowledgment of the Tolowa Nation* ("*Tolowa*"), Proposed Finding, in which the AS-IA found against UPFA and made a single criterion negative proposed finding under the community criterion of Section 83.7(b) for the entire historical period. The AS-IA's Proposed Finding included a full analysis of the Indian community in consecutive time periods from first sustained contact in 1853 to 2010 consisting of 20 pages. *Id.* at pages 20-40.

> included not only the 1850s treaty records but also court case and newspaper evidence from the late 19th century. While the OFA is not required to do SSM's research, it is certainly required to examine any evidence of previous recognition it finds during active evaluation, to reach a determination, even if preliminary, about that evidence, and to provide that evidence and conclusion to the petitioner in its finding. For the AS-IA to put the burden of submitting the evidence for previous recognition on the SSM this late in the process when the OFA has that evidence is to put the group at a serious disadvantage. In fact, to do so would be improper. (*See* **Enclosure 2** at page 3.)

In summary, the process used in reaching this flawed Proposed Finding violates both the applicable federal regulations and the guiding principles of the federal acknowledgment process, including the 2008 Guidance, and the OFA's own precedent in the Tolowa Proposed Finding. The federal acknowledgment guiding principles, which you and other Department officials have presented to Congress, are transparency, efficiency, timeliness, and flexibility[8], and are intended to ensure the overall fairness of the process. In light of the regulatory inconsistencies and deficiencies of the Proposed Finding noted herein, which contravene these guiding principles, it would be arbitrary and capricious to deny the Tribe's request that you withdraw the Proposed Finding on the grounds that "the AS-IA is not considering any alternatives to the established regulatory process . . . ." We are not speaking of alternatives to the federal acknowledgment regulatory process. We are speaking of the Department's compliance with its own regulations and process, and are requesting that you take action to ensure such compliance without further undue delay and expense to the SSMN.

We, therefore, submit that the Proposed Finding should be withdrawn, the OFA should be required to provide the requested FOIA documents within 30 days, and a new Proposed Finding issued within the extended period based on additional submissions by the SSMN, in consultation with the OFA and in accordance with the federal regulations. These additional submissions would provide further evidence supporting UPFA and address the SSMN community "at present" in the context of both UPFA and the other mandatory criteria, and would include updates to the SSMN membership and governing documents. We believe this approach will significantly advance preparation of a new Proposed Finding consistent with the regulations and the principles stated above; and is

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[8] Testimony of Bryan Newland, Senior Policy Advisor to the Assistant Secretary of Indian Affairs. to the U.S. Senate Committee on Indian Affairs, Oversight Hearing on Federal Acknowledgment, July 12, 2012, at 4, accessed at https://www.indian.senate.gov/sites/default/files/upload/files/Bryan-Newland-testimony-071212.pdf; *see also,* Testimony of Kevin Washburn, Assistant Secretary for Indian Affairs, Before the U.S. Senate Committee on Indian Affairs, on S. 1132, S. 161, and S. 1074, October 13, 2013, at 1-2, accessed at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ocla/WashburnTestimony-Little%20Shell-VAtribes-Lumbee%20bills-FINAL.pdf.

within your authority pursuant to 25 CFR § 1.2, and the best interest of the SSMN.[9]

On behalf of the SSMN, we respectfully request your consideration and immediate attention to these matters. Should you or your staff have any questions, please do not hesitate to contact me.

Respectfully,

HOBBS, STRAUS, DEAN & WALKER, LLP

Stephen V. Quesenberry

Attorneys for Southern Sierra Miwuk Nation

Enclosures (6)

cc. Sandra Chapman, Chairperson, SSMN
Deb Haaland, Secretary of the Interior
Lee Fleming, Director, OFA
Senator Dianne Feinstein
Senator Alex Padilla
Rep. Tom McClintock (4th District, CA)
Rep. Raul Grijalva, Chairman, House Natural Resources Committee
Rep. Teresa Leger Hernandez, Chair, House Natural Resources Subcommittee on Indigenous Peoples of the United States
Rep. Ruben Gallego, House Natural Resources Subcommittee on Indigenous Peoples of the United States
Mariposa County Board of Supervisors
Sierra Club, Tehipite Chapter (*attn*: Gary Lasky, Chair)

[9] 25 CFR § 1.2 (Applicability of regulations and reserved authority of the Secretary of the Interior). provides: "The regulations in chapter I of title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians."

Enclosure 1

December 4, 2018 Public Comment Letter of Dr. Aldo E. Salerno, Ph.D.

December 4, 2018

401 King Farm Boulevard, Apartment 301
Rockville, Maryland 20850

Office of the Assistant Secretary for Indian Affairs
Department of the Interior
Attn: Office of Federal Acknowledgment
1849 C Street Northwest
MS-4071 MIB
Washington, DC 20240

Dear Assistant Secretary for Indian Affairs,

I am submitting the attached comments in response to your proposed finding against Federal acknowledgment of the Southern Sierra Miwok Nation, published on November 23, 2018. I was a historian with the Office of Federal Acknowledgment from June 2001 to October 2017. During that time I worked on, and wrote large sections of, seventeen findings on Federal acknowledgment in various stages, including, among other things, proposed findings, final determinations, and reconsidered final determinations. I also wrote two dozen technical assistance letters for Indian groups seeking Federal acknowledgment and was part of the Assistant Secretary for Indian Affairs' working group in 2015 and 2015 to revise the acknowledgment regulations that led to the publication of the current rule.

I have also submitted a copy of my comments to the Southern Sierra Miwok Nation.

Sincerely,

Aldo E. Salerno, Ph.D.

Aldo E. Salerno's Comments on the Finding Against Acknowledgment of the Southern Sierra Miwok Nation (December 4, 2018)

1. Did the Assistant Secretary for Indian Affairs (AS-IA) issue an unauthorized finding?

On November 16, 2018, the Assistant Secretary for Indian Affairs (AS-IA) issued a proposed finding against acknowledgment of the Southern Sierra Miwok Nation (SSM). The finding evaluated only one of the seven mandatory criteria, criterion 83.7(b), or the community criterion, which a petitioner has to meet for the Federal government to acknowledge it as an Indian tribe. The finding also evaluated only the "modern" period of the SSM community from 1982 to 2011. The AS-IA claims to have the authority to issue a finding on one criterion under a Department directive of May 23, 2008, which permits a proposed finding on one, or more than one criterion, rather than all seven of mandatory criteria as required in most cases under the 1994 acknowledgment regulations, if the evidence shows the petitioner has failed on that criterion.

The directive, however, does not permit the AS-IA to issue a finding on only a portion of the criterion as the Department did in the SSM proposed finding where it examined only modern community. The only time the 1994 regulations allow the AS-IA to evaluate just modern community is when the Department has determined the group has met the requirements for previous unambiguous acknowledgment. But even in those cases, the AS-IA must fully evaluate the other six mandatory criteria. According to precedent, that evaluation of the other six criteria has always been necessary to inform and enhance the evaluation of modern community for a group that has previous recognition.

In the SSM finding, the AS-IA evaluated only 29 years of the SSM's community from 1982 to 2011 and did not examine the other six criteria, which would have certainly enhanced and informed the evaluation of modern community. The AS-IA cannot, in any meaningful way, fully know the basis of the SSM's modern community, without also examining the group's historical tribe and community, politics, descent from the historical tribe, and identification by outside observers. Instead, the AS-IA evaluated the SSM's community from 1982 to 2011 by examining only a smattering of interviews, group minutes, and attendance lists. By failing to examine fully the SSM community from first sustained contact to 1981, the AS-IA lacked any real understanding of how the historical context of the group's history during that period impacted its modern community, even though the regulations require the Department to take into account the historical context of every petitioner when evaluating the evidence.

The SSM will now be compelled to focus in its response during the comment period solely on the modern community. The SSM will not know what inadequacies, if any, exist in its petition record for the period before 1982 and after 2011, nor will it be given a fair chance and adequate time to obtain and review any evidence the Office of Federal Acknowledgment (OFA) might have obtained and analyzed for those periods before the next finding. The SSM should demand the AS-IA follow its own rules and re-issue a finding on all of the group's community from the 1850s to the present or a finding on all seven of the mandatory criteria.

2. Is the AS-IA being transparent and providing the SSM with all the evidence the OFA gathered for all the analyses it conducted during the eight years of active consideration of the group's petition?

When I left the OFA in October 2017, after 16 years of service, it had evaluated the evidence from and conducted several peer reviews of the SSM petition. The OFA then drafted several versions of the proposed finding, some nearly 200 pages long, reaching majority, affirmative conclusions on all seven mandatory criteria, which it eventually submitted to the Solicitor's office for review. To reach our

conclusions, the OFA staff reviewed thousands of pieces of evidence on the group's history from the 1850s to the present. The OFA staff conducted numerous analyses of this evidence on the SSM's historical tribe, community, politics, genealogy, identification by external sources, and previous acknowledgment under all seven of the mandatory criteria. While the Department may re-assess its conclusions regarding these analyses, the evidence it used to conduct them would be invaluable to the SSM in its pursuit of federal acknowledgment. For the OFA to withhold the evidence from the SSM would do the group irreparable harm. The SSM should demand all this evidence from the OFA so that it can submit a full and meaningful response to the AS-IA's negative appraisal of the group's modern community.

3. Has the AS-IA been completely transparent with the SSM about what the Department knows about the critical issues of the historical tribe, identification of the historical tribe's members, and unambiguous previous Federal acknowledgment?

In the proposed finding, the AS-IA appears ambiguous or tentative about reaching conclusions regarding the historical Indian tribe, lists of members of the historical Indian tribe, and unambiguous previous Federal acknowledgment, all critical issues for the SSM to have information about if it is to pursue recognition in any meaningful way.

For example, on the historical tribe, the AS-IA, after discussing some possibilities of the tribes in the Yosemite area from the 1850s to the 1920s from which the SSM may have evolved, makes this comment:

> These sources, and others, may suggest that, at some point after the treaties, an Indian entity—or multiple Indian entities—may have formed in the general area of the Yosemite Valley and the Merced River drainage. The petitioner may wish to review these sources to help it develop a formulation of its historical Indian tribe and, during the comment period, the petitioner or third parties may wish to provide additional evidence supporting or refuting the Department's finding regarding the historical Indian tribe.

This seemingly helpful statement is both disingenuous and misleading. While I was at OFA during the period SSM was under active consideration, OFA staff members analyzed hundreds of documents and reached firm conclusions regarding the historical Indian tribe from which we believed the group descended. To say that these sources "suggest" the identity of the historical tribe is untrue; they define it with great clarity. Indeed, for the Department to profess uncertainty about the historical Indian tribe this late in the process and yet still evaluate the group's modern community is nothing short of bewildering. Moreover, while OFA is not required to do SSM's research, it certainly should not require the SSM to do unnecessary research for answers it already has unless the petitioner disagrees with those conclusions.

On lists of the historical tribe, the AS-IA similarly describes a number of documents the SSM could use to identify members of the historical tribe from which current SSM members could trace descent and then states:

> The Department offers these suggestions as suggestions, not requirements, for identifying people who might have belonged to or descended from a historical Indian tribe in the greater Yosemite area. The petitioner may wish to provide additional evidence supporting the Department's findings regarding members of the historical tribe, or the petitioner may wish to provide the Department with its own evidence.

Again this vague statement is disingenuous and misleading for the same reasons as described above. The OFA analyzed scores of documents while SSM was under active consideration that were lists of the historical tribe and reached firm conclusions about their value as evidence of descent, including census, housing, and employment records from the National Park Service which the Department does not even mention in its suggestions in the proposed finding.

On unambiguous previous Federal acknowledgment, the AS-IA after discussing some 1850 treaties the SSM might use as evidence of previous acknowledgment provides this guidance:

> If the petitioner decides to request unambiguous previous recognition because of this treaty evidence, they should submit evidence that sets forth this claim.

This statement is not only disingenuous and misleading but a violation of the spirit and letter of the regulations. The OFA analyzed dozens of documents on previous recognition while the SSM was on active consideration and reached firm conclusions, covering several pages of text, regarding the issue. Those documents included not only the 1850s treaty records but also court case and newspaper evidence from the late 19th century. While the OFA is not required to do SSM's research, it is certainly required to examine any evidence of previous recognition it finds during active evaluation, to reach a determination, even if preliminary, about that evidence, and to provide that evidence and conclusion to the petitioner in its finding. For the AS-IA to put the burden of submitting the evidence for previous recognition on the SSM this late in the process when the OFA has that evidence is to put the group at a serious disadvantage. In fact, to do so would be improper.

The SSM should demand the AS-IA provide the group all the information the OFA has on the issues of the historical Indian tribe, lists of the historical Indian tribe, and previous unambiguous Federal acknowledgment.

4. Why did AS-IA fail to take into account and explain what evidence the 1982 finding for federal acknowledgment of the Death Valley Timbisha Shoshone Band provides as precedent in the acknowledgment of the SSM?

In 1982, the Department acknowledged the Death Valley Timbisha Shoshone Band of California through the acknowledgment process. As part of the evidence for acknowledgment, the Department's finding took special note of the group's relationship with, and recognition by, the National Park Service from 1933 to the present. Under that relationship, the Park Service provided relief, housing, and employment for the Indians, modeled on a program established earlier at Yosemite Park in California for the Yosemite Indians, from whom the SSM evolved. In fact, the Park Service at Yosemite Park has recognized and had a relationship with the SSM for over 100 years. It also provided relief, housing, and employment for the SSM and other Indians into the 1960s, and still considers and includes the SSM as a critical element of the Park history it provides to the public.

Yet, the AS-IA in the SSM finding barely mentions the National Park Service or its relationship with and recognition of the SSM. Nor does the finding describe the numerous documents, contained in the SSM petition record, which the National Park Service produced about the SSM community. These documents include Park Service correspondence, often to and from the BIA, censuses, and financial, employment, and housing records. It is beyond comprehension that the Park Service, a part of the Department of Interior, recognizes and maintains a relationship with the SSM similar to that of the Timbisha Shoshone,

but the AS-IA in the finding does not describe that relationship or discuss how the precedent of these two cases impacts the SSM petition for acknowledgment. The SSM should demand the AS-IA provide it with all the evidence the OFA has regarding the SSM relationship with the NPS, fully describe the nature of that relationship, and give a full analysis of how it relates to the precedent established in the Timbisha Shoshone finding.

5. Is the AS-IA requiring the SMM to meet a higher standard of evidence for community under the 1994 Federal acknowledgement regulations than it would under the revised 2015 regulations?

In the SSM proposed finding, the AS-IA concluded the SSM did not provide sufficient evidence under the 1994 regulations to demonstrate that "a predominant portion" of the group comprised a distinct community from 1982 to 2011. The 1994 regulations describe the requirement for meeting community as follows:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
>
> *Community* means any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. *Community* must be understood in the context of the history, geography, culture and social organization of the group.

The OFA always interpreted the predominant portion to mean more than half, although it was never clear to me during my tenure at OFA as to how it evaluated the evidence in a petition to reach a quantitative decision about what constituted a "predominant portion" of a group being a distinct community. Nonetheless, over the years, the vagueness of what the term meant and how the OFA evaluated it came under increased scrutiny and criticism. In July 2015, the AS-IA issued a revised set of regulations that tried to address that criticism and other criticisms of the 1994 regulations. In the revised regulations, the Department removed the "predominant portion" language from and revised the criterion to read as follows:

> (b) *Community.* The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members are differentiated from and distinct from nonmembers. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

As the reader can see, the new rules removed the requirement for a petitioner to demonstrate that a predominant portion of its members comprised a community. It also lessened the span of time needed to demonstrate the criterion from historical times to the present to 1900 to the present. The AS-IA explained the need for the change in the 2015 final rule:

> The final rule requires the petitioner to constitute a distinct community, and provides that the petitioner may demonstrate this criterion by showing evidence that a "significant and meaningful portion" of its members constituted a community. *See* final § 83.11(b)(1). While the proposed rule

> included a specific percentage [30 percent] in an attempt to set an objective standard, in reality, the number of members who must constitute a community depends on the historical circumstances faced by the petitioner. In practice, there is a range in which the Department has identified whether the petitioner's members are a distinct community.

Clearly, the AS-IA believed under the new rule that a range of community participation might allow a petitioner to meet the community criterion depending on the historical circumstances of the group. That range would be evaluated not as a fixed percentage, such as 51 percent, but as a flexible standard dependent on those historical circumstances. Thus, in the case of the SSM that range of a "significant and meaningful portion" of the group could be much lower than 51 percent, perhaps 30 percent, or even less. Indeed, the controlling factor for SSM to meet the criterion for community would not be the percentages of its community activity, but how the Department viewed the significance and meaningfulness of that activity in light of the group's historical context. Under this flexible standard of evaluation, SMM would have a reduced burden of proof both in terms of the level of evidence, which could even include the results of statistical sampling, and in the time frame under evaluation. The Department would also have to apply that reduced standard.

The 2015 regulations also supersede the 1994 regulations and other directives that apply to the substance of the regulations. Under the 2015 regulations, the AS-IA would have to rule on all seven of the mandatory criteria in a series of phases, first on four of the criteria, and then on the remaining three, with the OFA providing technical assistance after each phase. A one criterion finding on just community is simply not permissible under the 2015 regulations. The other six mandatory criteria also have significant differences (as does the requirement for unambiguous previous Federal acknowledgment) under the 2015 regulations from the 1994 regulations. In addition, the 2015 regulations provide for an administrative law judge to review findings and a more transparent process overall, which requires the posting of evidence, comments, and findings on the OFA website at every stage of the process.

While it is true the SSM, as a petitioner already under active consideration, chose to be reviewed under the 1994 regulations rather than the 1994 ones, it was unclear to me while I was a member of the OFA that the group, or any group which chose the same option, understood the implications of that choice. Simply put, the AS-IA has established a two-tiered Federal acknowledgment process, one in which some older petitioners are unwittingly, arbitrarily, and capriciously being evaluated under a stricter and more burdensome standard of evidence than newer petitioners. The SSM should demand, as a matter of fairness and equal treatment, that the AS-IA and the OFA evaluate its petition for all seven of the mandatory criteria under the 2015 regulations.

6. Have the Solicitor's Office and the OFA engaged in behavior detrimental to the SSM and its petition?

During my 16 years at the OFA, I was aware of improper ex parte communications by the Office of the Solicitor on acknowledgment findings under Solicitor review. These communications occurred between the Solicitor's Office and OFA staff members not working on those findings. The OFA rules regarding the peer review process were clear. After a finding completed the OFA peer review and went to Solicitor review, the Solicitor's office was to communicate only with the OFA director or with members of the team who had worked on that finding. The Solicitor was not to communicate, lobby, or try to influence any other members of the OFA staff, or any other office, regarding the merits of the case. This rule was flouted repeatedly by the Solicitor's office as it did communicate with OFA staff members to change,

influence, or call into question decisions made during the OFA peer review. This behavior continued while the OFA was evaluating the SSM petition and others. Such behavior tainted the peer review process, cast doubt on its legitimacy, and violated the rules of transparency required by the Department for the acknowledgment process as a whole. The SSM should demand to know if any members of the Solicitor's Office or the OFA had ex parte communications regarding the SSM petition, and if they did, the group should request a full reconsideration of its finding.

Enclosure 2

April 12, 2019 Public Comment Letter of Dr. Mark A. Nicholas, Ph.D.

To: Assistant Secretary-Indian Affairs
Department of the Interior
Washington, D.C.

From: Mark A. Nicholas, PhD

Comments by Dr. Mark A. Nicholas, on the Proposed Finding for Southern Sierra Miwuk:

Introduction: The Office of Federal Acknowledgment (OFA) assigned a team (referred to as the SSM team) comprised of three staff members -an anthropologist, genealogist, and historian -to work on the proposed finding (PF) for the Southern Sierra Miwuk Nation (SSM). The Assistant Secretary of Indian Affairs (AS-IA) issued a PF after considering OFA's recommendations. In the case of SSM, AS-IA issued a negative PF against acknowledging the SSM group as an Indian tribe under Federal law.

I worked for OFA for three years, from 2014-2017. I received my PhD in history from Lehigh University in 2006, and came to OFA after years as a recognized expert in the field of American Indian history. I taught American Indian history at multiple universities, and also trained and mentored graduate students in the field.

I left for many reasons. The main reason was that I felt like the office, as a whole, was not achieving its mission, and had no real urgency to achieve its mission. That lack of urgency trickled down to the OFA Director, Mr. R. Lee Fleming, who allowed for continuous extensions on projects. The lack of urgency, from my experience at OFA, severely impacted groups like SSM, who continually received extension letters. When I was there, staff could take as long as they felt they needed on finishing drafts of PFs; so it did not surprise me at all to see the numerous extension letters issued to SSM. It is not only frustrating for groups like SSM, but also a complete waste of taxpayers' dollars.

1) When I worked at OFA, the "Peer Review Process was broken:

OFA will make the argument that its staff, by utilizing historical, anthropological, and genealogical research methods, has given SSM an objective and fair assessment of its claims and evidence under the seven mandatory criteria. And yet, in my experience, OFA does not have anything resembling a fair and objective peer-review process, much less a structured one. There were no written rules or guidelines that Mr. Fleming insisted that we follow. With the peer reviews which I attended, the process began when the team circulated a draft of their work, which was followed by a staff meeting where we discussed the team's draft, while providing our edits/comments. Oftentimes, the meetings became hostile because of one disruptive staff member who chose to hijack most meetings to grandstand, which usually forced teams into a defensive posture to explain their reasoning and analysis. At my first "peer-review" the one staff member became so hostile, that I felt threatened. I sent emails to Mr. Fleming about my concerns. There were two or three "senior staff" who basically controlled the process. In the staff meetings, as well as the final drafts of the PFs, senior staffs' views and opinions, more often than not, drowned out and/or replaced those of more junior staff. **When I was at OFA, there**

was one senior staff member who was allowed to rewrite entire PFs and sections of PFs, that had been written by other teams and/or other disciplines. Mr. Fleming justified it as "peer-review edits." It was more than that. This staff member rewrote the sections of staff historians.

When I was at OFA, some of us (rightly) spoke up against the current state of peer-review, and how it inhibited fair and objective discussion. We also made the argument that in allowing one senior staff member to rewrite everyone else's work violated the spirit of the regulations and most certainly challenged the whole idea that OFA's PFs were the products of interdisciplinary teams. Based on my experience, OFA's version of "peer review" had all the elements of a toxic and hostile work environment. When I was at OFA, nothing was ever done to address the many problems that made the "peer-review" process ineffective.

Conclusion: The above statements about OFA's claimed "peer-review" process leads me to one important point: AS-IA really cannot make the claim **that SSM's claims and evidence** got a fair and objective evaluation under the seven mandatory criteria, when the process that OFA calls "peer-review" is neither fair nor objective. **SSM should demand to know which staff members had any role in writing the 2018 PF, and demand full disclosure about what the peer-review process was like for SSM.**

2) AS-IA provides very little oversight of OFA, and the oversight that is provided by the solicitor is too invasive and contrary to the spirit of the Federal acknowledgment regulations that petitioner's will receive a fair and impartial review of their evidence under the seven mandatory criteria:

When I was at OFA, a lot of problems existed for two interrelated reasons: 1) AS-IA provided very little oversight when I was there, other than the solicitor's office. 2) Mr. Fleming had adopted a "hands-off" approach to overseeing all research and writing conducted by the OFA teams, at least that was the case when I was there as a staff member.

The solicitor's office was too involved in our research and writing. That the solicitor had too much of a role to play in editing our PFs became evident when I participated in "editing sessions" on the **SSM PF. The report was a pre-decisional-positive in favor of SSM.** The solicitor had read the draft and commented on it. We (Mr. Fleming, SSM team, and myself) were going through the entire draft, line by line, to address the solicitor's extensive comments on the teams reasoning and analysis. This was more than legal advice. In fact, the solicitor showed up at that session, and commenced to tell us (trained historians, anthropologists, genealogists), how to evaluate the evidence. A solicitor does not have the professional training to make any evaluation of the evidence, other than to provide legal advice. Still, Mr. Fleming insisted that the SSM team make the recommended edits to the PF based on that meeting. I felt like the solicitor was trying to influence the process, possibly turning a positive PF into a negative recommendation.

Another example of the solicitor being too involved in our work during my time at OFA, was the relationship between the solicitor's office and with the same "senior" staff member who rewrote findings. That staff member had extensive communications with the solicitor's office, concerning what went on in peer review, and concerning other staff members and the findings they were working on that were still in draft form.

Conclusion: SSM should demand to know the extent of the involvement of the solicitor's office in the SSM review process, and if communication took place at any point during the review process between the solicitor's office and the senior staff member.

3) At some point during OFA's lengthy review process (8 years?), enough evidence to reach a positive determination became not enough evidence and a negative determination What happened? What did it take so long to issue a PF on a portion of one criterion (b)?:

When AS-IA released a negative finding, I was surprised to read an evaluation of one criterion (b) and only one portion of that criterion (b), when other drafts that I had read and worked on in an editorial capacity, were not so limited in their reasoning and analysis. AS-IA's release of a negative PF under only one portion of criterion (b) violates the whole purpose of the Federal acknowledgement process.

That OFA had worked extensively on a pre-decisional-positive in favor of SSM means that the 2018 negative PF issued by AS-IA is a very, very misleading PF, and by no means a fair representation of the extended evaluation of the group under all seven mandatory criteria that OFA had conducted over the years. Is the current AS-IA even aware of the amount of time OFA spent on evaluating SSM, and the amount of evidence the group has submitted over the years? Is the current AS-IA aware of all the pre-decisional drafts written by the previous team that came to an affirmative decision?

After my evaluation of the evidence and reading the draft, it was clear to me, and to others in the office, that SSM's claims and evidence met the reasonable likelihood standard. The SSM team had done a tremendous amount of work on the pre-decisional positive PF based on thousands of pages of acceptable evidence submitted by SSM and found by OFA staff during the review process. To highlight some examples:

- The SSM team had reconstructed the historical Indian tribe using the park service censuses
- I evaluated this park census data when I arrived at OFA, and talked extensively about it with two of the other staff historians and the anthropologist from the SSM team.
- Based on all the evidence we had at the time, the historians were also comfortable granting SSM unambiguous previous federal acknowledgement.
- Mr. Fleming also found court cases from the 1880s-1890s that talked about some of the Indian ancestors of the current petitioning group.
- When I first joined OFA in fall 2014, Mr. Fleming pointed to the court cases as an example of staff doing really good research to supplement the record in the absence of evidence from the petitioner.

- He told me the court documents helped alleviate some of his concerns about the park census data used to reconstruct the historical Indian tribe.

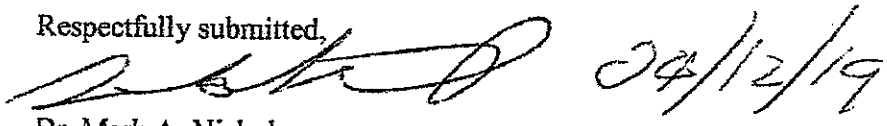
Conclusion: Why was none of this evidence evaluated in the 2018 PF? The negative PF issued by AS-IA seems to indicate that there was not enough evidence to draw any conclusions about the historical Indian tribe, unambiguous previous federal acknowledgment, etc. I know, for a fact, that there was enough evidence to evaluate SSM under all seven mandatory criteria.

Summary:

SSM should demand answers to the following questions: What was the peer-review process like when the earlier drafts of the SSM PF were circulated among staff? Were the staff meetings fair and objective? How long did they last and how many were there? Was there vote taken on whether to grant SSM federal acknowledgment? How many staff members actually wrote the current negative PF? How many staff worked on and wrote the pre-decisional drafts? How long did the writing process take with pre-decisional drafts versus the writing process with the negative PF? What role did the solicitor play in the editorial sessions on the pre-decisional positive PF? And why was a positive PF, containing very robust and sophisticated analyses of all seven mandatory criteria, turned into a negative PF that evaluated only a portion of one criterion?

In conclusion, SSM should demand another PF issued by AS-IA that evaluates the group under all seven mandatory criteria. In the reviewing of the evidence for this new PF, SSM should demand 1) that AS-IA form a professional team of outside experts to come in and evaluate the evidence and provide OFA the oversight it so desperately needs. Another option is to bring in professional experts and that OFA have no involvement whatsoever in reviewing the SSM petitioner from this point forward. 2) That the group be allowed to go under the 2015 regulations.

Respectfully submitted,



Dr. Mark A. Nicholas

Cc: Stephen V. Quesenberry Legal Counsel for Southern Sierra Miwuk Nation

Enclosure 3

Excerpt from April 24, 2019 Transcript of OFA On the Record Technical Assistance Meeting

TECHNICAL ASSISTANCE MEETING

SOUTHERN SIERRA MIWUK NATION

(PETITIONER #82)

PROPOSED FINDING

Moderated by Elizabeth Appel

Wednesday, April 24, 2019

10:00 a.m.

Office of Federal Acknowledgment

Department of the Interior

Main Interior Building

North Penthouse

Seventh Floor

Washington, D.C.

Reported by: Nate Riveness

Job No.: 3298832

were sufficient to determine that petitioner wouldn't satisfy the requirement of the criteria for this time period, and therefore not satisfy the criterion overall. Since all seven criteria must be met, this finding meant that it couldn't meet all seven criteria.

But, in the contemporary period this is a period when the group formally organized, and there may be more additional documentation that could be submitted to address all the issues raised in the finding. We suggested several sources for information that might address these deficiencies in the finding and we also read out all those signposts that were put up in the finding earlier. These suggestions indicate some of the types of evidence that when combined with the evidence in the record would show that the SSM meets B during this modern period. And the petitioner may also have other types of evidence that would help it meet to satisfy the criteria, and are encouraged to submit the evidence and their analysis of that evidence.

MS. APPEL: Are there any questions for Dr. Brown?

MR. QUESENBERRY: I have a question.

DR. BROWN: This is Dr. Quesenberry -- Mr. Quesenberry.

MR. QUESENBERRY: Yes. Yeah. Thank you. I'll try to remember to state my name before I start speaking. The question I have is under this decision to issue a finding on less than the seven mandatory criteria, there's a directive on May 23rd, 2008. And in section 7 of that directive, it states this process should be used to increase the speed of the decision-making process and