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

I worked for the OFA for three years, from 2014-2017. I received a PhD in history from the 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 ungency to achieve its mission. That lack of ungency trickled down to the OFA Director, Mr. R. Lee Fleming, who allowed for continious extensions on projects. The lack of ungency, from my experience with OFA, severely impacted groups like SSM, who continually received extension letters. When I was there, staff could take as long as the felt 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 the OFA, the "Peer Review Process was broke:**

OFA will make the argument that its staff, by utilizing historical, anthropological, and genealogical research methods, has given SSM an objective and fair assesment of its claims and evidence under the seven manditory 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 replaces 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 PDs 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 supposed 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 acknowledgment process.

**That OFA had worked extensively on a pre-decisional-positive in favor of SSM means that that the 2018 negative PD 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 petition group.
- When I first joined the OFA in fall of 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 had 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 acknowledgement, ect. 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 acknowledgement? 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 the pre-decisional drafts versus the 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 analysis 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    04/12/19